(2011) 03 GAU CK 0049

Gauhati High Court (Imphal Bench)

Case No: Writ Petition (C) No''s. 781 of 2010 and 81 of 2011

Habibullah		APPELLANT
	Vs	
State of Manipur and Others		RESPONDENT

Date of Decision: March 8, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 8, Order 23 Rule 1, Order 23 Rule 3, 10, 10C
- Constitution of India, 1950 - Article 226

Citation: (2011) 3 GLR 623

Hon'ble Judges: Asok Potsangbam, J

Bench: Single Bench

Advocate: H.S. Paonam, N. Bipin, Th. Ibohal and Th. Saratkumar, for the Appellant; H. Raghumani, Th. Ibohal and H.S. Paonam, for the Respondent

Judgement

Asok Potsangbam, J.
Heard Mr. H.S. Paonam, learned senior counsel assisted by Mr. N. Bipin, learned Counsel appearing for the Petitioner and Mr. H. Raghumani, learned Government advocate appearing on behalf of the Government Respondents. Also heard Mr. Th. Ibohal Singh assisted by Th. Saratkumar Singh, learned Counsel appearing for the private Respondent.

WP(C) No. 781 of 2010 and WP(C) No. 81 of 2011

2. Writ petition being WP(C) No. 781 of 2010 was filed by the Petitioner therein for issuance of a writ of quo warrantor against the private Respondent No. 4 and the learned Counsel appearing for the parties, have been heard at length and time was granted on many occasions, to enable them to canvass and substantiate their respective propositions/ contentions raised in the case. Order in WP(C) No. 781 of 2010 was

reserved by an order dated 10.2.2011 passed by this Court and while the aforesaid case was being kept CAV, the private Respondent No. 4 also filed another writ petition being WP(C) No. 81 of 2011 for issuance of a writ of quo warrantor against the Petitioner in WP(C) No. 781 of 2010. The Petitioner in WP(C) No. 81 of 2011 is the private Respondent No. 4 in WP(C) No. 781 of 2010. On 18.2.2011, Shri Th. Saratkumar Singh, learned Counsel appearing for the Petitioner in WP(C) No. 81 of 2011, Shri H. Raghumani, learned Government Advocate and Mr. H.S. Paonam, learned senior counsel appearing on behalf of the private Respondent No. 4 in the 2nd case, were heard at length and it was broadly agreed among the learned Counsels appearing for the parties that the issues raised in the subsequent case, i.e., WP(C) No. 81 of 2011 are more or less the same with that of the issues raised in WP(C) No. 781 of 2010, which were adequately urged and addressed by the contesting parties and as such, the second case be clubbed together with the first case. As agreed upon by the parties, WP(C) No. 81 of 2011 was ordered to be tagged along with WP(C) No. 781 of 2010 as they are analogous in nature and they are to be disposed of by this common judgment and order.

3. On consideration of facts and circumstances of the case, I do not consider it necessary that the entire facts associated with the case need be discussed but facts, which may be relevant for disposal of the cases, may be noticed as hereunder:

3.1 WP(C) No. 781 of 2010 was filed by the Petitioner therein stating/ contending that the private Respondent No. 4, whose promotion to the post of Battalion Commander in the Manipur Home Guards vide order dated 14.12.2000, was cancelled by the Government on 7.4.2001 on the ground that the very promotion was irregular and without mandatory approval of the State Government or the Director General of Home Guards. The aforesaid cancellation order dated 7.4.2001 was challenged by the private Respondent No. 4 in WP(C) No. 7500 of 2001 at the Principal Seat and an interim order dated 16.10.2001 was obtained, staying the cancellation order dated 7.4.2001 and also the consequential order dated 10.4.2001.

