

GAHC010040622018



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

Case No. : WP(C)/1224/2018

MALEK UDDIN
S/O- LT HABEZ UDDIN, PRINCIPAL, MANDIA ANCHALIK COLLEGE, R/O-
VILL- HAHCHARA, P.O. BAGODI, P.S. BARPETA, DIST- BARPETA, ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS.
REP. BY THE COMMISSIONER AND SECRETARY, GOVT. OF ASSAM,
HIGHER EDUCATION DEPTT., DISPUR, GHY-6

2:THE DIRECTOR OF HIGHER EDUCATION

ASSAM
KAHILIPARA
GUWAHATI - 781019.

3:THE DIRECTOR OF FINANCIAL INSPECTIONS

ASSAM
DISPUR
GUWAHATI- 781006

4:THE DEPUTY DIRECTOR OF HIGHER EDUCATION

ASSAM
KAHILIPARA
GUWAHATI - 78101

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

Advocates for the petitioner: Shri D. Das, Senior Advocate,
Shri K.A. Mohammad, Advocate.

Advocates for respondents : Shri K. Gogoi, SC, Higher Education Department.

Date of hearing : 07.06.2023

Date of judgment : 07.06.2023

- 1.** Heard Shri D. Das, learned Senior Counsel assisted by Shri K.A. Mohammad, learned counsel for the petitioner. Also heard Shri K. Gogoi, learned Standing Counsel, Higher Education Department.
- 2.** Considering the subject matter in dispute and as agreed to by the parties, this writ petition is taken up for disposal at the admission stage.
- 3.** The petitioner has put to challenge the Report No. 13 of 2016-17 submitted by the Director of Financial Inspections (herein after DFI), Assam, a Disciplinary Proceeding initiated vide Show Cause Notice dated 27.03.2017 which had culminated in an order dated 13.12.2017 by which a penalty for recovery of an

amount of Rs. 19,69,330/- (Rupees Nineteen Lakh Sixty Nine Thousand Three Hundred and Thirty rupees only) has been directed.

4. The petitioner was serving as the Principal of Bilasipara College when an order dated 23.06.2016 was passed placing him under suspension on certain allegations. The aforesaid suspension was however the subject matter of litigation subsequent to which though the petitioner was re-instated, he was transferred and posted to the Mandia Anchalik College in the district of Barpeta.

5. With regard to the Disciplinary Proceeding, it is the projected case that an enquiry was initially conducted through the Director of Financial Inspections, Assam who had submitted a Report being Report No. 13 of 2016-17. In the said Report, a finding was arrived at that the petitioner had made payment of excess amount of Rs. 19,69,330/- (Rupees Nineteen Lakh Sixty Nine Thousand Three Hundred Thirty rupees) without any justified work and therefore, the said amount was recommended to be recovered from the petitioner. The petitioner submits that such enquiry was discretely done and the Report was submitted without giving any opportunity to the petitioner.

6. Thereafter, a Show Cause Notice dated 27.03.2017 was served upon the petitioner mainly on three allegations. The first allegation was in connection with the Report of the DFI on excess expenditure of Rs. 19,69,330/- (Rupees Nineteen Lakh Sixty Nine Thousand Three Hundred Thirty) where there was a recommendation for recovery from the petitioner. The second allegation is with regard to unauthorized absence from 18.10.2014 to 13.11.2014. The third allegation is connected with the second allegation whereby it has been alleged

that during the said period from 18.10.2014 to 13.11.2014, the petitioner did not hand over charge and important documents to the President of the Governing Body of the College which had caused inconvenience. The Show Cause notice was accompanied by a statement of allegations which contained a list of witness and a list of document. In the list of document, the Report of the Director of Financial Inspections, Assam was indicated.

7. On receipt of such notice, the petitioner had submitted an application dated 19.04.2017 whereby a request was made to provide the petitioner with the relevant documents which were the basis of the charges. The said request was followed by another request dated 14.12.2017. It is submitted that in spite of such request, nor copies of the documents on the basis of which the allegations were made were handed over to the petitioner neither he was given any scope to inspect the same. The petitioner submits that he was not aware of any ensuing enquiry but was surprised on getting the information that an order was issued by the Director of Higher Education on 13.12.2017 whereby the petitioner was imposed a penalty for recovery of an amount of Rs. 19,69,330/- (Rupees Nineteen Lakhs Sixty Nine Thousand Three Hundred Thirty rupees) which was divided into parts to be recovered within the span of time from January, 2018 to December, 2021. The petitioner submits that immediately on coming to know of such Enquiry Report, he had submitted an application for grant of some more time to file his defence statement which however was rejected vide a communication dated 27.12.2017.

8. Shri Das, the learned Senior Counsel for the petitioner submits that the inception of the proceeding, namely, the Report of the DFI is itself not legally

sustainable. He further submits that apart from the grounds of challenge which would be elaborated subsequently in this judgment, on the aforesaid ground itself that the Report of the DFI is not sustainable, the entire Departmental Proceeding is liable to be interfered with.

