

(2011) 06 GAU CK 0034

Gauhati High Court (Shillong Bench)**Case No:** Writ Appeal No. (SH) 55 of 2009 in Writ Petition (C) No. 238 (SH) 2006

Union of India (UOI)

APPELLANT

Vs

Md. Akbar Ali Warrant Officer
(Clerk)RESPONDENT

Date of Decision: June 1, 2011**Hon'ble Judges:** Tinlianthang Vaiphei, J; Biplab Kumar Sharma, J**Bench:** Division Bench**Advocate:** S.C. Shyam, CGC, for the Appellant; M. Chanda, S. Choudhury, P. Nongbri and N. Mozika, for the Respondent**Final Decision:** Allowed

Judgement

B.K. Sharma, J.

This appeal is directed against the judgment and Order dated 21.10.2009 passed by the learned Single Judge in WP(C) No. 238 (SH) 2006 by which the prayers made in the writ petition were all allowed. Consequently, the direction has also been issued to the Appellants to give promotion to the writ Petitioner including seniority with all other consequential service benefits.

2. Briefly stated the facts leading to the filing of the writ petition are that the Petitioner when he was serving as Havildar/Clerk in Assam Rifles was reduced in rank by an order dated 18.08.1988. The Petitioner did not challenge the said order but agitated his grievances relating to the cancellation of the order of promotion dated 17.05.1990 by which he was promoted to the rank of Havildar Clerk w.e.f. 01.01.1990. The order of cancellation came to be issued on 13.06.1990 before the Petitioner could join the promotional post. Thereafter, the Petitioner submitted a representation for restoration of his promotion, but according to the Petitioner the said representation did not yield any result.

3. In the aforesaid circumstances, the Petitioner who is the Respondent in this appeal had filed a writ petition being CR 4762/1998 praying for setting aside and

quashing the order of cancellation of promotion. The writ petition was disposed of by the judgment and order dated 03.12.2003, directing the Respondents to consider the case of the Petitioner for promotion in terms of the observations made in the said judgment.

4. It appears that during the course of hearing of the writ petition an argument was made that the impugned order of demotion was bad in law. However, noticing the fact that the said order was not under challenge in the writ petition and that the circumstances in which the order of demotion was passed was different than the instances cited by the Petitioner, the following findings was recorded.

4. Unlike these employees, the Petitioner was demoted from the post of Havildar/Clerk to that of Rifleman/Clerk. In this writ petition, the Petitioner has not made any grievance against the said order of demotion, but his grievance is confined to the order of cancellation of his subsequent order of promotion. Although he was ordered to be promoted by Annexure-A order dated 17.05.1990, but the same was cancelled before he could join the post. His representation was also disposed of by non-speaking order.

5. No affidavit-in-opposition has been filed controvert the fact on record. The Petitioner has also not chosen to annex the copy of the order dated 18.08.1988 by which he was demoted to the rank of Rifleman/Clerk. In the aforesaid circumstances I am not inclined to grant the prayers made in the writ petition and instead I issue a direction to the Respondent No. 1 to consider the case of the Petitioner for promotion as Havildar/Clerk, which in fact, once granted with effect from 01.01.1990 by an order dated 17.05.1990 (Annexure-A).

5. After the aforesaid judgment and order, the Assam Rifles authority passed the order dated 05.03.04 towards consideration of the case of the Petitioner for promotion. For ready reference the said order is also quoted below:

MAHANIDESHALAYA ASSAM RIFLES:
DIRECTORATE GENERAL ASSAM RIFLES
SHILLONG-793001

ORDER

No. Rec (Adm-IV) 360181/2004/02 05 Mar 2004

ORDER BY IC-21254L LIEUTENANT GENERAL H S
KANWAR, PVSM,AVSM,VSM, DIRECTOR GENERAL
ASSAM RIFLES IN THE CASE OF No. 360181
WO(CLK) AKBAR ALI OF No. 1 CONSTRUCTION
COMPANY ASSAM RIFLES.

1. Pursuant to the judgment of the Hon"ble High Court Guwahati order No. 4792 dated 03 Dec 2003 the case of No. 360181 WO (Clerk) Akbar Ali of 1 Construction Company Assam Rifles for grant of promotion has been re-examined. The individual was tried under CCS (CCA) Rules for participating in an agitation on 06 July 1988 and reduced to the ranks on 18 Aug 1988. However, he was promoted to Hav/Clerk by Commandant 9 Assam Rifles on 01 Jan 1990 which was not in order as the promotion of clerks (Centrally Controlled Category) was controlled by HQ DGAR. Hence the bid irregular promotion order was cancelled by HQ DGAR signal No A 2929 dated 13 Jun 1990. He was promoted to Nk/Clerk wef 22 Feb 1990 according to his seniority after reduction to ranks. Thereafter, he has been getting promotions and is presently WO (Clerk) wef 01 Feb 2003.