3.2 Pursuant to the interim order passed by this Court, as discussed above, the Government issued an order dated 20.10.2001 by way of complying with the interim order dated 16.10.2001 as referred to above and the interim order was extended till the disposal of the writ petition. The State Government contested the aforesaid writ petition, i.e., WP(C) No. 7500/2001(Gau.), which was re-numbered as WP(C) No. 2005 of 2001(Imp.), by filing an exhaustive affidavit which is available at Annexure A/16 to the writ petition. In the aforesaid affidavit, it is maintained by the State Government that at the time of promotion of the Petitioner therein to the post of Battalion Commander, he was only holding the post of Company Commander and that the promotion order dated 14.12.2001 was issued by the Commandant of Home Guard without considering the seniority position of Company Commanders and without the approval of either the Director General of Home Guards or the State Government, which is the statutory requirement. The Government further contended that the promotion of the Petitioner was given to the post of Battalion Commander by superseding 8 Divisional Commanders and

16 Company Commanders and Government also justified the cancellation of the said promotion order with facts on record. It is stated by the Petitioner in WP(C) No. 781 of 2010 that the Respondent No. 4 continued for nearly 10 years as Battalion Commander by virtue of, and, on the basis of an interim order passed by this Court in WP(C) No. 7500/2001(Gau.)/2005/2001(Imp.) but on the basis of submission made by the Petitioner therein, the aforesaid writ petition was disposed of on 26.10.2010 as not pressed. The writ petition No. 2005/2001(Imp.) was not decided on merit and there was no finding of the court on the legality or otherwise of the cancellation order dated 7.4.2001 and the consequential order dated 10.4.2001 and that apart, no fresh order was issued by the competent authority/ Government to enable the private Respondent No. 4 to continue as Battalion Commander. The Petitioner further submits, that as the protection given by the interim order dated 16.10.2001 was no longer available after the case was disposed of as not pressed on 26.10.2010 and in absence of any fresh order issued by the competent authority appointing the private Respondent No. 4 as the Battalion Commander, his continuance in the post of Battalion Commander is illegal and without the support of any valid order and as such, the writ Petitioner, who is working as the Battalion Commander in the Imphal East District, prays for issuing a writ of quo warrantor preventing/ousting the private Respondent No. 4 from usurping, discharging the duties and responsibility of Battalion Commander of Thoubal or by issuing any other appropriate writ.

4. Mr. H. Raghumani, learned Government advocate submits that in view of the affidavit (Annexure A/16) already filed by the State Government in WP(C) No. 2005 of 2001(Imp.), which was disposed of as not pressed by the Petitioner therein, Government cannot take any stand contrary to the earlier stand with regards to matters relating to service conditions of the private Respondent No. 4 and as such, he is not opposing the contention and the prayer of the writ Petitioner in WP(C) No. 781 of 2010.

5. At this stage, it may be pertinent to state the relevant posts in the Home Guards organization as provided in the Manipur Home Guards Act and Rules as below:

Sl. No.	Name of Posts	Remuneration /Allowance
1.	Battalion Commander	Rank pay Rs. 100 p.m. in addition to Duty allowance
2.	Divisional Commander	Rank pay Rs. 50 p.m. in addition to Duty allowance
3.	Company Commander	Rank pay Rs. 25 p.m. in addition to Duty allowance
4.	Senior Platoon Commander	Rank pay Rs. 15 p.m. in addition to Duty allowance
5.	Junior Platoon Commander	Rank pay Rs. 15 p.m. in addition to Duty allowance

6.	Sergeant	Rank pay Rs. 15 p.m. in addition to Duty allowance
7.	Section Leader	Rank pay Rs. 10 p.m. in addition to Duty allowance
8.	Assistant Section Leader	Rank pay Rs. 10 p.m. in addition to Duty allowance
9.	Member	Duty allowance comprising Duty allowance @ Rs. 86.65 per day Fooding allowance @ Rs. 500 p.m. (30 days) Transportation allowance @ Rs. 10 per day. Washing allowances@ Rs. 50 p.m. (30 days)

It can be seen from the above that the Battalion Commander occupies the highest post among the members of the Home Guards organization. There are 4 Battalion Commanders in four valley districts of Manipur State - the first is at Imphal West, the second is at Imphal East, the third is at Bishnupur and the fourth is at Thoubal.

