

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Extra-Ordinary Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.P.(C) No. 52 of 2022

Mani Kumar Subba,
Son of late C.S. Subba,
Aged about 56 years,
Resident of Theyzong Heem,
Development Area,
P.O. & P.S. Gangtok,
Sikkim.

..... Petitioner

versus

1. State of Sikkim,
Through its Chief Secretary,
Tashiling Secretariat,
Bhanu Path,
Gangtok – 737101.
2. Department of Personnel,
Adm. Reforms, Training & Public Grievances
Through its Secretary,
Government of Sikkim,
Gangtok – 737101.
3. Human Resource Development Department,
Through its Secretary,
Government of Sikkim,
Gangtok – 737101.
4. Pension, Group Insurance & Provident Fund,
Finance Department,
Through its Director,
Government of Sikkim – 737101.
5. Buildings & Housing Department,
Through its Secretary,
Government of Sikkim,
Gangtok – 737101.

6. Sikkim Vigilance,
Police Station Gangtok,
Through its Director,
Gangtok – 737101. Respondents

Petition under Article 226 of the Constitution of India

Appearance:

Mr. Yam Kumar Subba, Advocate for the Petitioner.

Mr. Zangpo Sherpa, Additional Advocate General with
Mr. S.K. Chettri, Government Advocate and Mr. Sujan
Sunwar, Assistant Government Advocate for the
Respondents.

Date of hearing : 29th November, 2024

Date of judgment: 11th December, 2024

J U D G M E N T

Bhaskar Raj Pradhan, J.

The present writ petition challenges the impugned order dated 14.02.2023 passed against the petitioner revoking the earlier order dated 27.02.2019 which reduced his punishment from dismissal from service to compulsory retirement with compulsory retirement benefits. The writ petition, therefore, explores the jurisdiction and scope of *Rule 11 of the Sikkim Government Servants' (Discipline and Appeal) Rules, 1985 (the Discipline & Appeal Rules)*.

2. On 25.09.2018, the petitioner was imposed a penalty of dismissal of service in terms of *Rule 3(ix)* of the *the Discipline & Appeal Rules*.

3. The petitioner had filed Writ Petition No.4 of 2018 challenging the failure of the respondents to accept his notice for voluntary retirement or resignation. On 27.09.2018, the writ petition was allowed to be withdrawn as the compliance report dated 25.09.2018 filed by the State respondent stated that the Disciplinary Authority had taken its decision and imposed a penalty of dismissal of service on the petitioner.

4. On 25.02.2019, the petitioner made a representation to the Chief Minister to review the order dated 25.09.2018, seeking voluntary retirement.

5. On 27.02.2019, the respondent no.2 issued office order modifying the order imposing the penalty of dismissal of service and reducing it to compulsory retirement with compulsory retirement pension benefit in accordance with *the Sikkim (Pension) Rules, 1990*.

6. On 30.06.2022, the petitioner wrote to the respondent no.1 seeking disbursement of retirement benefits as he was not given any retirement benefits.

7. On 17.11.2022, the petitioner preferred the present writ petition before this Court for release of payment

W.P. (C) No. 52 of 2022
Mani Kumar Subba vs. State of Sikkim & Ors.

of compulsory retirement pension and other retirement benefits.

8. During the pendency of the writ petition, the impugned order dated 14.02.2023 was passed which is reproduced herein verbatim.

“ GOVERNMENT OF SIKKIM
DEPARTMENT OF PERSONNEL
GANGTOK – 737101

No. 820/G/DOP

Dated:14.02.2023

ORDER

Whereas, disciplinary proceedings against Shri Mani Kumar Subba the then Divisional Engineer (Civil), Human Resource Development Department now 'Education Department' was instituted and communicated to him vide Memorandum No: 10672/G/DOP dated 27.06.2017 under rule 5 of the Sikkim Government Servants' (Discipline & Appeal) Rules, 1985.

