

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 12th November, 2018

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.57 of 2016

Petitioner : Bijay Gurung

versus

Respondents : The State of Sikkim and Others

Application under Article 226
of the Constitution of India

Appearance

Mr. Jorgay Namka, Ms. Panila Theengh, Mr. Karma Sonam Lhendup and Ms. Tashi Doma Sherpa, Advocates for the Petitioner.

Mr. J. B. Pradhan, Additional Advocate General, Mr. Karma Thinlay, Senior Government Advocate with Mr. Thinlay Dorjee Bhutia, Government Advocate, Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Government Advocates for State-Respondents No.1, 2 and 3.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The impugned Office Order bearing No.10/SPE/RDR/2004(Vol-II)558/SPIC, dated 09-07-2016 (Annexure P5), of the Respondent No.3, Superintendent of Police, East District, Gangtok, Sikkim, imposed the penalty of compulsory retirement on the Petitioner pursuant to a departmental enquiry under the Sikkim Police Force (Discipline and Appeal) Rules, 1989 (hereinafter "1989 Rules"). Claiming irregularities and non-compliance of statutory provisions in the departmental enquiry which culminated in the

Bijay Gurung vs. The State of Sikkim and Others

impugned Office Order *supra*, the Petitioner exhorts that his fundamental rights have been abrogated and seeks reprieve.

2. In the year 1996, the Petitioner was recruited in the first batch of the Indian Reserve Battalion (hereinafter "IRB") and posted in Delhi from 1996 to 2011, where, according to him, he served with honesty, integrity and to the best of his ability. In the year 2015, the IRB was merged with the Sikkim Police and the Petitioner transferred to the said Force. Beset with family problems at the relevant time, his performance declined following which he was ordered to undergo Reformatory Course at the Sikkim Armed Police, Pangthang, East Sikkim (hereinafter "SAP") from 19-02-2016 to 20-03-2016. In compliance thereof, he joined the Course on 19-02-2016, where on 20-02-2016 on an alleged search of his bag, controlled substances comprising of eight bottles of "Khoos Khoos" cough syrup, eight strips of Spasmo Proxyvon containing sixty-four capsules and one strip of Nitrosun 10, containing ten tablets were recovered. That, the allegation being false was consequently not reported to the concerned Police Station despite the mandate of the Sikkim Anti Drugs Act, 2006. Office Order bearing No.010/POL/SPE/RDR/2004(Vol-II)/161, dated 20-02-2016 (Annexure P1), impugned herein, came to be issued by the Respondent No.3 placing the Petitioner under suspension in contemplation of departmental proceedings. The Office Order was allegedly issued on a Complaint received from the Training Officer, SAP, informing the Respondent No.3 of recovery of the aforestated controlled substances. This was followed by Memorandum bearing No.10/POL/SPE/RDR/2004/193,

Bijay Gurung vs. The State of Sikkim and Others

dated 27-02-2016 (Annexure P2), also impugned, issued by the Respondent No.3 proposing to hold an enquiry against the Petitioner and directing him to submit within ten days of the receipt of the Memorandum, a written statement of his defence and whether he desired to be heard in person, duly appending the statement of articles of charge. That the list of documents on the basis of which the articles of charge were to be proved were not made over to the Petitioner. Although Sl. No.2 of the list pertains to a Property Seizure Memo but as no criminal case was registered against the Petitioner the requirement of such a document is questionable. Vide Order of the disciplinary authority, Respondent No.3, bearing No. 10/POL/SPE/RDR/2004(Vol-II)/213, dated 09-03-2016, (Annexure P3), one Prasad Dewan, Dy. SP, SDPO, Pakyong was appointed as the Inquiry Officer (hereinafter "I.O.") and PI Bikash Tiwari, SHO, Pakyong P.S., as the Presenting Officer (hereinafter "P.O.") to present the matter on behalf of the disciplinary authority. Both Officers being subordinate to and working under the Respondent No.3 are alleged to be amenable to his directions. Upon his appointment the I.O. issued a letter dated 09-03-2016 (Annexure P4) to the Petitioner directing him to file his written statement of defence, without furnishing the relevant documents, within a period of ten days from the receipt of the said letter revealing thereby his ignorance of the Memorandum dated 27-02-2016 (Annexure P2) *supra*, thereby indicating the ulterior motive of the authorities. That, the records made over to the Petitioner reveal that the Respondent No.3 and the I.O. were evidently at the same place on 09-03-2016 to have issued Annexure P3 (*supra*) and Annexure P4 (*supra*). It is