9. In support of his submission, the learned Senior Counsel for the petitioner has referred to the Assam Financial Inspection of Departmental Sanctions and Implementation of Scheme Rules, 1982 (herein after Rules). The definition of Director and Executive Agency appearing in Section 3 (b) and 3(I) along with the control over the Director appearing in Section 4 have been pressed into service. Emphasis has been laid on Section 7 which lays down the procedure for submission of a Report. He submits that the proviso to the said Section makes it clear that before the Director submits his Report, there is a requirement to formally communicate to the Executive Agency his findings so as to give them an opportunity to explain such lapse or irregularity.

10. It is submitted that it is an admitted case that the inspection was done in absence of the petitioner and without giving him any opportunity before the Report was furnished.

11. The learned Senior Counsel submits that without prejudice to his contention that on the aforesaid basis, the consequential action is not sustainable, it is submitted that even the consequential action are in violation of the established principles of law governing the field of Disciplinary Proceedings.

12. By drawing the attention of this Court to the Show Cause Notice dated

27.03.2017, it is submitted that to give a reasonable opportunity to make an effective statement of defence, the materials which are relied upon for framing the charges are required to be given to a delinquent or at least inspection of such documents are required to be given which admittedly has not been done. He, further, submits that the enquiry was conducted *ex-parte* and the petitioner was not informed about such enquiry and till date, the Report of such enquiry has not been furnished to him.

13. The learned Senior Counsel submits that the requirement of law does not end at the stage of enquiry and there is a further requirement of giving an opportunity to the delinquent by the Disciplinary Authority before acceptance of findings of the Enquiry Report which are adverse to him. In the instant case, no second Show Cause Notice was given to the petitioner and therefore, the petitioner was deprived of a reasonable opportunity to present his case and defend himself.

14. The learned Senior Counsel, accordingly, submits that the entire action of the respondent authorities not being sustainable in law are liable to be interfered with by this Court. This Court has further been informed that though there is an interim order by which the recovery directed has been stayed, no post-retirement benefits have been given to the petitioner who had retired during the pendency of this case in March, 2022. It is accordingly submitted that while interfering with this matter, a consequential direction be issued clarifying that the post-retirement benefits cannot be withheld and connected with the present proceeding which is required to be interfered with.

15. *Per contra*, Shri K. Gogoi, learned Standing Counsel for the Department has submitted that the allegations, more particularly, the allegation no. 1 is of very serious nature and it involves a huge amount of public money. He submits that the amount was sanctioned for a Womens Hostel in the Bilasipara College which apparently was misused as per the Report of the DFI.

16. As regards the challenge to the Report of the DFI, the learned Standing Counsel submits that the aforesaid Report was not acted unilaterally and the views of the petitioner was sought for which would be evident from the Show Cause Notice dated 27.03.2017 and therefore, the application of the proviso to Section 7 of the Rules of 1982 may not come into the way. As regards the allegation that the enquiry was conducted *ex-parte*, he submits that on each occasion the petitioner was informed regarding the sitting of the enquiry and he on his own volition had declined from attending the same.

17. Shri Gogoi, the learned Standing Counsel had also referred to the representation of the petitioner dated 14.12.2017 which would rather reflect that the petitioner had taken some other grounds for not being able to submit the Show Cause Notice.

18. With regard to the allegations that the Report of the Enquiry Officer was not furnished to the petitioner, Shri Gogoi, the learned counsel submits that the Report was in fact issued to the petitioner by DTDC courier as well as by registered post which however had returned with the remark "*Out of Station from 7 days, Hence, Retd to Sender, sd/- illegible 14/9*". He submits that it can be deemed that the petitioner was aware of the Report and on his own volition

did not offer his comments to the Enquiry Report. He, accordingly, submits that no fault can be attributed to the Director in passing the impugned order dated 13.12.2017 which has been done by taking into consideration all the relevant factors.

19. Alternatively, the learned Standing Counsel submits that even in the event this Court comes to a finding that the order dated 13.12.2017 was passed without taking the views of the petitioner, the matter would be remanded back from the stage of giving the petitioner an opportunity and passing an order afresh after considering his comments on the Enquiry Report.

20. The learned Standing Counsel finally submits that there is a provision for appeal in the Rules governing the parties namely the Assam Service (Discipline and Appeal) Rules, 1964 and without exhausting the said remedy, this writ petition has been filed.

21. Shri Das, the learned Senior Counsel, however, submits that the statement made that the copy of the Enquiry Report was issued to the petitioner by post cannot mean that the Report was received by the petitioner in absence of any substantial evidence. He, further submits that the petitioner was posted and working as the Principal of Mandia Anchalik College, Barpeta where the Report could have been easily issued and the documents annexed by the respondent in the additional affidavit dated 22.05.2023 would show that such letters were posted to in the name of the petitioner at his residential address at Kokrajhar and College address at Bilasipara. In any case, it is submitted on behalf of the petitioner that the statutory provision contained in the Rules of 1982 cannot be

ignored and the Report of the DFI itself is liable to be declared as *non-est* in law.

