THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

Dated : 19th June, 2025

DIVISION BENCH : THE HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE
THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WA No.01 of 2025

Appellants : State of Sikkim and Others

versus

Respondent : Mani Kumar Subba

Letter Patent Appeal under Chapter V Rule 148 of the High Court of Sikkim (Practice and Procedure) Rules, 2011

Appearance

Mr. Zangpo Sherpa, Additional Advocate General with Mr. Mohan Sharma, Advocate for the Appellants.

Mr. Yam Kumar Subba and Mr. Mukkum Hang Limboo, Advocates for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. Whether the office order bearing no.1615/G/DOP, dated 25-09-2018, of the Govt. of Sikkim, Deptt. of Personnel, ADM. Reforms, Training and Public Grievances, Gangtok (hereinafter, "DOPART"), terminating the government service of the respondent could have been modified to one of compulsory retirement by the same department, vide office order bearing no.6001/G/DOP, dated 27-02-2019, *sans* consultation by the Governor with the Sikkim Public Service Commission (hereinafter, "SPSC").

(i) On the heels of the above circumstance, whether the appellants, vide the order dated 14-02-2023, bearing no.820/G/DOP, could have withdrawn the aforementioned office order, bearing no.6001/G/DOP, dated 27-02-2019, citing non-compliance of Rule 11 of the Sikkim Government Servants' (Discipline and Appeal) Rules, 1985 (hereinafter, "D&A Rules") and restored the penalty of termination, imposed by the prior office

order bearing no.1615/G/DOP, dated 25-09-2018, are the two questions that fall for determination in this intra-Court appeal.

2. Before delving into the merits of the matter, it is essential to put forth a brief summation of the facts that led to the discord between the parties herein.

(i) In 1994, the respondent was appointed as Assistant Engineer in the State Government and in 2004 promoted as Divisional Engineer.

(ii) On 09-07-2012, the Sikkim Vigilance Police Station registered an FIR, under the provisions of the Prevention of Corruption Act, 1988, against the respondent, alleging that he was in possession of disproportionate assets.

(iii) A few days later, vide letter dated 18-07-2012, addressed to the P.C.E.-cum-Secretary, Buildings and Housing Department, the respondent resigned from government service. He was instead placed on suspension, from 19-07-2012, vide office order no.967/G/DOP, and his resignation rejected, vide letter bearing no.9194/G/DOP, dated 13-08-2012, of the DOPART, on grounds of the pending vigilance case against him.

(iv) The respondent sought to withdraw his resignation letter dated 18-07-2012 and also requested for revocation of his suspension, by a letter dated 29-09-2014, addressed to the Chief Minister of Sikkim. The suspension order, dated 19-07-2012, was revoked by office order of the DOPART, bearing no.2588/G/DOP, dated 04-11-2014.

(v) Subsequent thereto, on 04-11-2016, the Sikkim Vigilance Police sought initiation of departmental action against the respondent along with other engineers, on grounds of misconduct and failure to maintain absolute integrity.

(vi) This was followed by issuance of a Memorandum bearing no.5202/G/DOP, by the DOPART, dated 30-03-2017, to the respondent for causing disappearance of GI pipes and passing false bills. The respondent was to submit his written statement within ten days of receipt of the charge. Instead, he applied for voluntary retirement, vide letter dated 28-07-2017, which was rejected on 14-10-2017.

(vii) In addition to the above circumstances, the respondent also remained incommunicado and was found to be absent unauthorizedly from work. On this count, the DOPART issued Memorandum no.10672/G/DOP, dated 27-06-2017, under Rule 5 of the D&A Rules requiring him to submit his defence within ten days.

(viii) The respondent filed two separate responses, both dated 23-07-2018, to the Memoranda (*supra*). Annexure R-8, denying charges of misappropriation and Annexure R-9, accepting charges of unauthorised absence from work.

(ix) The DOPART issued office order bearing no.1615/G/DOP, dated **25-09-2018** and dismissed the respondent from service. Admittedly, the dismissal order was in connection with charges of unauthorised absence from duty. For the disproportionate assets charge, the vigilance case is still pending and charge-sheet is under preparation.

(x) The respondent filed an application to the Chief Minister of Sikkim, dated 25-02-2019, seeking a review of the office order dated 25-09-2018.