Bijay Gurung vs. The State of Sikkim and Others

alleged that the Petitioner who was directed to be stationed in the Office of the Respondent No.3 vide Office Order dated 20-02-2016 (Annexure P1) was coerced and intimidated not to assail the above-mentioned Office Orders and Memorandum with assurances of leniency in the enquiry. That, the Petitioner till then was neither served with the Office Order dated 20-02-2016 nor a copy of the Memorandum but his signature obtained on blank paper on the pretext that it would be used to mark his attendance. In such hostile circumstances, the Petitioner was compelled to file his written statement without fully comprehending the charges levelled against him sans documents or statement of witnesses. Nevertheless, the Petitioner has denied the charges framed against him in his written defence as false and fabricated. Pursuant thereto, the enquiry was conducted without following the procedure prescribed in Rule 7 of the 1989 Rules and without extending an opportunity to the Petitioner of making any verbal representation or the benefit of examining documents or cross-examining the witnesses. Admittedly he appeared before the I.O. on four occasions but alleges the absence of the P.O. except on one date. Further, that none of the listed witnesses were seen by him at the enquiry, nor was he allowed to take the help of his superiors or legal assistance. On subsequent realisation by the Respondents that the departmental enquiry against the Petitioner would not sustain, the Respondents coerced him to admit and plead guilty to the charges levelled against him, following which, the impugned Order bearing No.10/POL/RDR/2004(Vol-II)558/SPIC, dated 09-07-2016 (Annexure P5), was issued by the Respondent No.3. In the month

Bijay Gurung vs. The State of Sikkim and Others

of August 2016, the Petitioner with false assurances and in the absence of records of the enquiry was persuaded to apologise but his apology was treated as an Appeal under Rule 11 of the 1989 Rules by the Respondent No.2 before whom he was neither summoned nor proceedings initiated. Office Order dated 22-08-2016 (Annexure P7) instead was served on him confirming the penalty imposed. The Petitioner on legal advice approached the Respondent No.3 seeking the departmental enquiry records on several occasions, but none were forthcoming. Hence, the prayers in the Petition as follows;

- (a) to issue a writ/order or direction to quash/set aside Impugned Office Order No.010/POL/SPE/RDR/2004(Vol-II)/161 dated 20.02.2016, Memorandum No.10/POL/SPE/RDR/2004/193 dated 27.02.2016 and Office Order 10/SPE/RDR/2004(Vol-II)558/SPIC dated 09.07.2016 issued by Respondent No.3 and Office Order No.169/PHQ/L&O/2016 dated 22.08.2016 issued by Respondent No.2;
- (b) to issue appropriate Writ/Order or direction to quash all subsequent amendments to the Sikkim Police Force (Discipline & Appeal) Rules, 1989 brought about after 1989;
- (c) to pass any other direction/s, relief/s, order/s that may be deemed fit and proper in the circumstances of this case;
- (d) to allow the costs of the Writ Petition in favour of the Petitioner.

3. Respondents No.1, 2 and 3 filed a joint Counter-Affidavit disputing and denying the allegations made in the Writ Petition or violation of fundamental rights of the Petitioner. That, on the recommendation of the concerned SDPO on 15-02-2016, the Petitioner along with eight others was sent to SAP, Pangthang, for a

Bijay Gurung vs. The State of Sikkim and Others

Reformatory Course from the Sadar P.S., Gangtok, where they were posted, on failure to perform their duties diligently. During the morning physical training on 20-02-2016 the Petitioner's inability to walk/run was noticed following which at around 0730 hours after the morning session a surprise check of the belongings of the Petitioner was conducted by two ASIs and one Head Constable (H/C) stationed at SAP. The search led to recovery of the controlled substances detailed *supra* from a pair of black boots belonging to the Petitioner kept under his bed. The seized items were duly handed over to the Respondent No.3 along with a Property Seizure Memo prepared by the Training Officer, SAP. Consequently, the Petitioner was placed under suspension vide impugned Office Order dated 20-02-2016 and disciplinary proceedings initiated against him for gross misconduct and negligence in terms of Rule 7 of the 1989 Rules and the Sikkim Police Force (Disciplinary & Appeal) Amendment Rules, 1995 (hereinafter "Amendment Rules 1995"). Pursuant thereto, the Memorandum dated 27-02-2016 (Annexure P2) was issued by the Respondent No.3 to the Petitioner while the I.O. issued correspondence dated 09-03-2016 (Annexure P4). Although on 17-03-2016 when the Petitioner filed his written statement to the articles of charge (Annexure R6) he accepted the charges framed against him contrarily when the I.O. recorded his statement he denied ownership of the articles. On 30-03-2016, the I.O. also recorded the statements of six witnesses in the presence of the P.O. PI Bikash Tiwari. On 28-06-2016, the I.O. recorded the statements of the Training Officer and thereafter afforded an opportunity to the Petitioner to cross-examine the Officer, which he declined. On

