

THE HIGH COURT OF SIKKIM : GANGTOK

WRIT PETITION (C) NO. 14 OF 2003

In the matter of an application under Article 226 of the Constitution of India.

N.B. Tiwari,
at Church Road,
P.O. Gangtok,
East Sikkim.

... **Petitioner**

VERSUS

1. State of Sikkim,
Through the Chief Secretary,
Government of Sikkim,
Tashiling, Gangtok.
2. Secretary,
Department of Personnel,
Administrative Reforms and Training,
Government of Sikkim,
Tashiling, Gangtok.
3. Secretary,
Department of Power,
Government of Sikkim,
Tashiling, Gangtok.

... **Respondents**

For petitioner : Shri A. Moulik assisted by Shri
B.K. Gupta, Advocates.

For respondents : Shri S. P. Wangdi, Advocate
General assisted by Shri N.B.
Khatiwada, Additional Advocate
General, Shri J. B. Pradhan,
Government Advocate and Shri
Karma Thinlay, Assistant
Government Advocate.

**PRESENT : THE HON'BLE SHRI JUSTICE R.K. PATRA, CHIEF JUSTICE,
THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.**

Date of judgment : 16th March, 2004.



J U D G M E N T

R.K. PATRA, C.J.

In this petition under Article 226 of the Constitution of India the petitioner seeks quashing of the order dated 9.8.2002 of the Department of Personnel, Administrative Reforms and Training, Government of Sikkim at annexure 27, imposing the penalty of compulsory retirement on him in exercise of the powers conferred by rule 3(vii) of the Sikkim Government Servants' (Discipline and Appeal) Rules, 1985. Incidentally, he also questions the validity of the inquiry report dated 27.9.2000 at annexure 20 and the remand order dated 2.2.2000 at annexure 13 of the Department of Personnel, Administrative Reforms & Training, Government of Sikkim.

2. In the year 1997 when the petitioner was working as Superintending Engineer in the Power Department, Government of Sikkim, he was placed under suspension by office order no.1025/Gen/DOP dated 3.9.1997 at annexure 1 of the Department of Personnel, Administrative Reforms and Training, Government of Sikkim, pending drawing up of departmental proceedings against him. He was served with statement of articles of charges and statement of imputations of misconduct by memorandum No. 1959/(G)/DOP dated 3.11.1997. In response to the articles of charges the petitioner filed his written statement dated 12.11.1997 at annexure 4, denying the charges levelled against him. He

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pleaded *inter alia* that there was no misconduct or misbehavior on his part which would constitute act of indiscipline or dereliction of duty in terms of the Sikkim Government Servants' Conduct Rules, 1981 or any other provision of law. On consideration of his stand taken in the written statement, the Department of Personnel, Administrative Reforms and Training, Government of Sikkim by order dated 25.11.1997 at annexure 5 appointed Nari Tshering, Secretary, Sikkim Legislative Assembly, as the inquiring authority to inquire into the charges. In course of the inquiry, S. D. Negi, Superintendent of Police, East and A. Dutta, DIG (SB) were examined on 6.5.1998 and 13.5.1998 respectively, in support of the charges. On the basis of the evidence the inquiring authority held the petitioner guilty of the charges and submitted its report dated 26.6.1998 at annexure 12. The disciplinary authority after considering the relevant records, imposed the penalty of compulsory retirement on the petitioner by office order no. 4226/G/DOP dated 24.3.1999 at annexure 11. Being aggrieved by the said order, the petitioner filed a review petition before the Governor under rule 11 of the Sikkim Government Servants' (Discipline and Appeal) Rules, 1985. The Governor as communicated by Department of Personnel, Administrative Reforms and Training order dated 2.2.2000 at annexure 13, set aside the findings of the inquiring authority on the

