

GAHC010004822013



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1136/2013

BABUL HUSSAIN
S/O MD. SAHABUDDIN AHMED R/O VILL- PURAN BIJNI P.O. and P.S. BIJNI
DIST. CHIRANG, BTC, ASSAM.

VERSUS

THE STATE OF ASSAM
REP.B Y THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
HOME DEPARTMENT, DISUR, GUWAHATI-6.

2:THE DEPUTY INSPECTOR GENERAL OF POLICE

WESTERN REGION
ASSAM
BONGAIGAON DIST. BONGAIGAON
ASSAM.

3:SUPERINTENDENT OF POLICE

BONGAIGAON
DIST. BONGAIGAON
ASSAM

B E F O R E
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI
JUDGMENT & ORDER

Advocates for the petitioner : Shri H. Bezbaruah, Advocate

Advocates for the respondents : Shri T.C. Chutia, Addl. Senior

Government Advocate, Assam.

Date of hearing : 28.09.2023

Date of judgment : 29.09.2023

1. A Disciplinary Proceeding initiated vide a Show Cause Notice dated 22.02.2012 which has culminated in an order of imposition of a major penalty of discharge is the subject matter of challenge in this petition filed under Article 226 of the Constitution of India.

2. Before going to the issue which has arisen for determination, it would be convenient if the facts of the case are narrated in brief.

3. The petitioner was appointed as a Constable (Armed Branch) in the Assam police on 22.03.1993. It has also been brought to notice that in discharge of his duties, the petitioner had sustained injuries in a bomb blast at Bijni on 05.01.2000 and further in connection with his meritorious service, he was awarded the "Police Antrik Suruksha Seva Padak" in 2011.

4. On 30.11.2011, while the petitioner was posted at the Bongaigaon D.E.F., he was deputed to Guwahati for some official job and on reaching back Bongaigaon in the same evening, while part of the arms and ammunitions were deposited in the Office, the magazine and 40 ammunitions were retained by the petitioner. It is the case of the petitioner that in the same evening he suffered from sudden ailment and therefore could not attend his duties on the next morning and rather he was admitted in a hospital. On 09.12.2011, a notice was issued to the petitioner regarding his absence from 01.12.2011 without depositing the ammunitions. It is the case of the petitioner that immediately on receipt of the said notice, on 14.12.2011, the wife of the petitioner had deposited the ammunitions in the Office and had also reported regarding the illness of the petitioner.

5. Be that as it may, on 22.02.2012, a Show Cause Notice was issued to the petitioner on the allegations of unauthorized absence and also being a habitual absentee. The said notice was accompanied by a statement of allegation with list of witnesses and documents. A date prior to the said notice, the petitioner was also placed under suspension on 21.02.2012. The petitioner had submitted his statement of defence and not being satisfied with the same, an enquiry was conducted. On 24.04.2012, a second Show Cause Notice was issued to the petitioner by forwarding the Enquiry Report which was followed by the order of impugned order of imposition of penalty of discharge issued on 30.05.2012. The Departmental Appeal preferred by the petitioner was also rejected and accordingly, the instant writ petition has been filed.

6. I have heard Shri H. Bezbaruah, learned counsel for the petitioner whereas

the State respondents are represented by Shri T.C. Chutia, the learned Addl. Senior Government Advocate, Assam.

7. Shri Bezbaruah, the learned counsel for the petitioner makes the following submissions.

(i) The entire Disciplinary Proceeding is vitiated for lack of fairness whereby reasonable opportunity to the delinquent was not given.

(ii) The procedure prescribed in law for holding such enquiry has not been followed.

(iii) There is no prescribed penalty of 'Discharge' in the concerned Rules and therefore, the impugned action is without jurisdiction.

(iv) There is no discussion on the allegations of habitual absentee in the Enquiry Report and the same has been presumed on basis of certain records without giving any opportunity to the petitioner.

(v) The reasons assigned by the petitioner for being absent have been wholly overlooked.

