

IN THE HIGH COURT AT CALCUTTA

(Constitutional Writ Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Krishna Rao

WPA 10975 of 2003

Mir Majibur Rahaman

Versus

Union of India & Ors.

Mr. Abdul Hamid Molla

Mr. Mukteswar Maity

Md. Abdul Halim

.....For the Petitioner

Mr. Rudra Jyoti Bhattacharya

.....For the U.O.I.

Hearing Concluded On : 13.04.2023

Judgment on : 22.06.2023

Krishna Rao, J.:

1. The petitioner has filed the present writ application challenging the order passed by the Disciplinary Authority dated January 28, 2003 wherein the Disciplinary Authority has imposed punishment of removal from service of CISF with immediate effect and the order passed by the Appellate Authority dated May 31, 2003 wherein the order of

punishment against the petitioner was upheld and the appeal filed by the petitioner is rejected.

- 2.** The petitioner was appointed as a Constable in the Central Industrial Security Force with effect from September 10, 1975 and was posted at FCI in Sindhri. On July 19, 1993, the petitioner was promoted to the post of Head Constable/GD. The petitioner was posted as Head Constable, CISF Unit, ONGC, Jorhat.
- 3.** On June 24, 2002, the petitioner was detailed for escorting of field party, GP-33 with arms SMG (Carbine 9 mm) and 90 rounds live rounds with three magazines. The escort party was divided into three phases and the petitioner was posted in the last phase. While the convoy of ONGC field party was returning forward base camp at 16.20 hours about 2 km from the Dhanshri Railway Station level crossing, the convoy was ambushed and attacked by the suspected militants and started firing at random and in the meantime, the other two colleagues left the ambush-spot. On hearing, the first sound of firing and when the petitioner intended to get down from the vehicle, the petitioner fell down and got injury on his chest and started feeling giddiness due to low pressure and the petitioner had taken possession in a bush which was at the distance of hundred (100) metres from the site of militants' attack and the petitioner became unconscious.
- 4.** On the next morning i.e. on June 25, 2002, at the early morning, the petitioner by keeping the arms safe and secured left the spot and came

to Diphu Railway Station through railway track and reported to the station at 7:30 hours and went to Police Station at 7:40 hours and informed the same to the Officer-in-Charge about the occurrence.

- 5.** By a Memo dated July 7, 2002, the Commandant, being the Disciplinary Authority had issued a Memorandum along with Article of charges under Rule 36 of CISF Rule, 2001, on the allegation that the petitioner fled away from the scene of incident leaving his colleagues and ONGC employees on June 24, 2002 around 16:30 hours, when the convoy of the ONGC field party GP-33 was ambushed by the suspected militant group on their way back to base camp near Dhansiri railway crossing. The petitioner left his SMG Carbine 9 mm, 90 live rounds - 9mm with three magazines unattended in the bushes near the place of incident though he was deployed on escort duty.
- 6.** On receipt of the Memorandum along with Article of charges, the petitioner has submitted his reply stating that the story as mentioned in paragraphs 3 and 4 supra. The Disciplinary Authority was not satisfied with the explanation offered by the petitioner and accordingly a regular enquiry was conducted by appointing Enquiry Officer.
- 7.** The Enquiry Officer after examination of witnesses and on completion of enquiry, had submitted enquiry report to the Disciplinary Authority and the Disciplinary Authority had forwarded enquiry report to the petitioner. The petitioner had submitted his reply to the said report and

on January 28, 2003, the Disciplinary Authority had passed final order of punishment of removal from service of the petitioner.

- 8.** Mr. Abdul Hamid Molla, the learned Advocate representing the petitioner submits that neither the Disciplinary Authority nor the Appellate Authority have considered the situation which the petitioner had faced on the date of incident. He submits that since the very beginning, the petitioner had informed the authorities that when the petitioner had tried to get down from the cabin of the vehicle, the petitioner fell down on the ground and has sustained injury on his chest and started feeling giddiness as he was suffering from low pressure for the long time and has taken possession in a bush at a distance of hundred (100) metres from the site of militants attack and subsequently the petitioner became unconscious for a long time. When the petitioner gains conscious, he found dark night. Due to his weakness and bad weather, he could not able to move and was remain in jungle for the whole night and nobody had come to search the petitioner and on the early morning, the petitioner through the railway track went to the station and reported the matter.
- 9.** Mr. Molla submitted that the petitioner was not given an opportunity to adduce his evidence and to cross-examine the witnesses properly as the petitioner was not fully conversant with either English or Hindi language. He further submits that no enquiry report was given to the petitioner and the petitioner could not get a chance to file representation against the enquiry report.