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ground that the findings were vitiated for non-compliance of sub-rule (14), (16), (17) and (18) of rule 5 of the Sikkim Government Servants' (Discipline and Appeal) Rules, 1985 and remitted the matter to the inquiring authority with direction to examine the witnesses as per the list submitted by the petitioner and by affording him the opportunity to cross-examine the witness Govind Mohan, the then District Collector (East). The penalty of compulsory retirement issued by office order no.4226/G/DOP dated 24.3.1999 at annexure 11 was suspended until further orders. On receipt of the aforesaid remand order dated 2.2.2000 the petitioner made a representation dated 14.2.2000 at annexure 14 praying for revocation of the suspension order with retrospective effect, appointment of a new inquiry officer in place of Nari Tshering Bhutia and to give him proper assistance through a lawyer of his choice. After remand of the matter, one Amit Kumar Jain was appointed as inquiry officer vice Nari Tshering Bhutia. The department did not choose to examine Govind Mohan. The petitioner submitted a list of six defence witnesses to be summoned. Though they were all summoned, he examined only three of them. They were Prem Tshering Lepcha, Junior Engineer, Power Department, Damber Chettri, Assistant Engineer, Building and Housing Department, and R. P. Sharma, a teacher of the Education Department. The inquiry officer gave liberty

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to the department as well as to the petitioner to submit written synopsis of arguments. On consideration of the materials available on record the inquiry officer in his report dated 27.9.2000 at annexure 22 held that charges were partially proved and accordingly recorded his findings.

On receipt of the inquiry report the petitioner submitted a representation dated 13.2.2001 at annexure 24 challenging the adverse findings recorded against him. On examination of the records, the disciplinary authority in its order dated 10.9.2001 at annexure 25 imposed the penalty of compulsory retirement. The petitioner thereafter filed a writ petition in this court bearing writ petition no. (c) 5 of 2002 challenging the above order of compulsory retirement on the ground *inter alia* that his representation dated 13.2.2001 at annexure 24 was not considered by the disciplinary authority. This court by order dated 10.7.2002 set aside the order of penalty and directed the disciplinary authority to consider the representation and pass appropriate orders according to law. Thereafter, the state government upon hearing the petitioner and on consideration of the record of the disciplinary proceedings including the representation dated 13.2.2001 passed the impugned order of compulsory retirement dated 9.8.2002 at annexure 27 in exercise of the powers conferred by rule 3(vii)

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of the Sikkim Government Servants' (Discipline and Appeal) Rules, 1985.

3. Shri A. Moulik, learned counsel for the petitioner submitted the following points in support of the writ petition which are being dealt with here-in-after :

3A) It was contended by Shri Moulik that the charges are vague *inasmuch* as there is no reference to any specific rule of the Sikkim Government Servants' Conduct Rules, 1981 which was alleged to have been violated. In support of it, reliance was placed on the judgment of the Supreme Court in *Sawai Singh vs. State of Rajasthan* AIR 1986 SC 995.

We have perused the memorandum containing articles of charges (annexure 2). It contains three articles of charges based on the following allegations:-

- (i) He participated in the meeting held on 27.9.1997 in the Community Hall and actively incited the government employees to continue the illegal strike.
- (ii) He made statement to the effect that the Employment Exchange (Compulsory Notification of Vacancies) Act had been extended to Sikkim and this statement was calculated to mislead the government employees.
- (iii) He did not attend to his duties from 26th to 28th September 1997.

At the end of article III it was mentioned as follows:-

"..... He is, therefore, charged with gross dereliction of duty and violation of rule 3(i) (a) and (b) of the Sikkim

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Government Servants' Conduct Rules,
1981." [emphasis supplied]

From the above, it may be seen that the petitioner was charged with dereliction of duty which violated rule 3 (i)(a) and (b) of the Sikkim Government Servants' Conduct Rules, 1981 which lays down that every government servant shall at all times maintain absolute integrity and maintain devotion to duty. In the circumstances, it cannot be held that there was no reference to any rule which the petitioner was charged to have violated. We may also add that in the reply to the charges, he did not plead that because of vagueness of charge he was not in a position to submit his explanation. In view of this, we do not find any merit in the contention of Shri Moulik.

3B) It was urged by Shri A. Moulik that the petitioner was not given any opportunity to engage a lawyer in the disciplinary proceeding nor were documents supplied to him.