Bijay Gurung vs. The State of Sikkim and Others

completion of departmental enquiry on 30-06-2016, the I.O. submitted report to the Respondent No.3, who after taking into consideration the report, imposed the penalty of compulsory retirement on 09-07-2016 with effect from 20-02-2016, the date of suspension of the Petitioner. On 01-08-2016, the Petitioner filed an Appeal before the appellate authority requesting grant of pardon who on 22-08-2016 after hearing the Petitioner upheld the Orders of the disciplinary authority. As per the Respondents the Writ Petition is liable to be dismissed as it is neither maintainable in law or facts and suffers from delay and laches as penalty imposed was confirmed on 22-08-2016 but the Writ Petition has been filed only on 21-11-2016.

4. In Rejoinder, the Petitioner while denying recovery of the controlled substances from his possession would also reiterate the facts put forth in the averments made in his Petition which for brevity are not reiterated herein. It was also averred that the State-Respondents in its Counter-Affidavit did not deliberately file certain records, viz.; the letter dated 01-04-2017 which was the letter of the Petitioner through his Counsel being Annexure P9. (Pausing here for a minute, Learned Counsel was unable to establish that the alleged Annexure P9 was filed by the Petitioner before this Court or that it existed in the records of the instant matter, despite walking this Court through the documents filed.) That, the State-Respondents however made available letter dated 20-04-2017, Office Orders dated 07-02-2017 and 14-02-2017. Both these Office Orders pertain to the second delinquent LNK/960197 Karma Bhutia

Bijay Gurung vs. The State of Sikkim and Others

(hereinafter "second delinquent") against whom common proceedings with the Petitioner was undertaken. It was also reiterated that in view of the submissions made in the Writ Petition and the Rejoinder Affidavit the prayers of the Petitioner be allowed.

5. Mr. Jorgay Namka, Learned Counsel advancing his arguments for the Petitioner drew the attention of this Court to Rule 7 of the 1989 Rules and contended that the provisions elucidated therein have been grossly violated by the Respondents No.2 and 3 inasmuch as although at Sl. No.1 of Annexure III of the Memorandum (Annexure P2) issued by the Respondent No.3 details a report submitted by the Training Officer of SAP, this alleged report was not made available to the Petitioner nor does it find place in the records of the case which reveals that the matter was an endeavour to frame the Petitioner without any basis. The Rules mandate supply of documents to the Petitioner not only to prove the charges against him but to enable his defence, however no such documents were made available to him. The controlled substances were seized not from the person of the Petitioner but admittedly recovered from the pair of boots kept under the bed of the Petitioner without verification as to whether the boots actually belonged to the Petitioner. That, seizure of any Article could be resorted to only in the event of criminal proceedings against the Petitioner but records reveal that no criminal case was ever registered against the Petitioner as the allegations were false. The appointments of I.O. and the P.O. are against the tenets of equity and fair play as both Officers work directly under the Respondent No.3 and would therefore be

Bijay Gurung vs. The State of Sikkim and Others

acquiescent to his directions in regard to the action to be taken against the Petitioner. That, anomalies arise also in the orders of appointment of the I.O. since Annexure P3 would indicate that the I.O. was appointed on 09-03-2016 but the I.O. has signed on Annexure R4 after receiving the departmental enquiry File in respect of the Petitioner on 03-03-2016 itself, which concludes that the File was received by the I.O. on 03-03-2016, prior to his appointment, on 09-03-2016. Further, Annexure R9 would indicate that the statement of the Training Officer was allegedly recorded on 28-06-2016, but his statement is bereft of any report given against the Petitioner contrary to what has been stated in the impugned Office Order dated 20-02-2016. Besides, the entire statement of the Training Officer is computer generated but the sentences *"Opportunity has been given to both the delinquent for cross examination of the witness but they declined to do so"* is handwritten indicating its insertion as an afterthought without actually affording the Petitioner such opportunity. That, the disciplinary proceedings were initiated not only against the Petitioner but also against second delinquent where although the memorandum of charge was prepared individually, the statement of the Training Officer pertains to both the delinquents which is therefore irregular and deserves to be set aside. That the statement of H/C Bhagat Thapa was recorded by the I.O. on 28-06-2016 where both the Petitioner and the other delinquent have signed whereas there ought to be different statements for each of the alleged delinquents and their signatures obtained separately to indicate that both had understood the statement and sufficient opportunity had

