

GAHC010029202023



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

Case No. : WP(C)/808/2023

GUNAJAY CHAUDHURY
HEAD ASSISTANT (UNDER SUSPENSION), BARPETA ROAD MUNICIPAL
BOARD, DIST- BARPETA, ASSAM

VERSUS

THE STATE OF ASSAM AND 4 OTHERS
REP. BY THE COMMISSIONER AND SECRETARY, TO THE GOVT. OF ASSAM,
URBAN DEVELOPMENT DEPTT, DISPUR, GUWAHATI-6.

2:THE DIRECTOR OF MUNICIPAL ADMINISTRATION DEPARTMENT
RUKMINIGAON
KHANAPARA
GUWAHATI-22

3:THE DEPUTY COMMISSIONER
BARPETA
DIST- BARPETA
PIN-781301

4:THE BARPETA ROAD MUNICIPAL BOARD
REPRESENTED BY ITS CHAIRMAN
BARPETA ROAD MUNICIPAL BOARD
DIST- BARPETA
PIN- 781315
ASSAM.

5:THE EXECUTIVE OFFICER CUM ENQUIRY OFFICER

BARPETA ROAD MUNICIPAL BOARD
DIST- BARPETA
PIN- 781315

ASSAM

Advocate for the Petitioner : MR. S K DAS

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT

Date : 15.02.2023

Heard Mr. U.K. Nair, the learned senior counsel assisted by Mr.S.K. Das, the learned counsel for the petitioner. Mr. R. Dhar, the learned counsel appearing on behalf of the respondent Nos. 1, 2 and 3.

2. Taking into account the order which this Court proposes to pass in the present writ petition, the presence of the respondent No. 4 and 5 is not felt necessary. Further to that, issuance of notice and staying any further proceedings would only derail the departmental proceedings so pending before the respondent No. 4.

3. The fact of the instant case is that the petitioner was dismissed from service vide an order dated 26/8/2016. Thereupon the petitioner appealed against the said decision and the appeal was dismissed vide the order dated 20/2/2017.

4. The petitioner being aggrieved approached this Court and filed a Writ Petition which was registered and numbered as W.P.(C) No. 1710/2017. This Court after taking into consideration the various contentions had set aside the said order of punishment dated 20/8/2016 and directed de-novo proceedings to be initiated by the respondent No. 4/Board. Paragraph 22 of the said judgment

in W.P.(C) No. 1710/2017 being relevant is quoted herein below :

22. That being the position, this Court directs as follows :-

- (i) The punishment imposed upon the petitioner vide order dated 20.08.2016 is hereby set aside and quashed.
- (ii) The respondent Board shall start the proceeding de-novo against the petitioner by issuing a fresh show cause notice on the basis of allegation of misbehavior/threatening alleged by the then chairman, Vice Chairman and Executive Officer of the Barpeta Road Municipal Board.
- (iii) The entire proceeding shall be completed within a period of six months from the date of receipt of the certified copy of this order.
- (iv) The petitioner shall participate in the proceeding and the petitioner shall not create any inappropriate situation during the departmental enquiry.
- (v) The petitioner is hereby reinstated in service for the purpose of the de-novo proceeding; however, he shall continue to remain under such suspension during pendency of the departmental proceeding.
- (vi) The petitioner shall be entitled for the subsistence allowance during such period of suspension.
- (vii) In the aforesaid terms, this writ petition is disposed of however, no order as to cost.

5. It further appears that although by the judgment dated 20/12/2021, the departmental proceedings de-novo was to complete within a period of six months from the date of receipt of a certified copy of the judgment but the respondent No.4/Board could not complete the same for which the respondent No. 4/Board filed an interlocutory application being I.A. (Civil) No.1801/2022 before this court seeking extension of the period till 16/12/2022. This Court vide order dated 30/11/2022 in IA(Civil) No.1801/2022 disposed off the said application thereby granting the respondent authority to complete and comply with the directions passed by this Court in the judgment dated 20/12/2021 in W.P.(C) No. 1710/2017 by 16/12/2022.

6. It further appears from the pleadings that as within the said period, the departmental proceedings were not completed, a contempt proceedings was

also initiated which was registered and numbered as Cont. Cas (C) No. 784/2022 and this Court vide an order dated 21/12/2022 had issued notice making it returnable by 6(six) weeks.