So far as representation by a lawyer is concerned, it may be stated that no delinquent has a legal right to be represented by a lawyer in a disciplinary proceeding. If the department engages a lawyer for presenting its case before the inquiry officer, the delinquent would be fully justified in seeking for permission to engage a lawyer for himself. In this connection, we may profitably refer to rule 5(8) of the Sikkim Government Servants' (Discipline and Appeal) Rules, 1985 which reads as follows:

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"(8) The Government servant may take the assistance of any other Government servant to present the case on his behalf, but may not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the Disciplinary Authority is a legal practitioner, or, the Disciplinary Authority having regard to the circumstances of the case, so permits."

A bare perusal of the aforesaid rule would show that engagement of a legal practitioner by a delinquent officer is not as a matter of course or right. If the presenting officer engaged by the department happens to be a legal practitioner then a delinquent officer as a matter of right can engage a lawyer to present his case. In the inquiry against the petitioner, the department did not engage a lawyer for presenting its case nor was the presenting officer a law knowing person. The charges are not complicated nor involve any question of law. They are based on simple and plain facts. The department examined two witnesses to establish the charges. The petitioner cross-examined them. He also got examined three witnesses in support of his case. For the reasons mentioned above, we are of the opinion that the circumstances of the case did not warrant engagement of lawyer.

Regarding the allegation of non-supply of documents, Shri Moulik has not been able to bring to our notice as to which document was withheld from the petitioner whereby

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he was handicapped in defending himself in the disciplinary proceeding.

3C) Shri Moulik seriously contended that the Deputy Inspector-General of Police submitted a confidential report which was utilised by the inquiry officer behind his back without giving a copy thereof to him. On perusal of the inquiry report it appears that the inquiry officer has referred to the confidential report of the Deputy Inspector-General of Police while dealing with article I of the charge. He has observed as follows :

“..... As regards part (a) of the charge, the documentary evidence (the Special Branch of Report dated 01/10/97) and the deposition of Mr. Abhijit Dutta (PW 2-1) clearly establishes that the government servant was present at the Community Hall on 27.09.97”

That means that the confidential report was taken as corroboration to the evidence of Abhijit Dutta (D.I.G.) PW2 who deposed that on 27.9.1997, the petitioner was present in the Community Hall. The petitioner in his reply at annexure 4 to the charges has admitted that he was present in the Community Hall on the relevant day. This is what he has stated in the reply :

“On 27.09.1997 while going to the office I was persuaded by the striking employees to go to the Community hall to attend the meeting organized by the Government employees and I could not avoid the same.”

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It follows that besides the oral evidence of Abhijit Dutta (PW2), there is admission by the petitioner himself that he was present in the Community Hall on 27.9.1997. Therefore, even if the confidential report is excluded from consideration, there exists other evidence on record to sustain the above finding of the inquiry officer.

While dealing with article I (part b) the inquiry officer has also referred to the confidential report. He has taken it as an additional piece of evidence to the oral evidence of S. D. Negi who was examined as PW1 in the inquiry who deposed that while the district administration was trying to convince the agitating employees, the petitioner argued that the strike should continue and this incited the employees present there. The inquiry officer has held that the petitioner could not successfully discredit the testimony of S. D. Negi. Therefore, even if the confidential report is taken out of consideration, there is oral evidence of PW1 in support of the finding.

For the reasons mentioned above, non-supply of the confidential report to the petitioner is of little consequence and it has not vitiated the proceeding in any way.

3D) Shri Moulik strenuously contended that the findings of guilt recorded by the inquiry officer are based on no evidence.

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At this stage, it would be appropriate to indicate the gravamen of charges levelled against the petitioner and the relevant findings reached by the inquiry officer. They are as follows:

Article I : The petitioner participated in the public demonstration on 26.9.1997 and 27.9.1997. He absented himself from his normal duties without permission. On 27.9.1997 while participating in the illegal meeting held in the Community Hall he actively incited the employees to continue the illegal strike and vehemently opposed any proposal to discontinue the strike. His participation in the demonstration of a political nature, support to a strike by government employees and active incitement to the employees are violation of the Sikkim Government Servants' Conduct Rules 1981.