Bijay Gurung vs. The State of Sikkim and Others

not been offered to them to cross-examine the witnesses. Despite both the Petitioner and the second delinquent being tried together during the departmental enquiry, the case of the second delinquent was taken into consideration by the Director General of Police (DGP) and his order of compulsory retirement revised to voluntary retirement, by stating that prescribed procedure for awarding punishment was not followed. The case of the Petitioner however was not taken into consideration thereby establishing a bias against him. In view of the joint enquiry of both delinquents the consideration given to the second delinquent is also applicable to the Petitioner. That the letter dated "8-16", Annexure P6 (clarified to be of 01-08-2018), was a request for pardon and relaxation but was instead treated as an Appeal contrary to Rule 11 of the 1989 Rules and decided and disposed of by the IGP. That, the enquiry being vitiated, the reliefs prayed for be granted. To fortify his submissions, reliance was placed on decision of this Court in ***Tashi Chopel Bhutia vs. The State of Sikkim and Others***¹.

6. Resisting the arguments Mr. J. B. Pradhan, Learned Additional Advocate General would canvass the contention that no grounds exist for setting aside the Office Order dated 09-07-2016 (Annexure P5) which is compliant to all provisions laid down in the 1989 Rules. That, the enquiry report has infact not been challenged, in such circumstances, the report is valid and hence, the penalty and the orders issued on the appeal of the Petitioner also follow suit. That, the appeal filed by the Petitioner dated 01-08-

¹ MANU/SI/0038/2016

Bijay Gurung vs. The State of Sikkim and Others

2016 before the IGP was duly considered by the concerned authority and the orders of the disciplinary authority upheld. He would further contend that the records clearly reveal that the Petitioner has admitted to the offences charged with. That, Rule 7(4) of the 1989 Rules provides that the disciplinary authority shall deliver or cause to be delivered to the police officer a copy of the articles of charge, the statement of the imputations of misconduct and misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained. The provision also requires the police officer to submit within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person. Annexure R5, Memo bearing no.71/SDPO/ Pakyong dated 09-03-2016 made over to the Petitioner by the I.O. indicates compliance of the said Rules. That, the written statement of the Petitioner submitted to the I.O. reveals in unequivocal terms that the controlled substances were recovered by the Police personnel from a bag and admittedly were for the Petitioner's use. Being contrite, he sought excuse for the act and assured its non-repetition thereby clearly confessing his guilt. Learned Additional Advocate General would rely on the decision of ***Manoj H. Mishra vs. Union of India***² to contend that where the Petitioner had once admitted his guilt in his written statement he cannot resile from his statement at a later stage and that the penalty imposed on the Petitioner is proportionate to the gravity of the offence. That, in the event this Court reaches a finding that there has been non-compliance of the mandatory requirements and

² (2013) 6 SCC 313

Bijay Gurung vs. The State of Sikkim and Others

the principles of natural justice violated, then the Court while setting aside the order of punishment can remit the matter to the disciplinary authority to enable it to take a fresh decision from the stage that it stood vitiated. Reliance was placed on the decisions of ***Chairman, Life Insurance Corporation of India and Others vs. A. Masilamani***³ and ***Managing Director, ECIL, Hyderabad and Others vs. B. Karunakar and Others***⁴. It was urged that the Court cannot go into the decision made by the concerned authorities but would only consider the irregularities in the decision-making process. Conceding to the fact that Rule 7(16) of the 1989 Rules was not complied with, Learned Additional Advocate General would hold that the said provision requires that when the case for the disciplinary authority is closed, the police officer shall be required to state his defence, orally or in writing, as he may prefer. If the defence is made orally, it shall be recorded and the police officer shall be required to sign the record. In either case, a copy of the statement of defence shall be given to the P.O., if any, appointed. No copy of such statement was made over to the P.O. However, the other provisions of Rule 7 of 1989 Rules have been complied to the letter. Further, he would contend that although the delinquent asserts that cross-examination was not conducted, the documents on record would prove otherwise. That should the Petitioner allege prejudice on account of irregularity in following procedure the burden to establish prejudice would be upon him. Strength on this count was garnered from the ratio in ***State of U.P. vs. Harendra Arora and***

³ (2013) 6 SCC 530

⁴ (1993) 4 SCC 727

Bijay Gurung vs. The State of Sikkim and Others

Another⁵. He would further argue that infraction of every statutory provision does not make the procedure invalid buttressing his arguments with the decision in **Union of India and Others vs. P. Gunasekaran**⁶.

7. Careful and anxious consideration has been given to the submissions made at the Bar, the documents which Learned Counsel have walked this Court through during the hearing have also been carefully perused and considered as also the Judgments relied on.

8. The question for consideration is whether there were procedural defects in the departmental enquiry, if so, whether it was in breach of principles of natural justice or violation of any rules to the prejudice of the Petitioner?