7. It further appears that an undated enquiry report was submitted to the chairman of the respondent No. 4 and as per the said enquiry report all the charges brought against the petitioner were proved beyond doubt. However, it is relevant to take note of that in the said enquiry report there is a seal of receipt on 17/12/2022. Be that as it may, the petitioner was issued a second show cause notice dated 1/2/2023 asking the petitioner to submit his reply within 7(seven) days as to why the petitioner should not be dismissed from service. The petitioner thereupon on 7/2/2023 had submitted his show cause reply. In the said show cause reply, the petitioner had alleged perversity in the findings of the enquiry report and also that the enquiry report as well as further continuation of the departmental proceedings is bad and in violation to the judgment dated 20/12/2021 passed in W.P.(C) No. 1710/2017 as well as the order dated 30/11/2022 passed in IA(Civil) No. 1801/2022. Paragraph 4 of the said show cause reply being relevant is quoted herein below :-

“4. Sir, since there was a specific direction of the Hon’ble Court to complete the departmental proceeding within the extended time period i.e. 16.12.2022 as directed by the Hon’ble High Court by order dated 30.11.2022 passed in I.A.(C) No.1801/2022 and judgment dated 20.12.2021 passed in W.P.(C) No. 1710/2017 which could not be completed as per the prescribed procedure and time, I am entitled to be reinstated in service by dropping all the charges against me by revoking the suspension with all consequential benefit. It seems just to avoid the pending contempt proceeding being Contempt Case (C) No. 782/2022, an attempt has been made to show that the departmental proceeding drawn against me vide show-cause notice dated 13.05.2022 and letter dated 28.11.2022 for recording of statement has been completed within a few days. The entire proceeding is perverse and based on no evidence. I was not given a chance to examine those on the other side and as such my right for cross-examination of the witnesses were denied to me causing great prejudice

to me.”

8. Pursuant to the submission of the said show cause reply, the petitioner has approached this Court challenging the second show cause notice dated 1/2/2023 and the consequential reliefs of re-instatement by revoking the suspension.

9. I have heard Mr. U.K. Nair, the learned senior counsel appearing on behalf of the petitioner and Mr. R. Dhar, the learned counsel appearing on behalf of the respondent No. 1, 2 and 3.

10. Mr. U.K.Nair, the learned senior counsel for the petitioner submitted that the findings of the enquiry report is perverse and also is in violation to the judgment dated 20/12/2021 passed in W.P.(C) No. 1710/2017 and the order dated 30/11/2022 passed in IA(C) No. 1801/2022. He further submitted that the entire proceedings as mandated by this Court in paragraph 22(iii) would encompass the entire proceedings starting from the show cause notice till the culmination of the entire departmental proceedings. He submitted that the issuance of the second show cause notice on 1/2/2023 which the respondent No.4/Board is bound to do in view of the judgment of the Constitution Bench in the case of **Managing Director, ECIL, Hyderabad Vs. D. Karunakar** reported in **(1993) 4 SCC 727** would clearly show that the proceedings have not been culminated till now and this is in the teeth of the judgment and orders passed by this Court. He further submitted that although the petitioner had initiated a contempt proceedings but the relief sought for by way of the instant writ petition is separate and distinct which cannot be availed in a contempt proceedings.

11. On the other hand, Mr. R. Dhar, the learned counsel appearing on behalf of the respondent Nos. 1, 2 and 3 submitted that the proceedings as mentioned

in paragraph 22(iii) would mean only the enquiry proceedings and not any further order. He further submitted that not conforming to the time schedule as directed by this Court would not automatically render the action bad. It may be a case of a contempt but cannot under any circumstances be said that the proceedings would be void for not conforming to the time schedule.

12. This Court upon hearing the learned counsel for the parties and also upon perusing the second show cause notice as well the reply so submitted is of the opinion as to whether the enquiry report is to be accepted or not is still in the realm of the disciplinary authority. At this stage, this Court finds it relevant to refer to the judgment of the Constitution Bench of the Supreme Court in *Managing Director, ECIL Hyderabad and Ors. (supra)* wherein the Supreme Court dealt with the issue of reasonable opportunity being heard in respect of the charges against the delinquent in terms with Article 311(2) of the Constitution. This Court finds it relevant to refer to paragraph Nos. 25,26,27, 28 and 29 of the judgment which is reproduced herein below :

“25. While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the forty-second amendment.

26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the

punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the Enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it.

27. It will thus be seen that where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached. The employee's right to receive the report is thus, a part of the reasonable opportunity of defending himself in the first stage of the inquiry. If this right is denied to him, he is in effect denied the right to defend himself and to prove his innocence in the disciplinary proceedings.