22. This Court has carefully considered the rival submissions made by the learned counsel for the parties and have perused the materials on record.

23. In an ordinary case, this Court would be loath to interfere with a fact finding enquiry on the ground that it was strictly done without giving an opportunity to a delinquent. However, there is a mark distinction in this case where such fact finding enquiry is governed by Statutory Rules namely the Rules of 1982. The proviso to Rule 7 clearly states that there is a requirement to give the Executive Agency an opportunity to explain any lapse or irregularity in relation to which an enquiry was conducted before submitting his Report to the Secretary.

24. For ready reference, the relevant part of Rule 7 with the proviso is extracted herein below:

“7. Procedure for submission of report.-(a) The Director after having completed check an inspection referred to in Rule 5 (a) above shall submit a report to the Secretary, Finance Department clearly bringing out all cases and nature of financial irregularities detected by him in the course of the scrutiny of relevant papers / documents etc., produced during check / inspections and the Secretary, Finance Department shall thereupon proceed with the report in such a manner as may be deemed necessary in the interest of financial discipline and economy:

Provided that the Director, before submitting his report to the Secretary,

Finance communicating any lapse or irregularity found at the stage of inspection, shall formally communicate to the executive agencies his findings so as to give them an opportunity to explain such lapse or irregularity.”

25. In the opinion of this Court, the requirement of giving an opportunity to the incumbent before submission of the Report is a mandatory requirement which is also in consonance with giving a fair and reasonable opportunity to a person against whom certain adverse report is to be submitted. Apart from the same being a part of the principle of Natural Justice, not granting such opportunity would also be in violation of the doctrine of reasonability which is the hallmark of Article 14 of the Constitution of India.

26. Since this Court has come to a finding that the basis of the Departmental proceeding which is the Report of the DFI is itself unsustainable in law, there is actually no requirement to examine the validity of the process adopted by the authorities in the Disciplinary Proceeding. However, in the interest of justice, this Court has also noticed that the Disciplinary Proceeding also suffers from numerous infirmities in law making the same wholly unsustainable. Firstly, the delinquent against which a proceeding is initiated is required to be furnished with copies of the documents based upon which the allegations have been made. Even if in a given case, such documents are not able to be furnished, the delinquent is entitled to an opportunity of inspection of such documents and to make notes which apparently has not been done in the instant case in spite of request made by the delinquent as would be evident from the representation dated 19.04.2017 submitted immediately on receipt of the Show Cause Notice.

27. The second point is with regard to the Enquiry Report which has not been made a part of this proceeding, even by the respondents. However, from the submissions made and on reading of the penalty order dated 13.12.2017, it appears that the sittings of the enquiry were held on 3 dates namely 28.06.2017, 07.07.2017 and 14.07.2017 and in none of the dates, the petitioner was present. Even if, the version given by the respondents that the petitioner opted not to appear before the Enquiry Officer is accepted for the sake of argument, it is not in dispute that ultimately the enquiry was done *ex-parte* the petitioner. That apart, there is nothing on record to show that the Report of the Enquiry Officer was served upon the petitioner before the same was acted upon by the Disciplinary Authority. It is the settled position of law that before the Disciplinary Authority takes into account the findings of an Enquiry Report, the comments of the delinquent are required to be considered so that a reasonable opportunity is granted to the delinquent to convince the Disciplinary Authority to take a view against any findings which are adverse to the delinquent and the said opportunity which is of immense importance has not been given.

28. The Hon'ble Supreme Court in the landmark case of ***Managing Director, ECIL, Hyderabad & Ors. Vs. B. Karunakar & Ors.***, reported in **(1993) 4 SCC 727**, has laid down as follows:

“29. Hence it has to be held that when the Inquiry Officer is not the disciplinary authority, the delinquent employee has right to receive a copy of the inquiry Officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the

employee's right to defend himself against the charges levelled against him. A denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.”

29. The learned Standing Counsel may be right in contending that the Regulations contained a provision for preferring an appeal. However, considering that the impugned order of penalty is of the year 2017 and this writ petition is pending since the year 2018, remanding the petitioner to the Appellate Authority would be of no purpose, more so, when both the Appellate Authority and the Disciplinary Authority are respondents in this case.

30. While this Court has come to a finding that the impugned action of the respondents is not sustainable in law, the seriousness of the allegations, more particularly, the first allegation wherein public money is involved cannot be overlooked.

31. In view of the aforesaid facts and circumstances, this writ petition is allowed and the impugned Report No. 13 of 2016-17 of the DFI, Enquiry Report submitted on 29.08.2017 and being penalty order dated 13.12.2017 passed by the Director of Higher Education are set aside.

32. It is however made clear that considering the seriousness of the first allegation, the respondents would be at liberty to initiate an enquiry which however is required to be done strictly in accordance with law, if so advised.

33. Further, in view of the submissions made that the petitioner's post-retirement benefits has been held up, it is made clear that such action of holding up the post-retirement benefits cannot be related to the present proceeding and the post-retirement benefits are required to be released to the petitioner expeditiously unless there is any other legal objection to the same.

JUDGE

Comparing Assistant