(xi) In response thereto, the said order of dismissal was modified to that of compulsory retirement by office order dated **27-02-2019**.

(xii) On **14-02-2023**, this order was set aside and the order of termination restored.

3.(a) The learned single Judge *inter alia* discussed the provisions of Rules 10 and 11 of the D&A Rules and observed that, the Governor, while revisiting the order of dismissal from service dated 25-09-2018, invoked Rule 10, exercising the powers conferred on him, considered the quantum of punishment imposed on the respondent and found it to be harsh. Pursuant thereto, the penalty was reduced to one of compulsory retirement, allowing him retirement pension, in accordance with the Sikkim (Pension) Rules, 1990. The learned single Judge was of the view that Rule 10 of the D&A Rules permits the Governor, on his own motion, to call for the records of the inquiry or revise any order made after consultation with the SPSC, where such consultation is necessary or whenever he deems it necessary. In such view of the matter, the office order dated 27-02-2019, passed in favour of the respondent cannot be assailed on the sole ground that the commission was not consulted. It was noticed that even after the passing of the office order dated 27-02-2019, the appellants took no steps to challenge or undo it, till the writ petition was filed on 17-11-2022 by the respondent.

(b) While considering the provisions of Rule 11 of the D&A Rules, the Court concluded that no new material or evidence was placed by the respondent which had the effect of changing the nature of the case. That, the failure to consult the SPSC alone would not change the nature of the case. More importantly, the proviso to Rule 11 prohibits any order imposing or enhancing any penalty by the Governor and mandates the requirement of fair play and natural justice, by extending a reasonable opportunity of making a representation against the penalty imposed. Admittedly, no such opportunity was granted before the impugned order, dated

14-02-2023, was passed, withdrawing the office order dated 27-02-2019. It was concluded that the impugned order, dated 14-02-2023, was passed in the teeth of Rule 11 of the D&A Rules and is liable to be set aside. The writ petition was allowed, setting aside the order dated 14-02-2023 and reviving the office order dated 27-02-2019.

4. The stance of the appellants before this Court is that while modifying the penalty of dismissal from service (25-09-2018), to compulsory retirement (27-02-2019), the Governor failed to comply with the mandate of Rule 10 of the D&A Rules, which requires the Governor to consult with the SPSC at the time of reviewing major penalty, which aspect the learned single Judge failed to appreciate. Strength was drawn from the observation of a three-Judge Bench of the Supreme Court in ***Indian Administrative Service (S.C.S.) Association, U.P. and Others*** vs. ***Union of India and Others***[1], which propounded that consultation is mandatory and non-consultation renders the action *ultra vires* or invalid or void.

(i) The next ground canvassed is that before modification of the order of dismissal by the order of compulsory retirement, the respondent was not afforded an opportunity of being heard in terms of Rule 10 of the D&A Rules. On noticing such irregularity, the appellants initiated the proposal for reviewing the offending office order, dated 27-02-2019 in terms of Rule 11 of the D&A Rules. In the interregnum on 17-11-2022 the respondent filed WP(C) No.52 of 2022 (*Mani Kumar Subba* vs. *State of Sikkim and Others*) seeking the relief of his retirement benefits. During the pendency of the writ petition, the order dated 14-02-2023 was issued, restoring the penalty of dismissal from service imposed on

[1] 1993 Supp (1) SCC 730

25-09-2018. The learned single Judge, by setting aside the order of dismissal, revived the office order dated 27-02-2019, which is in itself illegal, having been issued without consultation with the SPSC, apart from which, the respondent had admitted all Articles of Charges against him. Reliance was placed on the decisions of the Division Bench of the Supreme Court in ***Basawaraj and Another*** vs. ***Special Land Acquisition Officer***[2] and ***S.D.S. Shipping (P) Ltd.*** vs. ***Jay Container Services Co. (P) Ltd. and Others***[3].

(ii) It was next argued that no interference in office order no.1615/G/DOP, dated 25-09-2018, is warranted in this intra-Court appeal as that order was not assailed by the respondent at any point in time. That in light of the grounds advanced, the judgment of the learned single Judge deserves to be set aside.