Ref.: WP(C) No. 587 of 2010

6. Private Respondent No. 4 in WP(C) No. 781 of 2010 filed an affidavit, contending, inter alia, that WP(C) No. 587 of 2010, was filed by the Petitioner of WP(C) No. 781 of 2010 challenging the Government order dated 13.9.2010 where under the private Respondent No. 4 in WP(C) No. 781 of 2010, was given additional charge of Battalion Commander I, II and III in addition to his being the Battalion Commander No. IV. In other words, while holding the Battalion Commander of Thoubal District, he was also given the charge of Battalion Commander of Imphal West, Imphal East and Bishnupur Districts, and such order had the effect of ousting the incumbents holding the posts in those districts. It is further contended by the private Respondent No. 4 that WP(C) No. 587 of 2010 and the present WP(C) No. 781 of 2010 are similar and are on the same subject-matter and as such, the present proceedings of WP(C) No. 781 of 2010 was sought to be stayed by invoking Section 10C of the Code of Civil Procedure, 1908. The contention is seriously opposed by the learned senior counsel appearing for the Petitioner in WP(C) No. 781 of 2010 on the ground that the challenge in WP(C) No. 587 of 2010 is against the order dated 13.9.2010 which had given additional charge of three more districts to the private Respondent No. 4 whereas the challenge in the instant case being WP(C) No. 781 of 2010 is for ousting the private Respondent No. 4 from holding the post of Battalion Commander and his further continuance in the same post without the support of any valid order issued by the competent authority. It is further contended that in view of disposal of WP(C) No. 2005 of 2001(Imp.) as in fructuous, the interim order protecting the continuance of the private Respondent No. 4 as Battalion Commander of Thoubal District, ceased to exist any further. In order to enable the court to appreciate whether the aforesaid two proceedings are similar or are on the same subject-matter or not, records of

WP(C) No. 587 of 2010 had been requisitioned by the court and the following are the prayers sought in the aforesaid two writ petitions, namely, WP(C) No. 587 of 2010 and WP(C) No. 781 of 2010:

In WP(C) No. 587 of 2010

(i) Issue rule nisi and called for the records;

(ii) issue a writ in the nature of certiorari or any other appropriate writ or direction of the like nature quashing and setting aside the impugned order dated 13.9.2010 as illegal;

(iii) in the interim, suspend/stay the operation of the impugned order dated 13.9.2010 and maintained the present status of the writ Petitioner of Battalion Commander, Imphal East; and

(iv) pass any such further order(s) or direction(s) which this hon''ble court deem fit and proper to secure the ends of justice.

In WP(C) No. 781 of 2010

(i) Issue rule in nisi and call for records;

(ii) issue a writ of quo warrantor to the State-Respondents for restraining the private Respondents from assuming any office in the Manipur Home Guards as he has no authority and legal sanction to hold any office in the Office of Manipur Home Guards;

(iii) direct the Respondents to initiate enquiry against the private Respondents with respect to the fraudulent promotion order dated 27.12.1997 which purportedly promoted the private Respondent to the post of Divisional Commander in the Manipur Home Guards and which is admitted to be forged vide office letter dated 2.11.2010; and

(iv) pass such further order(s) or direction(s) which this hon''ble court deem fit and proper to secure the ends of justice.

6.1 Bare perusal of the prayers made in the aforesaid two writ petitions, as quoted above, would leave no doubt that the two petitions are not at all similar nor is the subject-matter same and also there is no common cause of action between the two writ petitions.

7. From the above narration of facts, the following issues emerged for consideration of this Court:

(i) Whether Section 10 of Code of Civil Procedure, which is sought to be invoked by the private Respondent No. 4 for staying the present proceeding of WP(C) No. 781 of 2010, is applicable in a writ proceeding or not and whether the provisions of the CPC are automatically applicable in writ proceedings or not;

(ii) in the facts and circumstances of the case, whether a writ of quo warrantor can be issued either against the private Respondent No. 4 in WP(C) No. 781 of 2010 or against the private Respondent No. 4 in WP(C) No. 81 of 2010.