(vi) The past services of the petitioner including

the incident where he had sustained injuries in a bomb blast and also the fact of being awarded with the "Police Antrik Suruksha Seva Padak" just before the allegations have been wholly ignored.

8. Elaborating his submissions, the learned counsel for the petitioner has contended that in the written statement of defence, the petitioner had not only disclosed the reasons of his illness, he had also submitted a Medical Certificate. While admitting the fact of being absent, the learned counsel has submitted that such absence was not willful and that aspect of the matter has been wholly overlooked by the respondents. It is also submitted that as the petitioner was still suffering from illness, on 14.12.2011, his wife had returned the ammunitions in the Office and the same would reflect that there was no lack of any *bona fide* on the part of the petitioner.

9. It is submitted that in the examination of witnesses before the Enquiry Officer, the petitioner was not given a proper opportunity to cross examine the witnesses which were four in numbers. The petitioner was also not afforded any Defence Representative to assist him. Shri Bezbaruah, the learned counsel has also submitted that the enquiry proceeded without there being any appointment of a Presenting Officer. By referring to the second Show Cause Notice dated 24.04.2012, the learned counsel has submitted that the said notice would not meet the requirements of law whose purpose is to give an opportunity to the delinquent to persuade the Disciplinary Authority to take a view against the findings in the Enquiry Report which are not in favour of the delinquent. He submits that a bare reading of the said notice would reveal that the Disciplinary

Authority had already accepted the findings and it is only with regard to awarding of a major penalty that the opportunity was given.

10. By referring to the Assam Services (Discipline and Appeal) Rules, 1964 (hereinafter the Rules) more particularly, Rule 7 which is with regard to "Nature of Penalties" the learned counsel has submitted that 'Discharge' from service is not even a prescribed penalty and therefore, the entire action is liable to be interfered with. He further submits that in case of an allegation of unauthorized absence, it is incumbent on the part of the authorities to establish that such absence was willful and in the proceedings, there is no discussion at all on that aspect.

11. Reference has also been made to Rule 9 regarding the requirement to appoint a Presenting Officer and the requirement under Rule 9 (6) to give the delinquent and effective opportunity to cross examine the witnesses.

12. In support of his submission, Shri Bezbaruah, the learned counsel places reliance upon the following case laws:

(i) Babulal Das vs. State of Assam & Ors.
reported in 2004 (2) GLT 259.

(ii) Nandeswar Borah vs. State of Assam & Ors.
reported in 2013 (6) GLR 738.

(iii) Rahul Kumar vs. Union of India & Ors.
reported in 2018 (5) GLT 544.

(iv) *Krushnakant B. Parmar vs. Union of India and Anr.* reported in **(2012) 3 SCC 178.**

13. In the case of ***Babulal Das*** (supra), this Court had explained the meaning and purport of a second Show Cause Notice and has also laid down that if such Show Cause Notice is issued only as a formality when the Disciplinary Authority had already made up its mind, the outcome would be vitiated.

14. The case of ***Nandeswar Bora*** (supra) has been cited in support of the argument that in absence of appointment of a Presenting Officer in a Disciplinary Proceeding, the whole proceeding will not be sustainable in law.

15. The case of ***Rahul Kumar*** (supra) has been cited to support the contention that if a penalty is not prescribed under the Rules governing the field, such penalty cannot be imposed.

16. In the case of ***Krushnakant B. Parmar*** (supra), the Hon'ble Supreme Court has laid down that if a departmental proceeding is held with the allegation of an authorised absence, such allegation is required to be proved that the absence was willful.

17. *Per Contra*, Shri T.C. Chutia, the learned State Counsel has submitted that the projection made on behalf of the petitioner is not correct. Dealing with the allegations that Discharge is not a penalty within the meaning of Rule 9, he submits that for all practical purposes, Discharge is equivalent to Dismissal and

therefore the same cannot be a ground for interference. He submits that the allegations are very serious and grave, wherein not only the delinquent was found to be unauthorisedly absent, even magazine and ammunitions were not deposited in the office and such deposit was made after about 14 days. It is further submitted that there is no allegation of suffering any prejudice by the petitioner in the Disciplinary Proceeding.

