

GAHC010042042023



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

Case No. : WP(C)/1199/2023

SAMAR JYOTI SAIKIA
S/O LT. GOHIN SAIKIA R/O GOREHOGA SONARI GAON P.O. AZAD P.S.
NORTH LAKHIMPUR DIST. LAKHIMPUR ASSAM

VERSUS

THE STATE OF ASSAM AND 2 ORS
REP BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
WATER RESOURCES DEPTT. DISPUR GUWAHATI 6

2:THE CHIEF ENGINEER
WATER RESOURCES DEPTT. CHANDMARAI GUWAHATI 3

3:THE SUPERINTENDING ENGINEER
LAKHIMPUR WATER RESOURCE CIRCLE NORTH LAKHIMPUR DIST.
LAKHIMPUR ASSA

Advocate for the Petitioner : MR. P J SAIKIA

Advocate for the Respondent : SC. WATER RESOURCE DEPTT.

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

For the Petitioner : Mr. P. J. Saikia, Advocate

For the Respondent : Mr. C. Sarma, SC,
Water Resource Department
(for respondent Nos. 1 - 3)

Date of Order : **17.03.2023**

- 1.** Heard Mr. P. J. Saikia, learned counsel for the petitioner. Also heard Mr. C. Sarma, learned standing counsel for the respondent Nos. 1 to 3.
- 2.** The case of the petitioner is that the petitioner was arrested on 04.11.2022 in connection with ACB PS case No. 52 of 2022, registered under Section 120(B) of the Indian Penal Code read with Section 7(a) of the Prevention of Corruption Act, 1988 on the ground that the petitioner was arrested. The petitioners were placed under suspension. Vide order dated 10.11.2022 in exercise of the powers under Rule 6(1)(c) of the Assam Service (Discipline and Appeal) Rules, 1964 with immediate effect until acquittal of them from the aforesaid cases. It appears from records that on 30.11.2022, the Special Judge, Assam had released the petitioner on bail. It further appears that on 27.01.2023, the respondent No. 3 issued an Office order wherein it was mentioned that the Government of Assam vide communication dated 01.12.2022 had directed to draw the department proceedings against the suspended officials. It was further mentioned in the said communication that in view of the same departmental proceedings should be initiated against the petitioner and another to conduct an inquiry under Rule 9(2) of the Assam Services (Discipline and Appeal) Rules, 1964 (for short the Rules of 1964) and for that purpose it was decided to appoint an Inquiring Officer under Rule 9(4) of the Rules of 1964 to enquire into the charges framed against the suspended officials. Further to that vide said order dated 27.01.2023, one- Sri Pradip Kumar Das, Executive Engineer, Dhakuakhana, W.R. Division, Dhakuakhana was appointed as the Inquiry Officer and Sri Mahendra Mili was appointed as Presenting Officer. The said order dated 27.01.2023 was also forwarded to the petitioner and he was directed to submit his written submission to the Inquiry

Officer with a further direction to cooperate with the Inquiry Officer as and when called for. The petitioner being aggrieved for continuing the suspension beyond the period of 90 days without furnishing the memorandum of charges/ charge-sheet which were contrary to the Judgment of the Supreme Court in the case of *Ajay Kumar Choudhury -Vs- Union of India* reported in (2015) 7 SCC 291 have challenged the said continuation of the suspension on the basis of the order dated 10.11.2022.

3. Further to that the petitioner have also challenged the order dated 27.01.2023 whereby the respondent authorities have appointed the Inquiring Officer as well as Presenting Officer in terms of Rule 9(4) and Rule 9(5) of the Rules of 1964. It is the case of the petitioners that without issuing a show cause notice / memorandum of charges/charge-sheet, the question of appointment of a Enquiry Officer as well as the Presenting Officer is contrary to the Rules of 1964.

4. It would therefore be seen from a perusal of the writ petition that the challenge made in the writ petition is two folds. First, there is a challenge to the continuation of the suspension beyond the period of 90 days and further the Order dated 27.01.2023 whereby the Presenting Officer as well as the Enquiry Officer were appointed is challenged being contrary to the Rule 9 of the Rules of 1964. It may not be out of place to mention that it was only on 8.02.2023, the respondent No. 3 was formally informed that the petitioner was released on bail on 30.11.2022.