5. Learned counsel for the respondent *per contra* contended that dismissal of the respondent from service is disproportionate to the misconduct of absence from duty, which argument was buttressed with the decision of a Division Bench of the Supreme Court in ***State of Punjab and Others*** vs. ***Dharam Singh***[4], wherein the Court directed the competent authority to issue an order of compulsory retirement, instead of removal from service, despite the finding of wilful absence on the part of the delinquent officer. That, disproportionate penalty is violative of Article 14 of the Constitution of India as held in a Division Bench of the Supreme Court in ***Ranjit Thakur*** vs. ***Union of India and Others***[5]. That, the Governor reduced the punishment of dismissal to compulsory retirement, by exercising his quasi-judicial powers under Rule 10 of the D&A Rules, wherein the requirement of consultation is merely

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[2] (2013) 14 SCC 81
[3] (2003) 9 SCC 439
[4] (1997) 2 SCC 550
[5] (1987) 4 SCC 611

directory. A five-Judge Bench of the Supreme Court in ***State of U.P.*** vs. ***Manbodhan Lal Srivastava***[6] observed that the requirement of consultation under Article 320(3)(c) of the Constitution of India is not mandatory and the absence of such consultation does not vitiate penalty proceedings. It was further argued that failure to consult the commission does not constitute a valid ground to challenge a disciplinary action in a Court of law and the State cannot take advantage of its own procedural lapse. The order dated 14-02-2023, is not sustainable in law, having been reviewed under Rule 11 of the D&A Rules, which permits review only on the discovery of new materials or evidence, which was not so. The principles of natural justice were also flouted as the respondent was denied an opportunity of filing a representation before issuance of the order, dated 14-02-2023. Attention was drawn to Regulation 7(2)(viii) of the Sikkim Public Service Commission (Exemption from Consultation) Regulations, 1986 (hereinafter, "SPSC Regulations"), which provides that consultation with the commission is exempted at any subsequent stage where the commission has already given advice and no fresh question has arisen for determination, apart from which it was urged that Rule 58 of the Rules of Procedure and Conduct of Business of the Sikkim Public Service Commission (hereinafter, "SPSC Rules"), provides for consultation before imposition of sentence and not for modification or reduction of penalty. On the grounds advanced, the writ appeal deserves a dismissal.

6. We have meticulously examined the pleadings, the documents on record and perused the impugned judgment. We

[6] AIR 1957 SC 912

have also carefully considered the rival contentions advanced by learned counsel.

7. As can be culled out from the arguments advanced before us, the respondent was issued Memorandum bearing no.10672/G/DOP, dated 27-06-2017. The Articles of Charge, framed against the respondent was that he had remained absent from duty with effect from 11-04-2016 without prior sanction for leave. Vide, the Memorandum bearing no.5202/G/DOP, dated 30-03-2017, the DOPART framed charges against the respondent for causing disappearance of GI pipes and passing false bills.

(i) Vide two separate responses, both dated 23-07-2018, to each of the Articles of Charge, the respondent denied the allegations in the Memorandum dated 30-03-2017, while the Articles of Charge in Memorandum dated 27-06-2017 for unauthorised absence from work were admitted. Thus, the argument of learned Additional Advocate General that the respondent had admitted "all charges" against him, which led to the order of dismissal, is not correct.

(ii) The appellants had also argued that the order of dismissal dated 25-09-2018, warrants no interference by this Court as no grievance was raised in the pleadings. We are indeed aware of the legal position. It has been held in a litany of judgments that, punishment of removal from service imposed upon the respondent may be harsh but it is a matter which the disciplinary authority or the appellate authority should consider and not the High Court or the Administrative Tribunal [See ***State Bank of India and Others*** vs. ***Samarendra Kishore Endow and Another***[7]]. In a five-Judge Bench in ***State of Orissa and Others*** vs. ***Bidyabhushan***

[7] (1994) 2 SCC 537

Mohapatra[8], the Supreme Court held that having regard to the gravity of the established misconduct, the punishing authority had the power and jurisdiction to impose punishment. The penalty was not open to review by the High Court under Article 226 of the Constitution. However, it may also been seen that in ***Ranjit Thakur*** (*supra*), after finding the appellant guilty on Court martial, he was dismissed from service and the sentence of imprisonment was imposed as permitted by the Army Act, 1950. While quashing the said punishment on the grounds that it was strikingly disproportionate, the Supreme Court observed *inter alia* that the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. Thus, it concludes that irrationality and perversity are recognised grounds which warrant judicial review.

