

GAHC010087022018



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

Case No. : WP(C)/2702/2018

PADMESWAR BARMAN
S/O- LT RABILOSAN BARMAN, VILL- BORDHANTOLI, P.O. MILANPUR,
DIST- NALBARI, ASSAM, PIN-781337

VERSUS

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

2:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI
GHY-7

3:THE DEPUTY INSPECTOR GENERAL OF POLICE (AP)
ASSAM
ULUBARI
GHY

4:THE COMMANDANT 19TH ASSAM POLICE (IR)
BATTALION
TENGAKHAT
DIBRUGARH
ASSA

Advocate for the Petitioner : MR R ISLAM

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

Judgment and Order (CAV)

Date : 21-12-2023

Heard Mr. R. Islam, learned counsel for the petitioner. Also heard Mr. J.K. Goswami, learned Additional Government Advocate, Assam for the respondents.

2] This writ petition is filed by the petitioner praying for setting aside and quashing the order dated 08.09.2017 imposing a penalty of removal from service and also to set aside and quash the order dated 28.02.2018 passed by the Director General of Police (T&AP), Assam, Ulubari, whereby the appeal preferred by the petitioner was rejected and further to direct reinstatement of the petitioner in service with all consequential benefits.

3] The pleaded case of the petitioner is that he was recruited and appointed as a constable on 15.09.1998 in the 19th Assam Police (IR) Battalion. The petitioner joined his services in the AP Battalion at Kahilipara. Subsequently, he was transferred to 19th AP Battalion, Head Quarter, Tengakhat, Dibrugarh in the year 2016. The petitioner continued in his service without any blemish from any quarter. While he was in service, he received information on 19.02.2017 that his old and ailing widowed mother was seriously ill. He, therefore, submitted a

leave application on the next day, which is on 20.02.2017, before the competent authority. However, no response was received from the competent authority. On 23.02.2017 he again received a phone call from his native place that the health condition of his mother was deteriorating and there was no one to look after his ailing mother in the home. So having found no option, the petitioner left the Headquarter without waiting for sanction of his leave and proceeded towards his native place on 24.02.2017. He reached his home on 25.02.2017. On reaching his home, he found that his mother had already undergone the Cataract operation on her right eye on 20.02.2017 at Shwahid Mukunda Kakoti Civil Hospital, Nalbari. As the mother of the petitioner could not regain her eye sight on the operated right eye, her left eye had to be operated which was undertaken in the month of April-May 2017. The petitioner however went to the Headquarter on 14.03.2017 to resume his duties before the left eye Cataract operation of her mother, but he was not allowed to enter into the Battalion Complex by the gate duty staff derailed for duty. The further case of the petitioner is that his monthly salary from the month of February, 2017 has not been received. The petitioner submitted further leave application on 08.09.2017 for granting 18 days Earned Leave. The petitioner was thereafter served with a notice dated 28.02.2017 issued by the Commandant, 19th AP (IR) Battalion, Headquarter, Tengakhat, Dibrugarh whereby the petitioner was asked to resume

his duties within 5 days from the date of receipt of the notice otherwise departmental action was contemplated to be initiated against the petitioner. It is stated that he received the notice in the second week of March, 2017 and immediately thereafter he proceeded to resume his duties but he was not allowed to enter into the Battalion Complex and consequently, he could not resume his duties. A show-cause notice dated 18.05.2017 was issued to the petitioner charging him with gross negligence in duty and indisciplined conduct rendered by the petitioner which made him unfit to be retained in service as a Constable of Disciplinary police force. He was directed to submit his written explanation within 10 (ten) days and in the event he intends to inspect the documents then he should write to the signatory of the letter within 7 days from the date of receipt of the said communication and thereafter submit his explanation within 10 days from the date of completion of the inspection. Along with the said show-cause notice, statement of allegation, list of prosecution witnesses were also enclosed. The petitioner filed his reply to the said show-cause notice on 25.05.2017. Enquiry Officer was thereafter appointed who was directed to conduct the enquiry and submit findings within 30 days. The petitioner was directed to appear before the Enquiry Officer.