2. As far as consideration of the case in the light of judgment of Supreme Court of India dated 20 Oct 1995 is concerned, it is seen that the colleagues of the Petitioner who were dismissed from service were re-instated, on the basis of Court Order, because of certain procedural lapses, and not, because they were exonerated of the offence they had committed. Hence he can not be exonerated of the offence committed by him on the same grounds.

3. No injustice to the individual has taken place by the said cancellation since the promotion was not permissible under the rules.

Signed at Shillong on this fifth day of Mar, 2004.

Sd/-

(HS Kanwar)

Lieutenant General

Director General Assam Rifles.

6. Being aggrieved by the aforesaid order dated 05.03.2004, the Petitioner filed yet another writ petition being WP(C) No. 3953/2004. In the writ petition apart from making a challenge to the said order dated 05.03.2004, the Petitioner also challenged the order of demotion that was passed way back in 1988. The Petitioner also challenged the cancellation of promotion dated 13.06.1990.

7. The Respondents in their counter affidavit filed in the writ petition not only denied the contention raised therein, but also took the plea of res-judicata so far as the orders of 1988 and 1990 were concerned.

8. The learned Single Judge by the impugned judgment and order dated 21.10.2009 having allowed the writ Petitioner granting all the prayers including interference with the said two orders of 1988 and 1990, the Union of India has preferred this appeal for challenging the legality and validity of the said judgment and order.

9. We have heard Mr SC Shyam, learned CGC appearing for the Union of India as well as Mr M Chanda, learned Counsel for the writ Petitioner/Respondent. Mr SC Shyam, the learned CGC submits that the learned Single Judge could not have set

aside the impugned orders of 1988 and 1990 inasmuch as the said orders were taken into consideration in the earlier proceeding without any interference. He also further submits that the said orders could not have been set aside in the proceeding initiated only in the year 2004 i.e. after 14/16 years.

10. Mr M Chanda, learned Counsel for the writ Petitioner/Respondent has submitted that the learned Single Judge having passed the judgment and order dated 21.10.2009 taking note of the judgment of this Court affirmed by the Apex Court, there is no infirmity in the said judgment and order.

11. At this stage, it will be appropriate to mention a particular fact. As against the demotion of the Petitioner to the lower post, some of his colleagues were dismissed from service making a challenge to which the said incumbents had approached this Court by filing a writ petition being CR No. 1788/1988. The impugned order of dismissal were set aside and quashed by judgment and order dated 22.01.1992 passed by this Court. Being aggrieved, the Union of India had approached the Apex Court and the Apex Court vide order dated 20.10.1995 in Civil Appeal No. 2499-2519 of 1993 dismissed the appeals.

12. From the above, it is seen that unlike the writ Petitioner in the instant case, the employees who had been dismissed from service in the year 1988 immediately approached this Court by filing the writ petition in the year 1988 itself. The Petitioner kept on waiting till arrival of 1998 when he filed the aforesaid writ petition i.e. CR No. 4762/1998. Thus the writ petition was filed after 10 years indirectly challenging the order of demotion and 8 years after the order for cancellation of promotion. It was in such circumstances, this Court declined to interfere with the order of demotion as well as the order for cancellation of promotion. However, the Respondents were directed to consider the case of the Petitioner in terms of the observations made in the said judgment and order. Consequently, the authority of the Assam Rifles passed the impugned order dated 05.03.2004 quoted above.

13. Apart from the fact that the orders of 1988 and 1990 were challenged by filing the writ petition in the year 2004, i.e. after a delay of 16 years, the said two orders were duly taken note of in the judgment and order dated 03.12.2003 passed in the earlier writ petition filed by the Petitioner. In the said judgment and order it was specifically pointed out that the order of demotion dated 18.08.1988 was not liable to be interfered with. So far as the grievance for cancellation of promotion is concerned, it was observed that under the facts and circumstances, the writ Petitioner deserves consideration of the case for promotion. Pursuant to the said judgment, the order dated 05.03.2004 was passed by the Assam Rifles authority referred to above.