And whereas, Shri Mani Kumar Subba vide his written statement dated 23.07.2018 had admitted to all the charges levelled against him.

And whereas, Shri Mani Kumar Subba had filed W.P. (C) No. 4 of 2018 in the matter of Mani Kumar Subba-vs-State of Sikkim.

And whereas, in compliance with the Order dated:04.09.2018 passed by the Hon'ble High Court of Sikkim, the penalty of dismissal from service was imposed on Shri Mani Kumar Subba, the then Divisional Engineer (Civil), 'Human Resource Development Department' now 'Education Department' vide Office Order No. 1615/G/DOP, dated 25.09.2018.

And whereas, the Sikkim Public Service Commission was consulted as required under the rules.

And whereas, Shri Mani Kumar Subba, the then Divisional Engineer (Civil), 'Human Resource Development Department' now 'Education Department' vide his application dated 25.02.2019 had made a representation to the Government for review of Office Order No. 1615/G/DOP, dated: 25.09.2018.

And whereas, the Governor, after due consideration of the representation submitted by Shri Mani Kumar Subba, was pleased to modify the Office Order No. 1615/G/DOP, dated 25.09.2018 and reduce the penalty of Dismissal from Service to Compulsory Retirement vide Office Order No. 6001/G/DOP, dated: 27.02.2019.

And whereas, the Law Department opined that at the time of reviewing of the penalty the Sikkim Public Service Commission was not consulted as required under rule 10 of the Sikkim Government Servants' (Discipline & Appeal) Rules, 1985 since the penalty of Dismissal from Service which is a major penalty was modified into Compulsory Retirement in a situation where the Government employee had admitted all the charges of misconduct. The Law Department also opined that Shri Mani Kumar Subba was not given an opportunity of being heard before imposing the penalty of Compulsory Retirement upon him vide Office Order No. 6001/G/DOP, dated 27.02.2019.

W.P. (C) No. 52 of 2022
Mani Kumar Subba vs. State of Sikkim & Ors.

And whereas, the Disciplinary Authority, after considering all the facts and records of the case has come to the conclusion that Office Order No. 6001/G/DOP, dated 27.02.2019 modifying the penalty of Dismissal from Service to Compulsory Retirement imposed on Shri Mani Kumar Subba, the then Divisional Engineer (Civil), 'Human Resource Development Department now 'Education Department' is required to be reviewed and the penalty imposed vide Office Order No. 1615/G/DOP, dated 25.09.2018 is to be restored.

Now, therefore, the Governor is pleased to withdraw the Office Order No. 6001/G/DOP, dated 27.02.2019 in terms of rule 11 of the Sikkim Government servants (Discipline & Appeal) Rules, 1985.

The penalty imposed vide Office Order No. 1615/G/DOP, dated: 25.09.2018 shall be restored from the date of its issue.

By Order

Sd/-
(Rinzing Chewang Bhutia, SCS)
Secretary to the Government of Sikkim

.....”

9. The petitioner filed an application for amendment of the writ petition to challenge the impugned order dated 14.02.2023. This application was allowed by this Court on 29.11.2023. Accordingly, the amended writ petition was filed challenging the order dated 14.02.2023, as well.

10. Heard Mr. Yam Kumar Subba, learned Counsel for the petitioner. It was submitted that the order dated 14.02.2023 is against the mandate of *the Discipline & Appeal Rules*, as it was passed without giving reasonable opportunity of making a representation against the penalty imposed. He further submitted that the narration of the fact in paragraph 4 of the order dated 14.02.2023 is misrepresentation of the actual fact and it seeks to project that this Court had sought for the penalty of dismissal of service against the petitioner which was untrue.