4] Pursuant to the direction, the petitioner appeared before the Enquiry Officer. The oral statement of the petitioner was recorded but the statement of

the mother, whom the petitioner wanted to present as a defence witness, was not recorded. The Enquiry Officer completed the enquiry and had found the charges to be proved and the disciplinary authority having provisionally accepted the conclusion arrived at by the Enquiry Officer and by notice dated 10.08.2017, another show-cause notice was issued to the petitioner enclosing a copy of the enquiry report. The petitioner was asked to submit his response as to why the proposed action which is removal from service should not be taken. The petitioner submitted his representation to the said notice giving reasons as to why the findings of the Enquiry Officer should not be accepted and the penalty as proposed should not be imposed on the petitioner. However, by order dated 08.09.2017 the Disciplinary Authority i.e. the Commandant 19th Assam Police (IR) Battelion, Tengakhat had passed the impugned order of removal on 08.09.2017 whereby the petitioner was removed from service with the immediate effect. Being aggrieved by the imposition of penalty by the impugned order dated 08.09.2017, the petitioner preferred an appeal before the appellate authority. The appellate authority rejected his appeal by the order dated 25.10.2017. Being aggrieved the present writ petition has been filed.

5] Learned counsel for the petitioner submits that because the mother of the petitioner was ailing and he received repeated phone calls from his native

place regarding deteriorating health condition of his mother the petitioner had proceeded to visit his old and ailing mother in his native place. The leave application which he submitted before the competent authority did not receive any consideration and consequently, considering the health condition of the mother he went to his native place. The further contention of the learned counsel for the petitioner is that the enquiry proceeding was not conducted as per the provision of law. There is a categorical averment by the petitioner that the statement of the petitioner was not recorded by the Enquiry Officer but by another officer, which is not permissible as per the provision of law. The further contention of the learned counsel for the petitioner is that no opportunity was granted to the petitioner to cross-examine the prosecution witnesses.

6] It is also submitted that although the petitioner was entitled to but he was not given the benefits of availing defence assistance during the enquiry proceedings. Under such circumstances, learned counsel for the petitioner submits that the enquiry conducted has no value in the eye of law and therefore, the Disciplinary Authority and also the Appellate Authority ought not to have accepted the findings of the Enquiry Officer. Consequently, the impugned order dated 08.09.2017 imposing the penalty of removal as well as the order dated 15.10.2017 passed by the Appellate Authority rejecting the appeal be suitably interfered with and set aside and quashed.

7] Learned counsel for the petitioner relies upon the judgment of the coordinate Bench of this Court rendered in *Bhubon Singh. Vs State of Manipur & Ors* reported in 2008 (4) GLT 623. Referring to the said judgment learned counsel for the petitioner submits that this Court by referring to an earlier judgment passed by the Division Bench of this Court held that lack of opportunity to provide for adequate defence assistance to the delinquent officer will lead to miscarriage of justice. The coordinate Bench of this Court interfered with the proceedings as they were held to be are not fairly conducted and the findings in the enquiry report were set aside. The consequential orders passed by the Disciplinary Authority based on the finding of the enquiry officer were also set aside.

8] *Per contra*, Mr. J.K. Goswami, learned Additional Senior Government Advocate, appearing for the respondents disputes the contentions of the petitioner. It is submitted that the respondent no.4 namely, the Disciplinary Authority who is the Commandant 19th Assam Police (IR), Battalion, Tengakhat, has filed the detailed affidavit disputing the contentions made by the petitioner. Relying on this affidavit, learned Government Counsel submits that the petitioner was found to be absent in the "*General roll call*" as well as from the Battalion Head quarter with effect from 24.02.2017. The petitioner was found to