Findings of the inquiry officer Part (a) - was partially proved as it could be established that the petitioner did not perform his duties only on 27.9.1997.

Part (b) - of the allegation that there was illegal meeting was not substantiated. The petitioner's action in the meeting held on 27.9.1997 led to incitement of the state government employees.

Article II : While participating in the illegal meeting of the government employees on 27.9.1997, he instigated the employees not to listen to the Chief Minister who had come to address them and incited the employees to demand immediate removal of the then Chief Secretary and the District Collector (East). He made baseless allegations against the government by stating that the provisions of the Employment Exchange (Compulsory Notification of Vacancies) Act, had been extended to the state of Sikkim. This statement was calculated to mislead the employees and amounts to criticism of the government. The action of the petitioner incited the government employees in an

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atmosphere already surcharged because of political activities by the opposition parties. Without doing his duty as a government servant he indulged in activities which were prejudicial to public order and amounted to violation of the provisions laid down in rule 10 of the Sikkim Government Servants' Conduct Rules, 1981.

Findings of the inquiry officer

Part (a) - The allegation that the meeting was 'illegal' not proved in absence of any prohibitory order.

Part (b) - The allegation that the petitioner incited the employees not to listen to the Chief Minister who had come to address the employees is not established. The allegation that he incited the employees to demand removal of the then Chief Secretary and the District Collector (East) is also not proved.

Part (c) - The allegation has been partly proved to the extent that the petitioner's action led to general incitement of employees against the government

Part (d) - Not proved as the department has not adduced evidence that the meeting of the employees was political.

Part (e) - Petitioner's action on 27.9.1997 led to incitement of the agitating employees and such action was against the interest of the government - proved .

Article III :

During the period 26.9.1997 to 28.9.1997 while participating in political activities he did not attend to his duties and absented himself from work without permission which was in violation of rule 3(i)(a) and (b) of the Sikkim Government Servants' Conduct Rules, 1981.

Findings of the inquiry officer

The department has been able to prove that only on 27.9.1997 the petitioner was absent from duty.

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The law as to the jurisdiction of this court under

Article 226 of the Constitution of India in dealing with the

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findings recorded by the inquiring authority is well-settled. This court while exercising writ jurisdiction in such matter does not act as an appellate forum of the disciplinary authority. It cannot as a court of appeal re-appreciate or re-assess the evidence recorded in a disciplinary proceeding and upset the findings of facts reached by the inquiring authority. The court's jurisdiction extends only to see whether there is any evidence to support the findings. A disciplinary proceeding is not a criminal trial. The standard of proof required is that of preponderance of probability and not proof beyond reasonable doubt. If there is some evidence on record in support of the finding of guilt, the court cannot enter into the domain of sufficiency or reliability of the evidence but where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at that finding, the writ court would be within its jurisdiction to interfere with it.

Keeping the above principle in view, let us examine if the findings of guilt are based on any evidence.

In respect of article I part (a) of the charge, the inquiry officer has held that the petitioner did not perform his duties on 27.9.1997. As noted earlier, on that day (27.9.1997), the petitioner was present in the Community Hall. That is the evidence of Abijit Dutta PW2. The petitioner himself has also admitted in his reply to the charges that he was present at

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the Community Hall on that day. It, therefore, follows that on that day he instead of attending to his official duties was present in the Community Hall. This finding, therefore, cannot be held to be without any evidence.

As regards the charge mentioned in article I (part b) and article II (part c) it has been held by the inquiry officer that the petitioner's action in the meeting held on 27.9.1997 led to general incitement of the state government employees. S. D. Negi, the Superintendent of Police who was examined as PW1 in the inquiry deposed that while the district administration was trying to convince the state employees, the petitioner argued in the meeting that strike should continue which incited the employees gathered there. It would be appropriate to extract the discussion of evidence made by the enquiry officer in his report :-

“The PW-1 (Mr. S.D. Negi) has however given clear account of government servant's activities on 27.9.97. PW1 has stated that while the district administration was trying to convince the agitating employees, the government servant argued that the strike should continue and thus incited the gathered employees. The government servant has not been able to creditably counter this evidence. In fact, DW2 and DW3 both mention about argument taking place between the PW1 and the government servant. It is further noted that the government servant was not member of any employees association then. Yet, at the time of agitation he seems to have actively involved himself in the strike on 27/9/97 and obstructed the district administration's attempt to pacify the agitation.”