11. The learned Additional Advocate General submitted that the petitioner has not challenged the imposition of major penalty vide office order dated 25.09.2018 and therefore, it is clear that he was an employee who was not fit to be a government employee which led to the loss of public exchequer. The imposition of the major penalty which led to his termination is valid. After the disciplinary proceeding was initiated against the petitioner, he filed his reply on 23.07.2018 where he admitted to the charges and accepted to face the penalties. After considering the reply and his admission, the petitioner was imposed a penalty of dismissal of service on 25.09.2018. The modification of office order dated 25.09.2018 by the Governor vide order dated 27.02.2019 reducing it to compulsory retirement of the petitioner was not valid as under the power of revision, i.e., *Rule 10*, he was required to consult the Commission which the Governor did not do. The modification is, thus, not tenable in the eyes of law. When the file pertaining to the compulsory retirement of the petitioner was moved, some irregularities were observed in the procedure adopted while reviewing the penalty of dismissal from service to compulsory retirement. After examining the records at the time of reviewing the penalty of dismissal from service to compulsory retirement, the

Commission was not consulted and therefore the order of the Governor was an illegal order. The learned Additional Advocate General relied upon the following judgments: ***Indian Administrative Service (S.C.S.) Association, U.P. and Others vs. Union of Indian & Others***¹, ***Competent Authority vs. Barangore Jute Factory and Others***², ***Shri Chandra Kumar Chettri and Ano. vs. Smt. Kipu Lepcha***³, ***N.B. Tiwari vs. State of Sikkim and Others***⁴, ***Naresh Kumar Rai vs. State of Sikkim and Others***⁵, ***Basawaraj and Another vs. Special Land Acquisition Officer***⁶, ***Employees' State Insurance Corpn. and Others vs. Jardine Henderson Staff Association and Others***⁷. This Court has perused the judgments which were all rendered in the facts of those cases. The facts of the present case are completely different and therefore, ratio laid down therein not applicable.

12. In ***Indian Administrative Service*** (supra), the Supreme Court was examining a case of seniority of IAS Officers. The Supreme Court examined section 3(1) of the All India Services Act, 1951 which provided that the Central Government may, after consultation with the Governments

¹ 1993 Supp (1) SCC 730

² (2005) 13 SCC 477

³ 2024:SHC:71

⁴ (2004) SCC Online Sikk 28

⁵ 2020:SHC:100

⁶ (2013) 14 SCC 81

⁷ (2006) 6 SCC 581

of the States concerned (including the State of Jammu & Kashmir), (and by notification in the Official Gazette) make rules for the regulation of recruitment, and the conditions of service of persons appointed to an All India Service. It is in this context that the Supreme Court examined various judgments rendered by it on the meaning of the word “consultation” and when such “consultation” is mandatory.

13. In ***Barangore Jute Factory*** (supra), while examining a land acquisition case under the National Highways Act, 1956, the Supreme Court opined that it is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone.

14. In ***Shri Chandra Kumar Chettri*** (supra), while interpreting the provisions of the National Highways Act, 1956, this Court relied upon the opinion of the Supreme Court in ***Vinod Kumar & Others vs. District Magistrate Mau & Others***⁸ in which it was held that where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule. The language employed in a statute is a determinative factor of the legislative intent. The legislature

⁸ (2023) SCC Online SC 787

is presumed to have made no mistakes. The presumption is that it intended to say what it had said.

15. In *N.B. Tiwari* (supra), the Division Bench of this Court while interpreting *Rule 11 of the Discipline & Appeal Rules* opined that 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. 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 is noticed that the petitioner was not given opportunity to examine his defence witnesses.

16. In *Naresh Kumar Rai* (supra), a Single Bench of this Court relied upon a judgment of the Supreme Court in *Sohan Lall Gupta vs. Asha Devi Gupta*⁹, where it was observed that the principles of natural justice cannot be put in a straightjacket formula. In a given case the party should not only be required to show that he did not have a proper

⁹ (2003) 7SCC 492

notice resulting in violations of principles of natural justice but also to show that he was seriously prejudiced thereby.