5. Upon the instant writ petition being filed, this Court issued notice making it returnable on 17.03.2023 and the learned counsel appearing on behalf of the respondents was directed to apprise this Court as to whether any memorandum of charges/ charge-sheet have been served upon the petitioner. It was also

categorically mentioned in the said office order dated 27.01.2023 cannot be construed in any manner to be the memorandum of charges/charge-sheet. The learned counsel appearing on behalf of the respondents today informed this Court that as on date no memorandum of charges/ charge-sheet have been served upon the petitioner. He, however, submitted that it was only on 08.02.2023 that the petitioner had informed the respondent No. 3 that he had been released on bail. It was also informed that the office order dated 27.01.2023 was served upon the petitioner.

6. I have heard the learned counsels for the parties.

7. In the backdrop of the above materials on record and the submissions made by the learned counsel appearing on behalf of the parties, let this Court consider the challenge so made in the writ petition. The first challenge so made is regarding the office order dated 27.01.2023 to the effect that without issuing a show cause it was in violation of the Rules of 1964 to appoint an Inquiry Officer as well as the Presenting Officer. This Court finds it relevant at this stage to take note of Rule 9 of the Rules of 1964 wherein the procedure have been engrafted. This Court for the purpose of the challenge made to the office order dated 27.01.2023 finds it relevant to reproduce the provisions of Rule 9 and its sub-Rules (1) to (9) of the Rules of 1969 which is extracted hereinbelow:-

*“9. **Procedure for imposing penalties.**- (1) Without prejudice to the provisions of the Public Servant (Inquiry) Act, 1850, no order imposing on a Government servant any of the penalties specified in Rule 7 shall be passed except after an inquiry, held as far as may be in the manner hereinafter provided.*

(2) The Disciplinary Authority shall frame definite charges on the basis of

the allegations on which the inquiry is proposed to be held. Such charges, together with a statement of the allegations on which they are based, shall be communicated in writing to the Government servant, and he shall be required to submit, within such time as may be specified by the Disciplinary Authority, a written statement of his defence and also to state whether he desires to be heard in person.

["At the time of delivering the charges, the Disciplinary Authority shall invariably furnish to the Government servant a list of documents and witnesses by which each article of charges is proposed to be sustained".]¹

Explanation- *In this sub-rule and sub-rule (3), the expression "the Disciplinary Authority" shall include the authority competent under these rules to impose upon the Government servant any of the penalties specified in Rule 7.*

(3) The Government servant shall, for the purpose of preparing his defence, be permitted to inspect and take extracts from such official records as he may specify, provided that such permission may be refused if for reasons to be recorded in writing, in the opinion of the Disciplinary Authority such records are not relevant for the purpose or its against the public interest to allow him access thereto:

Provided that when a Government servant is permitted to inspect and take extracts from official records due case shall be taken against tempering removal or destruction of records.

(4) On received of the written statement of defence, or if no such statement is received within the time specified the Disciplinary Authority may itself inquire into such of the charge as are not admitted or, if it

considers it necessary so to do, appoint for the purpose a Board of Inquiry or an Inquiring Officer.

(5) The Disciplinary Authority may nominate any person to present the case in support of the charges before the authority inquiring into the charges (hereinafter referred to as the inquiring authority). The Government servant may present his case with the assistance of any other Government servant approved by the Disciplinary Authority, but may not engage a legal practitioner for the purpose unless the person nominated by the Disciplinary Authority as aforesaid is a legal practitioner or unless the Disciplinary Authority, having regard to the circumstances of the case so permits.

(6) The Enquiring Authority shall, in the course of the enquiry consider such documentary evidence and take such oral evidence as may be relevant or material in regard to the charges. The Government servant shall be entitled to cross-examine witnesses examined in support of the charges and to give evidence in person and to adduce documentary and oral evidence in his defence. The person presenting the case in support of the charges shall be entitled to cross-examine the Government servant and the witnesses examined in his defence. If the Inquiring Authority declines to examine any witness or to admit any document in evidence on the ground that his evidence or such document is not relevant or material, it shall record its reasons in writing.

(7) At the conclusion of the inquiry, the inquiring Authority shall prepare a report of the enquiry, recording its findings on each of the charges together with reasons therefor.