be unauthorisedly absent with effect from 24.02.2017 to 08.09.2017. Although notices were served on the petitioner for resuming his duties and the receipt of the said notice was duly acknowledged by the petitioner by signing in the acknowledgment receipt, the petitioner failed to turn up for his duties. Learned counsel for the respondents submits that both Enquiry Officer and Presenting Officer were appointed for the departmental proceeding initiated against the petitioner. The said Departmental Proceeding (DP) being DP no. 08/2017 was conducted as per procedure and there is no infirmity in the procedure followed during the enquiry process and the conclusions arrived at. Consequently, the order of removal dated 08.09.2017 as well as the appellate order dated 25.10.2017 had been passed as per the provision of law and there is no occasion which calls for any interference of this order as prayed for. The learned counsel for the Department further submits that there is a categorical averment in the affidavit that the statement of the petitioner was recorded by one Mr. Sahu, ASI of the Police of the Clothing which as it is not supported by the records is not correct and is therefore denied. It is submitted that the petitioner was given all opportunity to defend his case and was also permitted to cross-examine the witnesses, however, he did not avail of that opportunity and no question was put to prosecution witnesses. It is further submitted that the enquiry proceedings were conducted according to the procedure prescribed and

thereafter submitted his report based on all the material facts placed before him.

9] The petitioner in his affidavit-in-reply reiterated his contentions made in the writ petition and disputed the contentions of the respondents in their affidavit-in-opposition. He reiterates his contentions that in view of the opportunity not being granted to cross-examine the prosecution witnesses, the enquiry cannot be accepted to be an enquiry in the eye of law and accordingly, the same should be interfered with. He further submitted that no defence assistance was granted to the petitioner.

10] Learned counsels for the parties have been heard and pleadings on record have been carefully perused. The judgments relied upon at the Bar have also been carefully noted. The original records of the proceedings have also been placed by the Department and this Court has perused the same.

11] The facts narrated in the writ petition reveal that the petitioner left his place of posting on 24.02.2017. From his averments made in the writ petition, it is seen that his mother's Cataract operation on her right eye was done on 20.02.2017. As such, it is clear that before he left his place of posting, her mother's Cataract operation was already done. It is also seen from the averments made that the operation in the left eye of his mother was to be

undergone on 25.05.2017. As such, since the time the petitioner left his place of posting i.e. on 24/02.2017, till the time he stated to have return back to his place of posting i.e. on 14.03.2017, the petitioner was not admittedly in the place of posting for about 18 days without sanctioned leave. The medical report submitted by the petitioner also reveals that the mother of the petitioner underwent Cataract operation in the right eye on 20.02.2017 and operation on the left eye was done on 25.05.2017. The petitioner has annexed one certificate dated 04.09.2017 issued by the Doctor of Swahid Mukunda Kakati Civil Hospital, Nalbari. However, there is no medical report to support the contention of the petitioner that the mother of the ptitoener could not regain her right eyesight. No material has been placed by the petitioner to show that he had proceeded to resume his duties on 14.03.2017 but was stopped to enter into the Battalion Campus. From the enquiry report it is evident that there are several other earlier instances when the petitioner had remained on unauthoirized leave without following proper norms. The order of the Appellate Authority also refers to the instances where the petitioner was on unauthorized leave or had overstayed on leave or had been recommended or punished due to his indiscipline conduct. It is clear from records of the proceeding as well as from the order dated 28.02.2018 of the Appellate Authority that the petitioner is a habitual offender. In spite of the Appellate Authority's order dated 28.02.2018, which reflects the

instances of indiscipline and misconduct forced by the petitioner, no explanation has been put forth by the petitioner in the writ petition or during the oral submission made by the petitioner. In *Bhubon Singh (supra)*, the issue before the Court was that as to whether the Defence Assistance was allowed to be engaged by the petitioner. A coordinate Bench of this Court held in the facts of the case that non furnishing of defence assistance vitiated the enquiry proceedings and thereby consequential orders was passed by the Disciplinary Authority and accordingly, this Court interfered with and quashed the same.

12] As per Rule 9 (5) of the Assam Services (Discipline and Appeal) Rules, 1964 the Government servant against whom the disciplinary proceeding has been initiated is entitled to present the case with any other Government servant approved by the Disciplinary Authority. Ordinarily, no legal practitioner be permitted for defence assistance unless the Disciplinary Authority himself nominates such a person or the circumstances of the case so permit. A perusal of the Rules of 1964 reveals that there is no specific provision by which the Disciplinary Authority is required to provide for a Defence Assistant. Such defence assistance may be sought for by the Delinquent Officer. In the facts of the case, there is only an oral statement that no defence assistance has been provided to the petitioner. However, no material is placed before this Court to show that the petitioner requested for defence assistance. No such material is

also seen from the records.