- 10.** Mr. Molla submitted that the petitioner has completed 27 years in service diligently and sincerely and without considering the long service of the petitioner, authorities have dismissed the petitioner from service. He further submits that neither the Disciplinary Authority nor the Appellate Authority had considered that the petitioner had kept the arms in the safe place which was recovered subsequently from the place when the petitioner has kept in the jungle.
- 11.** Mr. Molla submits that none of the grievance of the petitioner was taken into consideration and the punishment of removal of service is passed due to which the petitioner and the family members of the petitioner are in difficulties.
- 12.** On the other side, Mr. Rudra Jyoti Bhattacharya, learned Advocate representing the respondents submits that the petitioner fled away from the scene of the incident leaving his colleagues and ONGC employees when the convoy of the ONGC field party was ambushed by the suspected militant group on their way back to the base camp near Dhansiri railway crossing.
- 13.** Mr. Bhattacharya submitted that the petitioner has also left his SMG Carbine 9mm, 90 live rounds 9mm with three magazines unattended in the bushes near the place of incident and fled away when he was deployed on escort duty.
- 14.** Mr. Bhattacharya submitted that after submission of the Memorandum of Article of charges, the petitioner was given an opportunity to file his

representation and accordingly the petitioner has submitted his representation but the Disciplinary Authority was not satisfied with the explanation offered by the petitioner and accordingly a regular enquiry was conducted.

- 15.** Mr. Bhattacharya submitted that during the enquiry, the petitioner was present and in his presence, all the witnesses were examined and the petitioner was given an opportunity to cross-examine the witnesses and some of them were cross-examined by the petitioner and some of the witnesses, the petitioner refused to cross-examine. He further submits that the petitioner has taken a specific plea since after the incident and the petitioner was given an opportunity during the enquiry but the petitioner failed to establish his defence during the enquiry.
- 16.** He further submits that though the petitioner submits that no enquiry report was supplied to the petitioner but in the pleading and from the record, it is established that enquiry report was duly supplied to the petitioner and the petitioner has replied to the said enquiry report.
- 17.** Mr. Bhattacharya submitted that after the order of the Appellate Authority, the petitioner has also filed the review application against the order of the Appellate Authority but without waiting for the result of the review application, the petitioner has filed the present writ application but in the meantime on March 12th/13th, 2004, the Appellate Authority had again rejected the review application but the

petitioner has not challenged the said review order in the present writ application.

18. Mr. Bhattacharya submitted that the Disciplinary Authority and the Appellate Authority have considered the case of the petitioner as per the evidence brought on record and have passed the impugned order and thus this Court sitting in the writ jurisdiction cannot re-appreciate the evidence.
19. Heard the learned counsel for the respective parties and perused the materials on record. The Article of Charges levelled against the petitioner reads as follows:

“ARTICLE OF CHARGE - I

An act of cowardice and negligence on the part of No. 754450067 HC/GD MM Rahman of CISF unit, ONGC Jorhat in that he fled away from the scene of the incident leaving his colleagues and ONGC employees on 24.06.2002 around 16:30 hours, when the convoy of ONGC Field Party GP-33 was ambushed by the suspected militant group on their way back to the Base Camp GP-33, near Dhansiri Railway Crossing, District- Karbi-Ang-Long.

ARTICLE OF CHARGE - II

That No. 754450067 HC/GD MM Rahman of CISF Unit, ONGC Jorhat (Assam) on 24.06.2002 left his SMG Carbine 9mm, 90 live rounds 9mm with 03 magazines unattended in the bushes near the place of incident and fled away when deployed on escort duty, which tantamounts to gross carelessness and trustworthiness.”