[Explanations- *If in the opinion of the Enquiring Authority the proceedings of the enquiry establish any article of charge different from the original article of the charge it may record its findings on such article of charge:*

Provided that the findings on such article of charge shall not be recorded unless the Government servant has either admitted the facts on which such article of charge is based or has a reasonable opportunity of defending himself against such article of charge].¹

(8) The record of the inquiry, shall include-

(i) the charges framed against the Government servant and the statement of allegations furnished to him under sub-rule (2);

(ii) his written statement of defence, if any;

(iii) the oral evidence taken in the course of the enquiry;

(iv) the documentary evidence considered in the course of the inquiry;

(v) the orders, if any, made by the Disciplinary Authority and the Inquiring Authority in regard to the inquiry; and

(vi) a report setting out the findings on each charge and the reasons therefor.

(9) The Disciplinary Authority shall, if it is not the Inquiring Authority, consider the record of the inquiry and record its finding on each charge."

8. A perusal of the Rules so quoted would show that in terms with Rule 9(1) of the Rules of 1964, no order can be passed of imposition of penalty specified in Rule 7 except after inquiry, held as far as may be in the manner provided in Rule 9 of the Rules of 1964.

9. Sub-Rule (2) of Rule 9 categorically mandates that the disciplinary authority shall frame definite charges on the basis of allegations on which the inquiry is proposed to be held. Such charges, together with the statement of the allegations on which they are based, shall be communicated in writing to the Government servant, and he shall be required to submit within such time as may be specified by the Disciplinary Authority, a written statement of his defence and also to state whether he desired to be heard in person. At this stage, if this Court takes into account Sub-Rule (8), it categorically mentions that the record of the inquiry shall include the charges framed against the Government servant and the statement of allegations furnished to him under sub-Rule (2); the written statement of defence, if any; the oral evidence taken in the course of hearing enquiry; the documentary evidence considered in the course of the inquiry; the orders, if any, made by the Disciplinary Authority and the Inquiring Authority in regard to the inquiry and a report setting out the findings on each charge and the reasons therefor. Further to that, in sub-Rule (2), it has been mentioned that at the time of delivering the charges, the Disciplinary Authority shall invariably furnish to the Government servant a list of documents and witnesses by which each article of charge(s) are supposed to be sustained.

10. Sub-Rule (3) of Rule 9 stipulates that the Government servants shall, for the purpose of preparing his defence, be permitted to inspect and take extracts from such official records as he may specify, provided that such permission may be refused if for reasons to be recorded in writing, in the opinion of the Disciplinary Authority such records are not relevant for the purpose or it is against the public interest to allow the Government servants to have access thereto.

11. Sub-Rule (4) and sub-Rule (5) of Rule 9 are very relevant. In terms of sub-Rule (4), it is only upon receipt of a written statement of defence, or if no such statement is received within the time specified in terms with Rule 9(2) of the Rules, the Disciplinary Authority may itself inquire into such of the charges as are not admitted or, if it considers its necessary so to do, appoint for the purpose a Board of Inquiry or an Inquiring Officer. Sub-Rule (5) of Rule 9 stipulates that the Disciplinary Authority may nominate any person to present the case in support of the charges before the authority, enquiring into the charges meaning thereby the appointment of the Presenting Officer has to be contemporaneous with the appointment of the Enquiring officer or subsequent thereto.

12. It, therefore, transpires from the above procedure which has been mentioned that the Disciplinary Authority has to frame definite charges on the basis of allegations on which the enquiry is proposed to be held and such charges together with the statement of the allegations on which they are based shall be communicated in writing to the Government servants. The order dated 27.01.2023 under no circumstances can be said to be a memorandum of charge as mentioned in Rule 9(2) of the Rules of 1964. In as much as there is no mentioned whatsoever of any charges or any definite charges on the basis of any allegations on which the enquiry is proposed to be held.

13. The learned counsel appearing on behalf of the respondents had also fairly submitted that there has been no memorandum of charges/ charge-sheet in terms with Rule 9(2) served upon the petitioner. If this Court further takes into account to sub-Rule (4) of Rule 9, it will be seen that the Inquiry Officer would be appointed after the submission of the written statement of defence or if no such written statement is received within the time specified in terms of

Sub-Rule (2) of Rule 9. However, if the order dated 27.01.2023 is taken into account, it would show that even before the memorandum of charges containing definite charges on the basis of the allegations having been served upon the petitioner, the Inquiry Officer have been appointed, which is contrary to the mandate of sub-Rule (4) of Rule 9 of the Rules of 1964. In that view of the matter, it is apparent that the order dated 27.01.2023 is contrary to sub-Rules (4) and (5) of Rule 9 of the Rules of 1964. But the question arises as to whether the appointment of the Presenting Officer as well as the Inquiring Officer is required to be set aside being contrary Rules (4) and (5) of Rule 9 of the Rules of 1964.