9. Before embarking on a discussion of the merits of the matter, we may refer to the decision of the Supreme Court in **State of Andhra Pradesh and Others vs. Chitra Venkata Rao**⁷. While discussing the scope of Article 226 of the Constitution in dealing with departmental enquiries, the Supreme Court would hold as follows;

"21. The scope of Article 226 in dealing with departmental inquiries has come up before this Court. Two propositions were laid down by this Court in *State of A.P. v. S. Sree Rama Rao* [AIR 1963 SC 1723 : (1964) 3 SCR 25 : (1964) 2 LLJ 150]. First, there is no warrant for the view that in considering whether a public officer is guilty of misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond

⁵ (2001) 6 SCC 392

⁶ (2015) 2 SCC 610

⁷ (1975) 2 SCC 557

Bijay Gurung vs. The State of Sikkim and Others

reasonable doubt to the satisfaction of the Court must be applied. If that rule be not applied by a domestic tribunal of inquiry the High Court in a petition under Article 226 of the Constitution is not competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court is not a court of appeal under Article 226 over the decision of the authorities holding a departmental enquiry against a public servant. The Court is concerned to determine whether the enquiry is held by an authority competent in that behalf and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Second, where there is some evidence which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court to review the evidence and to arrive at an independent finding on the evidence. The High Court may interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion. The departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there is some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226.

22. Again, this Court in *Railway Board, representing the Union of India, New Delhi v. Niranjan Singh* [(1969) 1 SCC 502 : (1969) 3 SCR 548] said that the High Court does not interfere with the conclusion of the disciplinary authority unless the finding is not supported by any evidence or it can be said that no reasonable person could have reached such a finding.” [emphasis supplied]

10. The Judgment with clarity elucidates the stance that can be adopted by the High Court in matters under Article 226 of the Constitution of India in relation to departmental enquiries. It is also now settled by a plethora of other Judgments that in matters of

Bijay Gurung vs. The State of Sikkim and Others

disciplinary proceedings the High Court exercises a limited power as the grounds for judicial review are limited and would be reluctant to intervene unless the findings are wholly perverse, illegal, untenable or in prejudice of the statutory provisions or principles of natural justice.

11. It would now be appropriate to examine whether the procedure prescribed was followed in the instant matter for which consideration may be taken of the following provisions.

12. Rule 7 of the 1989 Rules is the provision that deals with procedure for imposing penalties specified in Clauses (xi) to (xv) of Rule 3. By an amendment vide Notification bearing No.183/GEN/DOP on 12-08-2009 the above clauses are under the marginal heading of "Major penalties". The said provisions are extracted below;

"3. Penalties.— Without prejudice to the provision of any law, or any special orders for the time being in force, the following penalties may, for good and sufficient reasons, be imposed on any police officer, namely:-

.....

Major penalties

- (xi) Reduction to a lower stage in the time scale of pay for a specified period, with further directions as to whether or not the police officer will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay;
- (xii) Reduction to a lower time-scale of pay, grade, post or Service which shall ordinarily be a to promotion of the police officer to the time scale of pay, grade, post or Service from which he was reduced, with or without further directions regarding conditions of restoration to the

Bijay Gurung vs. The State of Sikkim and Others

grade or post or Service from which the police officer was reduced and his seniority and pay on such restoration to that grade, post or Service;

(xiii) Compulsory retirement;

- (xiv) Removal from service which shall not be a disqualification for future employment under the Government;
- (xv) Dismissal from service which shall ordinarily be a disqualification for future employment under the Government.

.....” [emphasis supplied]

13. In the instant matter, the penalty imposed on the Petitioner is in terms of Rule 3(xiii), i.e., compulsory retirement. Rule 7(1) provides that no order imposing any of the penalties specified in Clauses (xi) to (xv) of Rule 3, which also includes compulsory retirement at Clause (xiii), shall be made except after an enquiry is held, in the manner as provided in the Rule. The disciplinary authority for the purposes of the instant matter is the Senior Superintendent of Police, Respondent No.3, he is also the appointing authority, while the appellate authority is the Deputy Inspector General of Police/ Inspector General of Police in terms of Notification No.81/GEN/DOP dated 23-11-1998. The argument of Learned Counsel for the Petitioner that Respondent No.3 is not the appointing authority is not tenable as the Notification No.62/GEN/DOP dated 29-13-1995 clarifies the position and confirms that he is indeed the appointing authority. Rule 7(2) lays down that if the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a police officer, the disciplinary authority can either inquire into the imputation himself or appoint an authority for

Bijay Gurung vs. The State of Sikkim and Others

the matter. In the instant case, the disciplinary authority vide its Order bearing No.10/POL/SPE/RDR/2004(Vol-II)/213, dated 09-03-2016, has appointed Deputy Superintendent of Police (Dy.SP) Prasad Dewan, the SDPO as the I.O.