20. The petitioner in the reply to the Memorandum of Article of charges has stated the following:

“That on 24/06/2002 I was detailed for escort of field party GP-33 with one SMG Carbine 9 mm and 90 live rounds with O3 Magazine, on that day after duty when he convey of ONGC Filed Party GP-33 was returning forwards base camp at about 16-30 Hours, about 2 kms from the Dhansiri Railway station level crossing, the convoy was ambushed by the suspected militants and started firing on hearing the sound of burst firing when I at once wanted to get down from the vehicle, I fell with the face downward and got injury on my chest and at the very moment vertigo (giddiness) started due to my low pressure from which I have been suffering since a long time. At that critical situation I could hardly took possession in a bush and became faint or a long time. When I regained my consciousness, it became dark and then it had been raining and I was feeling weakness and could not move at that time. I did not find any of my colleagues near me and also could not know when they left the place leaving behind me alone. I remained whole night sitting in that place. On the next day, i.e. on 25/06/2002 at dawn, I keeping my SMG carbine and ammunition in the bush, came to Diphu Railway station through Railway track on foot and wearing like a porter (35Kms). I reached the station -7-30 Hrs. and went to police station at 7-40 Hrs and O.C. of Diphu, P.S. informed the S.P. about my arrival and I informed over phone to the base camp at about 8-30 Hrs.”

- 21.** Though, the respondents have not filed their affidavit-in-opposition but have produced the file of the disciplinary proceeding of the petitioner. It is found from record, during the enquiry, the Enquiry Officer had examined altogether 17 witnesses being P.W.1 to P.W.17 and all the witnesses have been examined in presence of the petitioner and the petitioner had cross-examined some of the witnesses and for some of the witnesses, the petitioner has refused to cross-examine.

22. In the evidence of P.W.1, he has stated that on June 24, 2002, he was posted as Post Commander at ONGC, CISF unit Jorhat. On receipt of information about the attack by the militant on CISF ONGC field party, GP-33, he along with other CISF party rushed to the spot. On reaching there it was found that two of the constables and one civilian sustained bullet injury and they were shifted to hospital and some of the dead body of the civilian were lying on the vehicle and the dead body of the driver of the vehicle was lying on the road. All the CISF personnel assembled there and had checked the arms and ammunition and found that the petitioner along with his arms and ammunition was missing. On enquiry, at the place of incident found that the petitioner at the time of incident fled away from the place of incident along with his arms and ammunition and the CISF personnel have searched the petitioner at the place of incident by calling his name but he could not found at the place of incident. In the statement, P.W.1 has further stated that the petitioner was in the last vehicle along with three other Constables namely ML Ghosh, MM Fadikar and B. Talukdar. The said constables have informed P.W.1 that the petitioner fled away along with his arms and ammunition without giving any protection to the colleagues and the civilian and hide himself at the unknown place due to fear and he has not taken any steps against the militants. The petitioner has not cross-examined the P.W.1 and put his signature in the said statement as true.

- 23.** P.W.10, B. Talukdar has stated that on the date of incident, the petitioner was the Guard Commander along with the constables namely MM. Fadikar, ML Ghosh and B. Talukdar. At the time of incident, all three constables came down from the vehicle and have taken their position but the petitioner fled away from the place of incident. After the incident and before leaving the place of incident, the CISF personnel have searched for the petitioner by calling his name but the petitioner was missing along with his arms and ammunition. He also stated that on June 26, 2002, he along with other CISF personnel and the petitioner went to the place of incident to search the arms and ammunition of the petitioner but they could not find the arms and ammunition as the petitioner was not able to say in which place he has kept the arms but after long search the arms were found in the bushes. During cross-examination, the petitioner has not denied the statement made by P.W.10.
- 24.** P.W.8 and P.W.9, namely M.L. Ghosh and MM Fadikar who were along with the petitioner in the vehicle stated that when the militants have started firing, immediately they came down from the vehicle but they have sustained bullet injury in spite of the same they have fired against the militants and also became unconscious.
- 25.** It is found from the record, 11 CISF personnel including the petitioner were on escort duty and out of 11 personnel in the escort party, 10 personnel had taken their position immediately on getting out their vehicle and retaliated by opening fire at the militants. The said CISF

personnel have fired 05, 09, 07, 02, 11, 09, 22, 18, 16 and 13 rounds from their respective weapons and two of the CISF personnel received bullet injury on their neck and chest but they did not lost their courage to counter the attack of the militants and to save the ONGC staffs and their colleagues. On the other end, the petitioner not only failed to react and fire from his automatic service weapon to counter attack the militants but also fled away from the spot after throwing away his service SMG carbine with three magazines full of 90 live around of 9 mm ammunition, leaving his colleagues and ONGC staffs into the mouth of death.