8. Rules 10 and 11 of the D&A Rules were elaborately discussed by the learned single Judge in the impugned Judgment. The same Rules are extracted hereinbelow for clear comprehension;

> **"10. Revision.-**
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> (1) Notwithstanding anything contained in these rules, **the Governor may at any time, either on his own motion or otherwise, call for the records of any inquiry or revise any order made under these rules or under the rules repealed by rule 12 from which an appeal is allowed but from which no appeal has been preferred or from which no appeal is allowed, after consultation with the Commission where such consultation is necessary and may-**
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> (a) confirm, modify or set aside the order, or
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> (b) **confirm, reduce, enhance or set aside the penalty imposed by the order,** or impose any penalty where no penalty has been imposed, or
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> (c) remit the case to the authority which made the order or to any

[8] AIR 1963 SC 779

other authority directing such authority to make such further inquiry as it may consider proper in the circumstances of the case, or

(d) pass such other orders as it may deem fit.

Provided that no order of imposing or enhancing any penalty shall be made by any Revision Authority unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed and where it is proposed to impose any of the penalties specified in the clauses (v) to (ix) of rule 3 or to enhance the penalty imposed by the order sought to be reviewed to any of the penalties specified in these clauses, no such penalty shall be imposed except after an inquiry in the manner laid down in rule 5 and after giving reasonable opportunity to the Government servant concerned of showing causes against the penalty proposed on the evidence adduced during the inquiry and except after consultation with the Commission where such consultation is necessary.

11. Review.- The Governor may, at any time, either on his own motion or otherwise, review any order passed under these rules, when any new material or evidence which could not be produced or was not available at the time of passing the order under review and which has the effect of changing the nature of the case, has come, or has been brought to his notice.

Provided that no order imposing or enhancing any penalty shall be made by the Governor unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed or where it is proposed to impose any of the major penalties specified in rule 3 or to enhance the minor penalty imposed by the order sought to be reviewed to any of the major penalties and if an inquiry under rule 5 has not already been held in the case, no such penalty shall be imposed except after inquiring in the manner laid down in rule 5, subject to the provision of rule 7, and except after consultation with the Commission where such consultation is necessary.**"** **[emphasis supplied]**

9. The office order bearing no.6001/G/DOP, dated 27-02-2019, reveals that the Governor had invoked the powers conferred on him under Rule 10 of the D&A Rules. The Governor, vide the office order of 27-02-2019, while considering the quantum of punishment imposed on the respondent was of the view that the penalty was harsh and had decided to modify the order by reducing the penalty to compulsory retirement.

10. On a bare reading of Rule 10 of the D&A Rules, *(a)* we find that the Governor is conferred with the discretion of taking steps on his own motion to call for the records of any inquiry or refuse any order made under the D&A Rules and *(b)* the Governor is also conferred with the power of consulting the SPSC when he is of the view that "such consultation is necessary". The Rule thus permits the Governor to exercise his discretion as regards consultation. *(c)* The Rule further empowers the Governor to confirm, modify, reduce, enhance or set aside any penalty. *(d)* The caveat is revealed in the proviso to the Rule, wherein, for imposition and enhancement of penalty, the offending officer is to be afforded reasonable opportunity to make a representation against the proposed penalty. No enhancement ensued with the order of modification, dated **27-02-2019**, nor was there any imposition of fresh penalty. The penalty of dismissal imposed vide office order dated 25-09-2018 was in fact downgraded to that of compulsory retirement. Consequently, when the Governor did not consider it necessary to consult the SPSC by exercising his discretion then the issue ought to be given a quietus. Relevant reference can also be made to Regulation 7(2)(viii) of the SPSC Regulations which reads as follows;

> **"7. Disciplinary cases.-**
> (1) ……
> (2) ……
> (viii) in which the Commission has, at any previous stage, given advice in regard to the order to be passed and no fresh question has thereafter arisen for determination.
> ……**"**

The advice of the SPSC was already obtained when the order of dismissal dated 25-09-2018 was issued and therefore as no fresh question arose for determination, there was indeed no necessity for fresh consultation.