17. In *Basawaraj and Another* (supra), while examining sufficiency of cause in seeking condonation of delay of five and a half years in filing the appeals, the Supreme Court opined that it is settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decision made in other cases. The said provision does not envisage negative equality but has only a positive aspect.

18. In *Jardine Henderson Staff Association* (supra), the Supreme Court examined a case in which a notification issued by the Union of India by which Central Government amended Rules 50, 51 and 54 of the Employees' State Insurance (Central) Rules, 1950, pursuant to which the wage limit for coverage of an employee under section 2(9)(b) of the Employees' State Insurance Act was enhanced from Rs.3000/- to Rs.6500/- instead of the existing wage ceiling of Rs.3000/- per month. It is in this context that in paragraph 61 thereof the Supreme Court opined as it did which has no relevance in the facts of the present case.

19. After hearing the learned counsel for the parties, it seems it would be relevant to examine the power of *Revision* under *Rule 10* and the power of *Review* under *Rule*

11 of the *Discipline and Appeal Rules*. These Rules are reproduced herein below.

“10. Revision.-

(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-

- (a) confirm, modify or set aside the order, or
- (b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed, or
- (c) remit the case to the authority which made the order or to any other authority directing such authority to make such further inquiry as it may consider proper in the circumstances of the case,
- (d) or 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]

20. The sequence of events reflected above shows that the initial order dated 25.09.2018 of dismissal of service was revisited under *Rule 10* above. The office order dated 27.02.2019 records that the Governor in exercise of the powers conferred on him under *Rule 10*, called for the records of inquiry held against the petitioner, considered the quantum of punishment imposed and after due consideration came to the conclusion that the penalty of dismissal imposed was harsh and accordingly modified by reducing the penalty to compulsory retirement with an order that the petitioner be allowed compulsory retirement pension in accordance with the relevant provisions of *the Sikkim (Pension) Rules, 1990. Rule 10*, as quoted above, permits the Governor to on his own motion call for the records of the inquiry or revise any order made after consultation with the Commission where such consultation is necessary. *Rule 10*, therefore, allows the Governor to exercise his discretion to *suo motu* call for the records and consult the Commission whenever he deems it necessary. In such view of the matter, the order dated 27.02.2019 passed in favour of the petitioner cannot be assailed on the sole

ground that the Commission was not consulted without anything more. The facts reflect that even after the passing of the order dated 27.02.2019, the respondent took no steps to challenge it or undo it till the writ petition was filed on 17.11.2022 by the petitioner seeking the benefit of the order dated 27.02.2019.

21. *Rule 11* permits the Governor to review any order passed “*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*”. No new material or evidence has been placed by the respondent which has the effect of changing the nature of the case. Instead, the respondent argues that since the Governor had failed to consult the Commission as envisaged in *Rule 10* while passing the order dated 27.02.2019, the Governor thought it fit to review it. This Court is afraid that this failure 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 requiring 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, by which the order dated 27.02.2019 passed earlier, was withdrawn. When an order of compulsory retirement with compulsory retirement benefit was passed in favour of the petitioner on 27.02.2019, the impugned order dated 14.02.2023 imposing the penalty of dismissal of service without hearing the petitioner, cannot be sustained. As rightly contended by the learned counsel for the petitioner, the narration in paragraph 4 of the impugned order dated 14.02.2023 misrepresents the facts as well.

22. In the facts of the present case as narrated above, this Court has no hesitation in holding that the impugned order dated 14.02.2023 has been passed in the teeth of *Rule 11 of the Discipline and Appeal Rules* and liable to be set aside.

23. Resultantly, the writ petition is allowed. The order dated 14.02.2023 is set aside. The order dated 27.02.2019 stands revived. The respondents are directed to comply with it within a period of three months from today and grant the petitioner the compulsory retirement pension in accordance with *the Sikkim (Pension) Rules, 1990*.

(Bhaskar Raj Pradhan)
Judge