14. As noted above, the Petitioner had filed the first writ petition in the year 1998, without however specifically challenging the order of demotion. The order challenged was the order of cancellation of his promotion. Thereafter he filed a

second writ petition in the year 2004 making a challenge to the order dated 05.03.2004. However, in the process he also challenged the order of demotion of 1988 and the order of cancellation of promotion of 1990. Thus, there was a considerable delay in assailing the two said orders.

15. Apart from the fact that the said two orders could not have been challenged in view of the earlier judgment and order of 2003, there was also a delay of 16 years in doing so. In this connection we may rely on the decision of the Apex Court reported in AIR 1993 SCC 2276- Ratan Chandra and Ors v. Union of India and Ors. in which the Apex Court dealing with the plea of the Petitioner that he was similarly situated and that in view of the earlier decision of the Apex Court he was also entitled to same relief, declined to grant the relief to the Petitioner on the ground of delay and laches. In this connection the following observation in the judgment may be referred to:

6. Two questions arise, one, if the Petitioners are entitled as a matter of law for re-employment and other if they have lost their right, if any, due to delay. Right of casual laborer employed in projects, to be re-employed in railways has been recognized both by the Railways and this Court. But unfortunately the Petitioners did not take any step to enforce their claim before the Railways except sending a vague representation nor did they even care to produce any materials to satisfy this Court that they were covered in the scheme framed by the Railways. It was urged by the learned Counsel for Petitioners that they may be permitted to produce their identity cards etc, before opposite parties who may accept or reject the same after verification. We are afraid it would be too dangerous to permit this exercise. A writ is issued by this Court in favor of a person who has some right. And not for sake of roving enquiry leaving scope for maneuvering. Delay itself deprives a person of his remedy available in law. In absence of any fresh cause of action or any legislation a person who has lost his remedy by lapse of time loses his right as well. From the date of retrenchment if it is assumed to be correct a period of more than 15 years has expired and in case we accept the prayer of Petitioner we would be depriving host of others who in the meantime have become eligible and are entitled to claim to be employed

16. As regards the case of promotion of the Petitioner, it is on record that the order of promotion issued in favor of the Petitioner had to be cancelled as the same was issued unauthorized. However, thereafter, the writ Petitioner was provided with promotion by passing another order. It is mentioned in the order dated 05.03.2004 that after the said order of promotion, the Petitioner has earned further promotion and presently he is in the rank of Warrant Officer (Clerk) w.e.f. 01.02.2003.

17. As a consequence of the impugned judgment and order dated 21.10.2009, the order of demotion passed against the writ Petitioner way back in the year 1988 will have no effect, meaning thereby that the Petitioner will be entitled to get back his earlier position which he held prior to the order of demotion. As per the direction of

the learned Single Judge, the Petitioner will also be entitled to get consideration for promotion on getting back his earlier position before demotion. However, since the order of demotion was not challenged even in the year 1998, when the Petitioner had filed the first writ petition, and in view of the order by which the said writ petition was disposed of it was not open to the Petitioner to once again challenge the said order collaterally in the writ petition filed in 2004. The Petitioner could not have challenged the said two orders more particularly the one relating to demotion.

18. The learned Single Judge did not consider these aspects of the matter. So far as the order of demotion is concerned, the same was barred by res-judicata/constructive res-judicata. In terms of the earlier order passed in the first writ petition, the Respondents had passed the impugned order dated 05.03.2004 which has been quoted above, from which it appears that the case of the Petitioner was considered for further promotion from the reverted post and presently he is in the rank of Warrant Officer (Clerk) w.e.f. 01.02.2003.

19. By the impugned judgment and order, the position of the Petitioner as it stood prior to 1988 i.e. before demotion could not have been restored back in the facts and circumstances indicated above. The prayer of the Petitioner to set aside the order of demotion passed in 1988 was hit by the principles of res-judicata/constructive res-judicata and thus could not have been reopened by the impugned judgment and order based on a writ petition filed after 16 years of demotion and that too on the basis of a collateral challenge while challenging the consequential order of 2004 pursuant to the judgment dated 03.12.2003 passed in Civil Rule No. 4762/1998. In that view of the matter, we are of the considered opinion that the learned Single Judge fell in error in granting the prayer for setting aside the order of demotion passed way back in 1988.

20. For all the aforesaid reasons, we accept the submission made by the learned CGC and accordingly, we are inclined to interfere with the impugned judgment and order dated 21.10.2009 passed by the learned Single Judge in WP(C) No. 238 (SH) 2006. The impugned judgment and order is set aside and quashed. The writ appeal is allowed, leaving the parties to bear their own costs.