14. Rule 7(3) pertains to proposal to hold an inquiry against a police officer, in such a situation the disciplinary authority shall draw up or cause to be drawn up (i) the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge; (ii) a statement of the imputations of misconduct or misbehaviour in support of each article of charge, which shall contain (a) a statement of all relevant facts including any admission or confession made by the police officer; and (b) a list of documents by which and a list of witnesses by whom, the articles of charge are proposed to be sustained. In this context, we may examine whether this provision has been complied with in the instant matter. The disciplinary authority has prepared Memorandum bearing No. 10/POL/SPE/RDR/2004/193, dated 27-02-2016. The Memorandum includes at Annexure I the Statement of articles of charge framed against the Petitioner, Annexure II the Statement of imputation of misconduct or misbehaviour in support of the articles of charge framed against the Petitioner, Annexure III is the list of documents as required under Rule 7(3)(b) and Annexure IV is the list of witnesses also furnished as per Rule 7(3)(b) of the 1989 Rules. No admission or confession of the delinquent finds mention in the Memorandum in terms of Rule

Bijay Gurung vs. The State of Sikkim and Others

7(3)(a), evidently as none existed at that point in time. Hence, there is compliance of Rule 7(3) of the 1989 Rules.

15. Rule 7(4) of 1989 Rules reads as follows;

“(4) The disciplinary authority shall deliver or cause to be delivered to the police officer a copy of the articles of charge, the statement of the imputations of misconduct or misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require the police officer to submit, within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person.”

16. An examination of Annexure R3 relied on by the Respondents which is the Memorandum dated 27-02-2016 issued by the disciplinary authority, reveal at Sl. Nos.1, 2 and 6 as follows;

“.....

MEMORANDUM

1. The undersigned proposes to hold an inquiry against Nk.960208 Bijay Gurung of Sadar P.S., East District under Rule 7 of the Sikkim Police Force (Discipline & Appeal) Rules, 1989. **The substance of the imputations of misconduct or misbehaviour in respect of which the inquiry is proposed to be held is set out in the enclosed statement of articles of charge (Annexure – I). A statement of the imputation of misconduct or misbehaviour in support of each article of charge is enclosed (Annexure-II). A list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained are also enclosed (Annexure III and IV).**
2. Nk.960208 Bijay Gurung is directed to submit within 10 days of the receipt of this memorandum, a written statement of his defense (sic) and also to state whether he desires to be heard in person.

.....

6. Receipt of this Memorandum may be acknowledged by Nk.960208 Bijay Gurung of Sadar P.S., East District.

.....” [emphasis supplied]

Bijay Gurung vs. The State of Sikkim and Others

Copy of the document Annexure R3 bears the signature of the Petitioner, thereby acknowledging and indicating receipt of all the documents as listed in the Memorandum, hence establishing compliance of the aforestated Rules. It is clear from the above that steps envisaged by Rule 7(3) and Rule 7(4) have met with compliance.

17. Rule 7(5)(a), (b) and (c) is extracted hereinbelow;

“(5) (a) On receipt of the written statement of defence **the disciplinary authority may itself inquire into such of the articles of charge as are not admitted, or, if it considers it necessary so to do, appoint under sub-rule 2 an inquiry authority for the purpose, and where all the articles of charge have been admitted by the police officer in his written statement of defence, the disciplinary authority shall record its findings on each charge after taking such evidence as it may think fit and shall act in the manner laid down in under sub-rule 25.**

(b) If no written statement of defence is submitted by the police officer, the disciplinary authority may itself inquire into the articles of charge or may, if it considers it necessary so to do, appoint sub-rule 2 an inquiring authority for the purpose.

(c) Where the disciplinary authority itself inquires into any article of charge or appoints an inquiring authority for holding an inquiry into such charge, it may, by an order, appoint a police officer or a legal practitioner, to be known as the Presenting Officer to present on its behalf the case in support of the article of charge.”

[emphasis supplied]

18. What Rule 5(a) envisages is that pursuant to the documents listed at Rule 7(3) being made over to the delinquent, he shall file his written statement before the disciplinary authority, who, on receipt of the written statement has the option of inquiring into the articles of charge himself when the charges have ‘not’ been admitted by the delinquent. In other words, where the delinquent has not pleaded guilty to any of the charges the disciplinary authority can inquire into these charges. The provision also

Bijay Gurung vs. The State of Sikkim and Others

empowers the disciplinary authority to appoint inquiring authority if he so requires, for this purpose. The second leg of this Rule provides that when all the articles of charge have been "admitted" by the delinquent in his written statement, the disciplinary authority 'shall' record his findings on each charge, take evidence, followed with action in the manner provided in Rule 7(25) which reads as follows;

"(25) If the disciplinary authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in clause (xi) to clause (xv) of rule 3 should be imposed on the police officer, **it shall not be necessary to give the police officer any opportunity of making representation to the penalty proposed to be imposed:**"

[emphasis supplied]

It is relevant to state here that the proviso to the Rule has been deleted vide amendment notified on 29-03-1995, Notification bearing No.62/GEN/DOP.