18. He submits that most of the grounds presently advanced are not pleaded. He submits that there is no pleadings with regard to non-appointment of Presenting Officer and also not giving the assistance of a Defence Representative. It is also submitted that the allegation of not giving opportunity to cross examine the witnesses are not supported by the records inasmuch as, the proceedings of the disciplinary enquiry would show that the petitioner was given opportunity to cross examine which he had declined to do. The learned State Counsel has also placed on record the original file of the Disciplinary Proceeding, which includes the statements of the witnesses.

19. In support of his submissions, Shri Chutia, the learned Counsel for the State has relied upon the case of ***Maan Singh vs. Union of India (UOI) & Ors.*** reported in ***(2003) 3 SCC 464***. In the aforesaid case, the Hon'ble Supreme Court had upheld the imposition of penalty of Dismissal on the charge of unauthorized absence and the incumbent in the said case was a constable in the Delhi police.

20. The rival contentions of the learned counsel for the parties have been duly considered and the materials placed before this Court, including the original record of the enquiry have been carefully examined.

21. The safeguards given to a Government Servant facing a Disciplinary Proceeding is given under Article 311 of the Constitution of India. The prime objective of the said Article is to provide adequate and reasonable safeguard to a delinquent facing an enquiry. It may be mentioned that prior to the 42nd amendment of the Constitution of India, there was a requirement to notify the delinquent on the proposed penalty, which however has been done away with. However, what is required is that in the enquiry, all reasonable safeguards are to be afforded to the delinquent officer and on completion of the same, a copy of the said Enquiry Report is required to be forwarded to the delinquent by the Disciplinary Authority before concurring with the findings so that the delinquent is given an opportunity to persuade the disciplinary authority to take a view in favour of the delinquent based on the materials on record and not to concur with the findings of guilt arrived at by the Enquiry Officer. The requirement to give an opportunity to cross examine the witnesses produced by the management and to adduce evidence as defence and also to have the assistance of a defence representative are some of the mandatory inbuilt mechanism to ensure that the process is done fairly and transparently.

22. The Hon'ble Supreme Court in the case of ***Union of India and Ors. vs. Mohd. Ramzan Khan*** reported in ***(1991) 1 SCC 588*** had laid down that furnishing of the Enquiry Report is mandatory so as to give the delinquent an opportunity to persuade the disciplinary authority not to accept the said report. In the subsequent case of ***Managing Director, ECIL Ltd. & Ors. vs. B. Karunakar and Ors.*** reported in ***(1993) 4 SCC 727***, it has been clarified that the decision of ***Ramzan Khan*** (supra) would be prospective in nature. In subsequent cases, it has also been clarified that depending on the particular

facts and circumstances, the delinquent would also have to plead suffering of prejudice due to non-supply of the Enquiry Report.

23. From a perusal of the materials on record including the original file, it appears that the allegation of not being given opportunity to cross-examine the witnesses is not substantiated and it appears that the petitioner had declined to put any questions. This Court has however noticed that none of the statements made by the witnesses can be construed to have proved the allegation of unauthorized absence as there is no material even to suggest that there was any move to explore the reason of such absence. The witnesses have only made statements regarding the fact of absence. This Court has also noticed that there is not even a single statement by the witnesses with regard to the allegation of the petitioner being a habitual absentee.

24. With regard to the second show cause notice dated 24.04.2012 by which the disciplinary authority had asked for the views of the petitioner on the Enquiry Report, it appears that the said authority had stated that the findings of the Enquiry Officer were already concurred with. The aforesaid action on the part of the Disciplinary Authority is not in consonance with the requirement of affording a reasonable opportunity to a delinquent to safeguard himself as such opportunity is required to be given at all stages of a Disciplinary Proceeding.