8. Mr. Th. Ibohal Singh, learned Counsel appearing for the private Respondent No. 4, on request, was given sufficient time to canvass and substantiate his contention that Section 10 of CPC is applicable in a writ proceeding and similar opportunity had also been given to Mr. H.S. Paonam, learned senior counsel, to oppose the contention of the private Respondent No. 4. In course of hearing, Mr. Th. Ibohal Singh, the learned Counsel appearing for the Respondent No. 4, has fairly admitted before the court that he could not find any judicial pronouncement/authority to support his contention that Section 10 of CPC is applicable in a writ proceeding.

9. It is not in dispute at the Bar that there were conflicting views expressed by different High Courts in India about the applicability of the provisions of CPC in writ proceedings. In order to resolve the conflict, as discussed above, Section 141 of the CPC was amended by Parliament by adding an explanation, which reads as follows:

In this section, the expression "proceedings" includes proceedings under order IX, but does not include any proceeding under Article 226 of the Constitution of India.

According to the explanation, as quoted above, the expression "proceedings" appearing in different provisions under the Code of Civil Procedure, does not include any proceeding under Article 226 of the Constitution of India, i.e., a writ proceeding. The interpretation and impact of the explanation to Section 141 of Code of Civil Procedure, came up for consideration before the Apex Court in Puran Singh and others Vs. State of Punjab and others, In the aforesaid case, the hon''ble Apex Court held that exercise of extraordinary jurisdiction under Article 226 of the Constitution of India aims at securing a very speedy, inexpensive and efficacious remedy to a person, whose legal or constitutional right has been infringed. If all the elaborate and technical rules laid down in CPC are to be applied in writ proceedings, the very object and purpose is likely to be defeated and accordingly, the Parliament by amending Section 141 of the CPC has clarified that expression "proceedings" does not include any proceeding under Article 226 of the Constitution of India. The hon''ble Apex Court further observed in the following words:

It is, therefore, clear from the nature of the power conferred under Article 226 of the Constitution and the decisions on the subject that the High Court in exercise of its power under Article 226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and provisional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may for convenience, be described as extraordinary original jurisdiction.

The Apex Court also came to the conclusion that technical procedures prescribed in the CPC are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person and as such, High Courts should be left to adopt its own procedure for granting relief to the person concerned.

10. Mr. H.S. Paonam, learned senior counsel further submits that even the principle of res judicata as embodied in Section 11 of the CPC came to be applied in a writ proceeding only after a judgment by the hon''ble Apex Court (Constitutional Bench) passed in Daryao and Others Vs. The State of U.P. and Others, In the aforesaid case, the Apex Court held that the rule of res judicata being founded on consideration of public policy that an individual should not be vexed twice for the same kind of litigation and if a decision of the earlier court is on merit, the rule of res judicata shall operate and the subsequent plaint and petition should be barred.

11. In Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, it came up before the Apex Court for consideration whether Order 23, Rule 1 of the CPC should be extended in respect of writ petition filed under Article 226 of the Constitution of India and the hon''ble Apex Court held that order 23, Rule 1 of CPC shall be applicable in a writ proceeding as it would advance the cause of justice and discourage litigants from indulging in Bench hunting. Similarly, in Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, hon''ble Apex Court held that Section 20C of the CPC would be applicable. Further, the hon''ble Apex Court held in K. Venkatachala Bhat and Another Vs. Krishna Nayak (D) by Lrs. and Others, that order 23, Rule 3 would be applicable in a writ proceeding.

12. It is further submitted by Mr. H.S. Paonam, learned senior counsel that only the provisions of the Code of Civil Procedure, which were held applicable in a writ proceeding by a judicial decision/ruling of the hon''ble Apex Court, can be said to be applicable in a writ proceeding, otherwise not, and he relied upon a book called (Indian Constitutional Law) 6th end., 2010, by Professor M.P. Jain, wherein the applicability of the provisions of the CPC by judicial ruling of the hon''ble Apex Court have been stated and the same is quoted below:

(c) Provisions of Code held applicable: Illustrative cases

The following provisions have been applied to writ petitions:

Section 11 (Res judicata)

Section 144 (Restitution)

Order 1 (Joinder of parties)