(i) Rule 58 of the SPSC Rules provides that the SPSC shall be consulted in all cases of disciplinary matters, pertaining to civil posts, except where it is exempted under the Rules. It is not the case of the appellants that the SPSC was not consulted at all. Hence, this argument need detain us no further.

(ii) When the appellants seek to foist the entire alleged shortcoming on the Governor, the provisions of Article 166 of the Constitution cannot be ignored, which provides that all executive action of the Government of a State, shall be expressed to be taken in the name of the Governor. In such a circumstance, it is evident that the appellants were themselves responsible for the modification made, with the shortcomings they seek to enumerate.

11. The argument that the respondent ought to be given an opportunity to make a representation, before modification of the order of dismissal dated 25-09-2018 to one of compulsory retirement dated 27-02-2019, to meet the ends of justice, is also a misplaced argument as the proviso to Rule 10 explains that such opportunity is for cases where the Governor proposes to "impose or enhance penalty". By modifying the office order dated 25-09-2018, there was no proposal for "imposing" or "enhancing" the penalty. The penalty of dismissal already imposed was reduced in its severity. Nonetheless, it is not even the respondent's case that he was denied an opportunity of filing a representation before office order dated 25-09-2018 was modified. We need not dwell on this any further.

(i) Rule 11 (*supra*) provides for review, empowering the Governor either of his own motion or otherwise to review any order passed under the D&A Rules, when new material or evidence, which could not be produced or was not available at the time of the

concerned order and which has the effect of changing the nature of the case is brought to his notice.

(ii) In our considered view, Rule 11 of the D&A Rules is not even applicable, since no such circumstances envisaged in Rule 11 viz., new materials or evidence not available prior in time was discovered and produced and changed the nature of the case, has been flagged before us. In fact, it is the order dated 14-02-2023 which while setting aside the office order of 27-02-2019, bypassed the provisions of the Rules. By reviving the order of 25-09-2018, in effect, the penalty was enhanced from that of compulsory retirement to dismissal from service and the respondent ought to have been given an opportunity of being heard.

(iii) Consequently, we find no error in the conclusion of the learned single Judge that when an order of compulsory retirement with compulsory retirement benefits was passed in favour of the respondent on 27-02-2019, the impugned order dated 14-02-2023, imposing the penalty of dismissal of service, without hearing the respondent cannot be sustained.

12. We also deem it appropriate to point out that the law relating to the exercise of intra-Court jurisdiction is crystallised by a Division Bench of the Supreme Court in ***Management of Narendra & Company Private Limited*** vs. ***Workmen of Narendra & Company***[9] wherein it was held that;

> **"5.** ..... Be that as it may, in an intra-court appeal, on a finding of fact, unless the Appellate Bench reaches a conclusion that the finding of the Single Bench is perverse, it shall not disturb the same. Merely because another view or a better view is possible, there should be no interference with or disturbance of the order [*Narendra & Co. (P) Ltd.* v. *Workmen*, WP No. 41489 of 2002, decided on 14-3-2008 (KAR)] passed by the Single Judge, unless both sides agree for a fairer approach on relief.**"**

[9] (2016) 3 SCC 340

(i) In ***Airports Authority of India*** vs. ***Pradip Kumar Banerjee***[10]***,*** the Division Bench of the Supreme Court observed as follows;

> **"41.** The position is, thus, settled that in an intra-court writ appeal, the appellate court must restrain itself and the interference into the judgment passed by the learned Single Judge is permissible only if the judgment of the learned Single Judge is perverse or suffers from an error apparent in law. However, the Division Bench, in the present case, failed to record any such finding and rather, proceeded to delve into extensive reappreciation of evidence to overturn the judgment of the learned Single Judge.**"**

13. In the wake of the foregoing discussions, the above settled questions for determination are answered accordingly. We are, therefore, of the considered view that the impugned judgment of the learned single Judge warrants no interference.

14. The writ appeal, therefore, stands dismissed and pending applications, if any, stand disposed of accordingly.

(Meenakshi Madan Rai)
Judge

(Biswanath Somadder)
Chief Justice

Approved for reporting : **Yes**

ds/sdl

[10] (2025) 4 SCC 111