28. The position in law can also be looked at from a slightly different angle.

Article 311 (2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him." The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. What is further, when the proviso to the said Article states that "where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed, " it in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the enquiry officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry. The second stage follows the inquiry so carried out and it consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the forty-second Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges."

13. From the above law so laid down by the Constitution Bench of the Supreme Court, it transpires that pursuant to an enquiry being conducted and where the Enquiry Officer yderah

is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry report before the disciplinary authority arrives at its conclusion with regard to the guilt or innocence of the employee with regard to the charges levelled against him. It was also observed that the said right is a

part of the employee's right to defend himself against the charges levelled against him and a denial of the Enquiry Officer's report before the disciplinary authority takes its decision on the charges, is a denial of giving an opportunity to the employee to prove his innocence and is a breach of the principles of natural justice. It was also made clear by the Supreme Court in paragraph No. 25 of the said judgment which has already been quoted herein above that the right to represent against the findings in the report is a part of the reasonable opportunity available during the first stage of the enquiry, before the disciplinary authority takes into consideration the findings in the report. However, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority had already considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusion. It was observed that the first right is the right to prove innocence whereas the second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It was further observed that it is the second right exercisable at the second stage which has been taken away by the forty-second amendment to the Constitution of India.

14. In view of the above, the second show cause notice which was issued on 1/2/2023 along with which the enquiry report for the first time was furnished to the petitioner has to be taken as a show cause notice at the first stage of the enquiry thereby enabling the petitioner to prove his innocence by demonstrating that the enquiry report suffers from perversity or other legal infirmities. It further appears that the petitioner herein pursuant to the show cause notice dated 1/2/2023 had submitted his reply on 7/2/2023 raising various grounds as regard the infirmities in the enquiry report and also the ground that the said

enquiry report and the continuance proceedings is in violation to the orders passed by this Court.

15. Taking into account that it is still in the realm of the disciplinary authority to decide as to whether to accept the enquiry report or not and the grounds alleged in the reply dated 7/2/2023 to the show cause notice dated 1/2/2023, this Court is not inclined to interfere with the said show-cause dated 01/02/2023. This Court on the other hand finds it appropriate to direct the respondent authorities, more particularly, the Respondent Nos. 4 to 5 to decide the show cause proceedings by taking into account the reply to the show cause notice dated 7/2/2023 which was submitted by the petitioner in pursuance to the show cause notice dated 1/2/2023 as well as the observations made hereinabove and more particularly to the paragraphs quoted of the judgment of the Constitution Bench in the case of Managing Director, ECIL, Hyderabad and Ors.(supra). The said proceedings be disposed off as expeditiously as possible and not later than 30 days from the day a certified copy of the judgment is served upon the Respondent No. 4.

16. This Court had made a specific query upon the learned counsel appearing on behalf of the petitioner as to whether any order has been served upon the petitioner pursuant to the show cause reply dated 7/2/2023 by the respondent No. 4 and 5. The learned counsel for the petitioner submits upon instructions that as on date no order has been served upon the petitioner. Taking into account the same, this Court clarifies that the above observations and directions so issued by this Court shall not apply if any order has been served upon the petitioner prior to 12.15 PM today (15/02/2022). However, if no such order has been passed pursuant to the submission of the show cause reply dated 7/2/2023, the respondent Nos. 4 and 5 are directed to take appropriate steps in

terms with the observations and directions made herein above. Taking into account that the instant order has been passed ex-parte against the respondent Nos. 4 and 5, the petitioner is directed to forthwith serve a certified copy of this order to the respondent Nos. 4 and 5 by tomorrow.

17. The learned counsel Mr. R. Dhar be supplied with the copy of the instant order so that he can inform the respondent No. 4 about the order so passed. It is also clarified that in the circumstances the respondent Nos. 4 and 5 have already served the order prior to 12.15 PM today (15/02/2023) upon the petitioner or passes any order in pursuance to the above directions, the petitioner would be at liberty to avail such remedy as available under law.

18. This Court further observes that the observations and directions so made should not be in any manner construed to mean that this Court have dealt with the merits of the matter. The Respondent Nos. 4 & 5 are at liberty to decide upon the reply to the show-cause notice dated 7/2/2023 on its merits independently.

19. With the above observations and directions, the instant petition stands disposed.

JUDGE

Comparing Assistant