25. With regard to the contention that Discharge from service is not a prescribed penalty, this Court finds force in the argument that when the Rules governing the field do not prescribe such a penalty, the same cannot be imposed. This Court is unable to accept the submissions made on behalf of the State that the import and meaning is to be gone into and Discharge can be

construed as Dismissal. The different penalties prescribed under Rule 9 of the Rules have different connotations and implications and therefore such submissions are not acceptable.

26. In the case of ***Babulal*** (supra), this Court has already laid down that if the Disciplinary Authority, before taking the views of the delinquent on the Enquiry Report concurs with such findings, it is apparent that he has acted with a predetermined mind which is not in consonance with the requirement in law.

27. This Court has also noticed that, though the allegation of not affording an opportunity of cross-examination is not substantiated, the statements of the witnesses are not in the direction of any willful or deliberate intention of the petitioner to be absent. There is also not an iota of evidence put on record regarding the petitioner being a willful absentee. The learned State Counsel, however, had tried to defend the case by submitting that the past records of the petitioner would show that he was an habitual absentee. This Court is however of the opinion that unless such records were produced in the enquiry and duly established, those facts though may be relevant cannot be used against the petitioner without giving him an opportunity.

28. The learned counsel for the petitioner has also taken the ground of non-appointment of a Presenting Officer. However, such argument is not supported by any pleadings and therefore the said point is not required to be gone into in view of the decision taken by considering the other aspects. Further, the respondents did not have any opportunity to rebut such allegations.

29. There is another aspect of the matter which the Disciplinary Authority appears to have ignored. While coming to the conclusion to impose the penalty, the Disciplinary Authority had totally overlooked the past services and records of

the petitioner. Admittedly, the petitioner had suffered injuries in a bomb blast while on duty on 05.01.2000 and was also awarded the "Police Antrik Suruksha Seva Padak" in the year 2011. The said Award was given just prior to the date of the alleged incident. These factors are also relevant considerations for a Disciplinary Authority while deciding the nature of penalty which is to be imposed upon a delinquent.

30. The Hon'ble Supreme Court in the case of ***S Ramachandra Raju vs. State of Orissa*** reported in ***AIR 1995 SC 111*** was considering a matter relating to imposition of Compulsory Retirement on reaching a particular age and falling within a particular category. While examining the matter, the Hon'ble Supreme Court has laid down that a conclusion based on only one report may not be a correct approach and the past records of the Officer concerned is also to be considered which are relevant factors.

31. Be that as it may, this Court is of the view that even if the enquiry is held to be done in accordance with law, acting on the same by the Disciplinary Authority before giving a reasonable opportunity to the petitioner to submit his reply to the said report is not in accordance with law and accordingly the same is interfered with. This Court also finds that Discharge not being one of the prescribed penalties cannot be imposed on an employee under the Rules of 1964. Accordingly, the impugned penalty of Discharge dated 30.05.2012 is interfered with and set aside. Consequently, the order dated 20.11.2012 of rejection of the Departmental appeal also stands set aside.

32. Resultantly, the petitioner is directed to be reinstated in service. However,

taking into consideration the seriousness of Charges, the authorities, if so advised, may proceed from the stage of issuing the second show cause notice against the report of the Enquiry Officer and thereafter to take a decision strictly in accordance with law.

33. This Court has also been informed that the petitioner was suspended on 21.02.2012 and the impugned order passed on 30.05.2012 and in that period, the subsistence allowance was not paid. Subsistence allowance is a matter of right and accordingly, the subsistence allowance for the said period is directed to be paid as per the prescribed rate. It is, however, observed that on the reinstatement, as directed above, the petitioner would not be entitled to any back wages, but would be entitled only for the notional benefits, including seniority and fitment in the appropriate scale of pay.

34. Writ petition accordingly stands allowed in terms of the directions made above.

35. No order as to cost.

36. The records of the case are returned back to the learned State Counsel.

JUDGE

Comparing Assistant