14. This Court, in view of the language used in Rule 9(1) of the Rules of 1964 that the enquiry has to be held as far as may be in the manner provided, is of the opinion that the appointment of the Presenting Officer as well as the Inquiring Officer without the service of the memorandum of charges containing definite charges on the basis of allegations not being served upon the petitioner shall not be fatal. However, it is made clear that without the memorandum of charges containing definite charges on the basis of the allegations along with the list of documents and witnesses not being served, the question of the Inquiring Officer proceeding with the enquiry does not arise. Under such circumstances, this Court, therefore, is not inclined to set aside the order dated 27.01.2023 of appointment of the Presenting Officer as well as the Inquiring Officer. However, this Court makes it clear that without compliance to Sub-Rule (2) and (3) of Rule 9 of the Rules of 1964, the Inquiring Officer cannot proceed with the enquiry. Under such circumstances, this Court directs that the Inquiring Officer so appointed by the Office order dated 27.01.2023 shall not proceed with the enquiry unless and until the petitioner have been served the Memorandum

of Charges containing the definite charges on the basis of allegations on which the enquiry is proposed to be held alongwith the list of documents and witnesses which the Disciplining Authority proposes to rely upon for proving each article of charge.

15. The next question which arises is as to whether the petitioner is entitled to be re-instated on the ground that he have been released on bail.

16. In a recent Judgment dated 17.02.2023 in the case of *Rafed Ali Ahmed -Vs- the Sate of Assam and 3 Others* [WP(C) No. 455/2023], this Court after taking into account the Judgment of the Supreme Court in the case of *Ajay Kumar Chaudhary -Vs- Union of India* reported in (2015) 7 SCC 291 as well as the Judgment in the case of *Rakibuddin Ahmed -Vs- The State of Assam and Others* reported in (2020) 2 GLR 621 had categorically held that if within three months from the date, the delinquent officer/employee after having intimated the Appointing Authority that he have been released on bail is not served the memorandum of charges/ charge sheet then by virtue of the law laid down by the Supreme Court in *Ajay Kumar Choudhury (supra)* he has to be released on bail. In the instant case though admittedly the petitioner had on 08.02.2023 intimated the respondent No. 3 that he have been released on bail on 30.11.2022 by the Special Judge, Assam but one thing which also needs to be taken note of that on 27.01.2023, the Office order dated 27.01.2023 was served upon the petitioner. Under such circumstances, the service of the order dated 27.01.2023 upon the petitioner would deem that the respondent No. 3 had due knowledge that the petitioner was released on bail as on 27.01.2023. Taking into account the same date, this Court is of the opinion that the respondents authorities have still time till 27.04.2023 that is three months to take appropriate steps in terms with the observations made in Paragraph No. 21 of

the Judgment in the case of *Ajay Kumar Chaudhury* (supra). It is made clear that if within 27.04.2023, the memorandum of charges/ charge sheet in the manner stipulated under Sub Rule (2) of Rule 9 of the Rules of 1964 is not served upon the petitioner, the further continuation of the suspension vide order dated 10.11.2022 would be in violation to the law laid down by the Supreme Court in the case of *Ajay Kumar Chaudhury* (supra). Consequently, the concerned Appointing Authority of the petitioner would have to re-instate the petitioner forthwith thereafter.

17. Before concluding, this Court further would like to observe that the observations made in the paragraph immediately hereinabove shall not preclude the Appointing Authority to re-instate the petitioner to his office if during this period upto 27.04.2023, the Appointing Authority deems it proper to re-instate the petitioner. It is also made clear that if the petitioner is re-instated, the respondents would be at liberty to transfer the petitioner to any of its offices within the State so as to sever any local or personal contact that the petitioner may have and which he may misuse for obstructing the investigation against him. The respondents may also prohibit the petitioner from contacting any person, or handling records and documents till the stage of his having to prepare his defence.

18. With the above observation and directions, the instant petition stands disposed of.

JUDGE

Comparing Assistant