19. Rule 7(5)(b) *supra*, gives the disciplinary authority the option of inquiring into the matter himself if no written statement is submitted by the delinquent officer. The disciplinary authority is also clothed with the option of appointing an inquiring authority under Rule 7(2) if he considers it necessary. Rule 7(5)(c) requires appointment of a police officer or legal practitioner as a Presenting Officer to present the case on behalf of the disciplinary authority, irrespective of the fact that the inquiry may be conducted by the disciplinary authority himself or by the inquiring authority. Rule 7(6) provides that if the disciplinary authority does not take up the inquiry, he shall forward to the inquiring authority the documents listed therein. The provision is extracted hereinbelow for convenience.

Bijay Gurung vs. The State of Sikkim and Others

“(6) The disciplinary authority shall, where it is not the inquiring authority, forward to the inquiring authority -

- (i) a copy of the articles of charge and the statement of the imputations of misconduct or behaviour;
- (ii) a copy of the written statement of defence, if any, submitted by the police officer;
- (iii) a copy of the statement of witnesses, if any, referred to in sub-rule 3;
- (iv) evidence proving the delivery of documents referred to in sub-rule 3 to the police officer; and
- (v) a copy of the order appointing the Presenting Officer.”

20. A bare reading of the aforestated provisions would obtain that the role and duties cast upon the disciplinary authority extend from Rule 7(2) to Rule 7(6). It may be elucidated herein that when disciplinary proceedings are to be held against a police officer it becomes incumbent upon the disciplinary authority to draw up the details as laid down in Rule 7(3)(i), (ii)(a) and (b). Thereafter, the disciplinary authority is also to ensure delivery of the documents to the delinquent specifying a time frame within which the delinquent is to file his statement of defence as emanates from Rule 7(4). The written statement is to be received by the disciplinary authority himself and none else as envisaged under Rule 7(5)(a), following which the said authority is to take steps, viz.; where the articles of charge are not admitted then he is to enquire into such of the articles which are not admitted or appoint an inquiry authority under Rule 7(2) for the said purpose. However, where the articles of charge have been admitted by the delinquent the disciplinary authority is clothed with powers to record his findings on

Bijay Gurung vs. The State of Sikkim and Others

each charge after recording evidence as he thinks fit and then take steps as per Rule 7(25) which provides for steps to be taken for imposing penalty instead of inquiring into the matter or causing inquiry. The disciplinary authority has therefore to take steps in terms of rule 7(25) which he overlooked.

21. In the instant matter, the disciplinary authority before receipt of written statement of the Petitioner proceeded to appoint the I.O. on 09-03-2016, thereby putting the cart before the horse, whereas the written statement was submitted by the Petitioner only on 17-03-2016. To obfuscate the above is the letter dated 09-03-2016 issued by the I.O. requiring the delinquent to submit his reply over and above the time given in the Memorandum issued by the disciplinary authority. It may be noted that the role of the I.O. kicks into place only on completion of the provisions of Rule 7(2) to Rule 7(6). Before completion of the steps envisaged under the aforesaid Rules the inquiring authority has no role to play.

22. This would concomitantly take us to the argument of Learned Additional Advocate General which was to the effect that the enquiry stood vitiated from the stage of Rule 7(16), while disagreeing with this contention, in my considered opinion, there was no necessity of reaching the aforesaid stage, nevertheless for the sake of argument, we may look into Rule 7(16) of 1989 Rules which provides as follows;

“(16) When the case for the disciplinary authority is closed, the police officer shall be required to state his defence, orally or in writing as he may prefer. If the defence is made orally, it shall be recorded and the police officer shall be required to sign

Bijay Gurung vs. The State of Sikkim and Others

the record. In either case, a copy of the statement of defence shall be given to the Presenting Officer, if any, appointed.”