Order 1, Rule 8 (Representative suit)

Order 6 (Pleadings)

Order 9 (Appearance and non-appearance of parties)

Order 22 (Abatement of proceedings)

Order 23 (Compromise and withdrawal of suits)

Order 26 (Commissions)

Order 27 (Suits by or against Government)

Order 47 (Review)

13. From the above discussion, it can well be deducted that only the provisions of Code of Civil Procedure, which were held by the Apex Court as applicable in a writ proceeding, shall be applicable in a writ proceeding. Thus, in absence of any contrary view, Section 10 of the Code of Civil Procedure, which is sought to be invoked by the private Respondent No. 4, is held not applicable in a writ proceeding and this position has already been admitted by the learned Counsel appearing for the private Respondent No. 4. The Issue No. 1 is, therefore, answered in the negative.

14. With regard to issue No. 2, the court is to examine the circumstances in which a writ of quo warrantor can be issued and more particularly, in the facts-situation of the cases as discussed above.

15. Mr. H.S. Paonam, learned senior counsel appearing for the Petitioner in WP(C) No. 781 of 2010 submits that the strict test of locus stand applicable in other writs shall not be applicable in a writ of habeas corpus and quo warrantor in as much as any member of the public can always approach the court for ousting an usurper of a public office who holds the same without any authority of law. In support of this proposition Mr. H.S. Paonam, learned senior counsel has relied upon a case reported in Satish Chander Sharma Vs. The University of Rajasthan and Others, wherein the Rajasthan High Court held that in a proceeding of quo warrantor, the applicant does not seek to enforce any right of his as such, nor does he complain of nonperformance of any duty towards him. What is in question is the right of the non-applicant to hold the office and the rule is well settled that any private person may apply for a quo warrantor in a matter of public office. The learned senior counsel has also relied upon a judgment of the Constitutional Bench of the Apex Court reported in The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, wherein it was held that right under Article 226 shall ordinarily be personal or individual right of the Petitioner himself, though in case of some of the writs like habeas corpus or quo warrantor, this rule may have to be relaxed or modified. The learned senior counsel also further relies upon another case reported in AIR 1965 SC 1044 wherein a Constitution Bench of the Apex Court has held that quo warrantor proceeding afford a judicial enquiry in which any person holding an independent

substantive public office, is called upon to show by what right he holds the said office and if the inquiry leads to the findings that holder of the office has no valid title to it, the issue of quo warrantor ousts him from that office. In (2001) 7 SCC 231, the Apex Court held that a writ of quo warrantor is a writ which lies against a person who according to the relater is not entitled to hold an office of public nature. It is the person against whom a writ of quo warrantor is directed, who is required to show by what authority that person is entitled to hold the public office. Therefore, the onus lies with the holder of that public office to prove that he holds the public office under a valid order of the competent authority and on failure to establish the above, such holder of public office is liable to be ousted by issuing a writ of quo warranto,

16. Coming back to the facts and circumstances of the case, Mr. Paonam, learned senior counsel submits that as the private Respondent No. 4 in WP(C) No. 781 of 2010 continued as a Battalion Commander of Thoubal District only on the basis of an interim order passed by this Court in WP(C) No. 2005/2001 (Imp.), the right to continue in the post vanished when the writ petition itself was disposed of as not pressed on 26.10.2010. There was no order either from the court or from the Government enabling the private Respondent No. 4 to continue as Battalion Commander and as such, continuance of the private Respondent No. 4 in the capacity of Battalion Commander in the Manipur Home Guards organization is without any valid order thereby rendering himself liable to be ousted by issuing a writ of quo warrantor. As against the aforesaid proposition of law canvassed by the learned senior counsel, no effective counter arguments have been advanced by the learned Counsel of the private Respondent No. 4.