- 26.** As regard the opportunity of hearing, it is found from record that all the witnesses were examined in his presence and he has cross-examined many of the witnesses except some witnesses. With regard to supply of enquiry report in paragraph 26 of the writ application petitioner has admitted that he has submitted his representation against the enquiry report and from the record of the disciplinary proceeding, it is found that by letter dated January 13, 2003, the enquiry report was served upon the petitioner and on January 24, 2003, the petitioner has submitted his representation against the enquiry report.
- 27.** The petitioner has also suppressed the fact that the petitioner has filed a review against the order of the Appellate Authority and pendency of the review application, the petitioner has filed the present writ application and during the pendency of the writ application, the

Appellate Authority had dismissed the review application but the said fact was not brought before this Court.

28. The Constitution Bench, in case of ***State of Orissa & Others vs. Bidyabhushan Mohapatra*** had observed way back in 1963 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 the Article 226. A three-judge Bench in case of ***B.C. Chaturvedi vs Union of India & Ors.*** had also held that judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. When an inquiry is conducted on the charges of misconduct by a public servant, the Court or Tribunal would be concerned only to the extent of determining whether the inquiry was held by a competent officer or whether the rules of natural justice and statutory rules were complied with.

29. In ***Om Kumar & Others vs. Union of India*** this Court had also after considering the Wednesbury Principles and the doctrine of proportionality held that the question of quantum of punishment in disciplinary matters is primarily for the disciplinary authority, and the jurisdiction of High Courts under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the

applicability of one or the other of the well-known principles known as “Wednesbury Principles” namely whether the order was contrary to law, or whether relevant factors were not considered, or whether irrelevant factors were considered or whether the decision was one which no reasonable person could have taken.

30. Again a three-judge Bench in case of ***Deputy General Manager (Appellate Authority) & Ors. vs. Ajai Kumar Srivastava*** circumscribing the power of judicial review by the constitutional courts held as under:

“24. It is thus settled that the power of judicial review, of the constitutional court, is an evaluation of the decision making process and not the merits of the decision itself. It is to ensure fairness in treatment and not to ensure fairness of conclusion. The court/tribunal may interfere in the proceedings held against the delinquent if it is, in any manner, inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached or where the conclusion upon consideration of the evidence reached by the disciplinary authority are perverse or suffer from patent error on the face of record or based on no evidence at all, a writ of certiorari could be issued. To sum up, the scope of judicial review cannot be extended to the examination of correctness or reasonableness of a decision of authority as a matter of fact.

25. xxxxxxxx

26. xxxxxxxx

27. xxxxxxxx

28. The constitutional court while exercising its jurisdiction of judicial review under Article 226 or Article 136 of the Constitution would not interfere with the findings of fact arrived at in the departmental enquiry proceedings except in a case of mala fides or perversity i.e. 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 those findings and so long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained.”

- 31.** In view of the aforesaid legal position, this Court is of the opinion that the Disciplinary Authority as well as the Appellate Authority had rightly imposed punishment upon the petitioner for removal of service of CISF. The petitioner having been found to have committed gross misconduct as he failed to react and fire from his automatic service weapon to counter attack the militants and fled away from the spot after throwing away his service SMG carbine with three magazines full of 90 live around of 9 mm ammunition, leaving his colleagues and ONGC staffs into the mouth of death. The respondent authorities have passed the order of removal of the petitioner from service after following due process of law without actuated by malafides, this Court is not inclined to interfere with the impugned orders.
- 32.** In that view of the matter, **WPA 10975 of 2003** is thus **dismissed**.

Parties shall be entitled to act on the basis of a server copy of the Judgment and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)