23. Learned Additional Advocate General contends that copies of the statement of defence was not made over to the P.O. Even on a cursory look at Rule 7 and its Sub-Rules, it is noticed that the disciplinary authority was to have proceeded in terms of Rule 7(25) in view of the admission of guilt of the Petitioner as revealed by Annexure R6 written statement of the Petitioner and as laid down in Rule 7(5)(a) which he failed to do. Therefore the argument of the Learned Additional Advocate General pertaining to Rule 7(16) is indeed not tenable. Once the written statement of the Petitioner was received admitting to the charges, the Rules provides necessary steps as emanates from Rule 7(5)(a). It is from this stage that the enquiry stood vitiated, since on admission of guilt firstly it was not necessary to have put the delinquent officer through the process of enquiry as the disciplinary authority was clothed with sufficient powers to record evidence and follow it up with imposition of penalty.

24. The discussions which have ensued hereinabove reveal that the Petitioner was aware of the imputations and charges against him having acknowledged receipt of the Memorandum and its Annexures and he has filed his response admitting his guilt contrary to the argument of his Learned Counsel that he had denied the charges framed against him. No prejudice was evidently caused to the Petitioner at that stage since as established, he was in receipt

Bijay Gurung vs. The State of Sikkim and Others

of all relevant documents with sufficient opportunity afforded to rebut the allegations.

25. The instant case is distinguishable from the ratio in **Tashi Chopel Bhutia** (*supra*) relied on for Learned Counsel for the Petitioner inasmuch as in the case *supra* there was absolute non-compliance of the statutory procedure which had prejudiced the Petitioner and he was denied an opportunity of proving his innocence ambiguous notice having been issued to the Petitioner therein and insufficient time to resist the charges. He was afforded no opportunity of cross-examining the witnesses or to examine himself or his witnesses and above all the relevant documents had not been made over to the Petitioner to enable him to put up a defence. The circumstances in the instant matter clearly differ as would be evident from the discussions *supra*.

26. In the light of the facts and circumstances discussed hereinabove and in consideration of the ratio extracted *supra*, the following impugned Orders are hereby set aside;

- (i) Order No.10/POL/SPE/RDR/2004(Vol-II)/213, dated 09-03-2016;
- (ii) Office Order No.10/SPE/RDR/2004(Vol-II)558/SPIC dated 09-07-2016 issued by Respondent No.3; and
- (ii) Office Order No.169/PHQ/L&O/2016 dated 22-08-2016 issued by Respondent No.2.

27. In **Chairman, Life Insurance Corporation of India** (*supra*) it was enunciated that it is settled legal proposition that once the Court sets aside an order of punishment, on the ground that the

Bijay Gurung vs. The State of Sikkim and Others

enquiry was not properly conducted, it must remit the case concerned to the disciplinary authority for it to conduct the enquiry from the point that it stood vitiated and conclude the same. At Paragraph 21, it was held as follows;

"21. After hearing the counsel for the parties, we are of the view that the impugned judgment and order dated 10-1-2011, in *LIC v. A. Masilamani* [*LIC v. A. Masilamani*, Writ Appeal No. 7 of 2011, decided on 10-1-2011 (Mad)], as well as the order of the learned Single Judge dated 17-2-2010, passed in *A. Masilamani v. LIC* [*A. Masilamani v. LIC*, Writ Petition No. 11152 of 2002, decided on 17-2-2010 (Mad)], cannot be sustained in the eye of the law and are therefore hereby set aside. The present appeal is allowed. The matter is remitted to the disciplinary authority to enable it to take a fresh decision, taking into consideration the gravity of the charges involved, as with respect to whether it may still be required to hold a de novo enquiry from the stage that it stood vitiated i.e. after issuance of the charge-sheet.
....."

28. Consequently the disciplinary proceedings shall commence from the stage it stood vitiated as discussed and clarified above.

29. The disciplinary authority while taking a decision in the matter may take into consideration that the concerned authorities in the first instance failed to lodge a complaint against the Petitioner under the provisions of the Sikkim Anti Drugs Act, 2006, when he was allegedly found to be in possession of controlled substances. Secondly, the disciplinary authority may also take into consideration that the Director General of Police in his Office Order bearing No.13/PHQ/2017, dated 07-02-2017 (Annexure P11) has while considering the representation filed by the second delinquent LNK/960197 Karma Bhutia for conversion of his compulsory retirement to voluntary retirement following the departmental

Bijay Gurung vs. The State of Sikkim and Others

enquiry, recorded that, on going through the departmental enquiry proceedings it was found that the proper procedure for awarding punishment under Clauses (xi) to (xv) of Rule 3 of the 1989 Rules was not followed. Accordingly, he had revised the order of compulsory retirement of the delinquent and allowed him voluntary retirement as requested by the second delinquent.

30. Under the facts and circumstances, the Writ Petition stands disposed of with the above directions.

31. No order as to costs.

Sd/-
(**Meenakshi Madan Rai**)
Judge
12-11-2018

Approved for reporting : **Yes**

Internet : **Yes**