17. Mr. Th. Ibohal Singh, learned Counsel appearing for the private Respondent No. 4.in WP(C) No. 781 of 2010, has submitted that even if Section 10 of the CPC is held not applicable in a writ proceeding/no case has been made out by the writ Petitioner warranting issuance of a writ of quo warrantor in as much as malice and bias are writ large in the instant case. To garner the above proposition, learned Counsel further submits that it is the writ Petitioner in WP(C) No. 781 of 2010, who filed the earlier WP(C) No. 587 of 2010 challenging the Government order dated 13.9.2010 by which additional charge was given to the private Respondent No. 4 and this Court passed an interim order on 22.9.2010 staying the aforesaid order dated 13.9.2010. The above facts will undoubtedly establish and demonstrate that litigation have been going on between the Petitioner of WP(C) No. 781 of 2010 and the private Respondent No. 4 therein, who has filed WP(C) No. 81 of 2011 seeking more or less the same relief to oust the writ Petitioner in WP(C) No. 781 of 2010 by issuing a writ of quo warrantor. If WP(C) No. 781 of 2010 had been filed by a member of the public, not connected with any dispute about the service matters of the private Respondent, the situation would have been different. It is further submitted by Mr. Th. Ibohal Singh that WP(C) No. 781 of 2010 had been filed only in furtherance of the pending dispute, which is the subject-matter of WP(C) No. 587 of 2010 and, therefore, the question of bias and malice cannot be ruled out. In support of the aforesaid proposition, the learned Counsel appearing for the private Respondent No. 4

has relied upon a case reported in B. Srinivasa Reddy Vs. Karnataka Urban Water Supply and Drainage Board Employees" Association and Others, (II), wherein the Apex Court held that when malice and bias are established in a case, no writ of quo warrantor shall be issued by the court.

18. It must be clearly understood that this Court has no quarrel with the proposition of the writ Petitioner in WP(C) No. 781 of 2010, that in a case of writ of habeas corpus and quo warrantor, the strict test of locus shall not be applicable. But the next question, which is the crux of the matter, is whether a writ of quo warrantor can be issued in the context of the above facts and situations. There is no dispute at the Bar that there have been pending litigation between the writ Petitioner and the private Respondent No. 4 prior to filing of the instant case being WP(C) No. 781 of 2010 and as such, malice and bias cannot be completely ruled out. Thus, the court is of the opinion that, in such facts and situations, it may not be appropriate for the court to issue a writ of quo warrantor against the private Respondent No. 4 in WP(C) No. 781 of 2010 despite the fact that the continuance of the private Respondent No. 4 in the post of Battalion Commander is without any valid order of the competent authority. Thus, issue No. II is also answered in the negative.

19. Despite the above findings of the court on issue Nos. I and II, it cannot escape the notice of the court that continuance of the private Respondent No. 4 as Battalion Commander IV of Home Guard, is without any valid order, more so, after the disposal of the earlier writ petition, i.e., WP(C) No. 2005/2001(Imp.) as not pressed. In view of the above, it will be in the fitness of things that Respondents, more particularly, the Director General of Home Guards, Manipur, be directed to issue an appropriate order with regard to further continuance of the private Respondent No. 4 as Battalion Commander IV, keeping in view the observations and discussions made hereinabove, within a period of two months from the date of receipt of a certified copy of this order. Ordered accordingly.

WP(C) No. 81 of 2011

20. The writ Petitioner in WP(C) No. 781 of 2010, who is arrayed as private Respondent No. 4 in WP(C) No. 81 of 2011, has been continuing as Battalion Commander of Imphal East, on the basis of an interim order dated 19.9.2004, passed by this Court in WP(C) No. 6697 of 2004(Gau.), renumbered as WP(C) No. 789 of 2004(Imp.), and the existence of the interim order dated 19.9.2004 has been duly recorded by this Court in the order dated 22.9.2010 passed in WP(C) No. 587 of 2010. When a person is continuing in a particular post, on the basis of an order passed by this Court, the question of issuance of a writ of quo warrantor does not arise unless the protective order is either vacated or modified. In view of the above position and following the reasoning adopted in WP(C) No. 781 of 2010, this Court is of the opinion that no case is made out either for issuing a writ of quo warrantor or any other writ and as such, WP(C) No. 81 of 2011 is dismissed as devoid of merit.

21. In the circumstances, there shall be no order as to costs.