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We may note that the petitioner was a senior officer in the rank of Superintendent Engineer and, therefore, his insistence and utterances in the meeting that the strike should continue must have added fuel to the agitation. The inquiry officer therefore legitimately inferred the finding of guilt by taking into consideration the evidence of S. D. Negi and DWs 2 and 3. Therefore, the finding cannot be held to be based on no evidence.

With regard to the charge contained in article II (part c) the inquiry officer held that the petitioner's action on 27.9.1997 led to incitement of the agitation of the employees and such action was against the interest of the government. As noted earlier, the petitioner was a senior officer in the state government. When the administration was trying to pacify the agitation of the government employees, the role of the petitioner in inciting them to go ahead with the strike definitely was against the government's interests. The above finding of the inquiry officer is also an inference drawn from the evidence on record.

In respect of charge contained in article III the inquiry officer held that the petitioner absented himself on 27.9.1997 from duty. This aspect has already been discussed by us while dealing with the finding of the inquiry officer in respect of article I (part a).

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For the reasons mentioned above, we have no hesitation to hold that the inquiry officer has drawn his conclusions on the materials available on record. They have been drawn in a reasonable manner and objectively which cannot be termed as perverse or based on no material.

5. Shri Moulik also contended that the remand order passed by the state government on the review petition filed under rule 11 of the Sikkim Government Servants' (Discipline and Appeal) Rules, 1985 was without jurisdiction. According to him, the reviewing authority has no power of remittal.

It may be stated that although there is no mention of power of remand in rule 11, that power is inherent in the reviewing authority. At times it happens that a delinquent officer has been materially prejudiced on account of improper inquiry. He may also suffer on account of omission or irregularity in the inquiry. In such cases, the reviewing authority cannot plead helplessness. It would be within its jurisdiction to remand the matter to the disciplinary authority for fresh disposal in the ends of justice. The power of remand always inheres with higher authority. The reviewing authority in the circumstances cannot be held to be lacking the power of remand when it noticed that the petitioner was not given opportunity to examine his defence witnesses.

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6. It was lastly contended on behalf of the petitioner that the penalty of compulsory retirement is wholly disproportionate to the charges proved against him. It has now been authoritatively held by the Supreme Court in a series of cases that the High Court, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court, it can appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

On careful consideration of the facts and circumstances, we have no hesitation to hold that the penalty of compulsory retirement inflicted on the petitioner cannot be held to be disproportionate to the charges established against him. As a senior officer of the state government he ought to have persuaded the agitating employees to refrain from the agitation particularly when the administration was trying to pacify it. Instead, he urged them to proceed with the strike. Mass agitation by the government employees causes lot of administrative difficulties and inconveniences which should be discouraged

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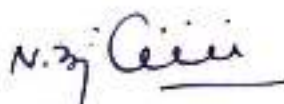
at any cost. The petitioner lacked in the sense of devotion to duty and his conduct in the circumstance did not behove of a responsible officer.

7. Shri Moulik faintly argued that some other officers were let off with the award of lesser penalty but the petitioner was inflicted with a major penalty. Imposition of penalty depends upon several factors, like the degree of gravity of charges, status of the delinquent officers, impact of penalty on other subordinates, penitence of the delinquents and other relevant factors. Therefore, those cases even, if any, cannot be precedent to the petitioner's case.

8. All the contentions raised on behalf of the petitioner fail. In the result, we do not find any merit in this writ petition which is accordingly dismissed. There shall be no order as to costs.


(**R. K. Patra**)
Chief Justice
16.03.2004

I agree.


(**N. Surjamani Singh**)
Judge
16.03.2004