13] From the records perused it does not appear that any request for cross-examination of the witnesses was made by the petitioner which was rejected by the Department. On the contrary, it is seen that the petitioner did not proceed to cross-examine the prosecution witnesses although opportunity was granted. The reply filed by the petitioner and the statement made before the Enquiry Officer were taken note of during the enquiry proceedings. Perusal of the reply reveals that the petitioner himself has admitted that he left his place of posting without informing the authority and he had undertaken that he would not commit such indisciplined activity. Therefore, the question of offering any Defence Assistance or the fact that the petitioner claims that his mother was not permitted to be presented as a witness will not materially alter the conclusions of the enquiry in view of the specific admission by the petitioner in his reply to the show cause notice. That apart, from the appellate order dated 28.02.2017 it is seen that in the past also the petitioner had remained on authorized absent on various dates and there are instances of punishment also. As such, it appears that the petitioner was well conversant with the practice and procedure and rigorous of discipline required to be maintained as a member of the Armed Police Force. The averments made in the writ petition that his mother was seriously ill is also not supported by any medical documents, save and except,

the medical certificate of a medical practitioner that his mother underwent the Cataract surgery on two different dates. This medical certificate does not reveal that during the Cataract surgery or any time thereafter the mother of the petitioner suffered serious ailment which could have put her life in danger, as was claimed by the petitioner.

14] Under such circumstances, it cannot be said that there was no evidence at all to arrive at a conclusion by the Enquiry Officer in respect of the charges framed against the petitioner. Accordingly, this Court does not find that any prejudice has been caused to the petitioner by not providing any defence assistance to the petitioner at the time of proceeding before the appellate authority. The infirmities if any alleged against the disciplinary proceedings will have to be examined from the stand point of prejudice caused to the petitioner or to the Delinquent Officer. In the facts and circumstances of the case and in view of the clear admission by the petitioner that he had gone on leave from his place of posting without the leave granted by the appropriate authority as well as the fact that the petitioner had resorted to similar instances of indiscipline conduct earlier also for which he had been punished reveals that the petitioner is conversant with the Rules and procedure and the consequences of non adherence to such Rules and Procedure. This is not the first disciplinary proceedings initiated against the petitioner. As such, in the considered view of

this Court, the petitioner has failed to demonstrate that he has been seriously prejudiced by not being provided with the defence assistance and thereby, the enquiry proceedings have been vitiated. On the contrary, no such prejudice is shown to have been caused to the petitioner warranting interference of the enquiry proceeding and consequential orders passed by the disciplinary and appellate authority.

15] The scope of judicial review in disciplinary proceedings has been time and again enunciated by the Apex Court. The limits of judicial review by the Constitutional Court in exercise of powers under Article 226 of the Constitution of India are extremely limited. Ordinarily judicial review is permitted when the enquiry proceeding are conducted contrary to the Rules or the findings arrived at the by Enquiry Officer is without any evidence or they are perverse or violative of natural justice. The power of judicial review of a Writ Court is therefore as aforementioned is ordinarily restricted. In the facts of the present case, it cannot be said that the enquiry was conducted *dehors* the procedure prescribed. Save and except the question of providing defence assistance, all other concomitant Rules and Procedures have been found to have been adhered to by the authorities concerned during the enquiry proceedings undertaken. There are witnesses who have been examined and who have deposed that the petitioner had left the Battalion Campus without the leave being sanctioned.

Sufficient opportunities were granted to the petitioner to examine the relevant documents and cross examine the prosecution witnesses. A Presenting officer was also appointed by the respondents.

16] In Deputy General Manager (Appellate Authority) and ors. vs. Ajai Kumar Srivastava, reported in (2021) 2 SCC 612, the Apex Court while examining the matter pertaining to departmental enquiry summarized the principles relating to exercise of judicial review by Constitutional Courts under Article 226 of the Constitution of India. The Apex Court held as under:

22. The power of judicial review in the matters of disciplinary inquiries, exercised by the departmental/appellate authorities discharged by constitutional courts under Article 226 or Article 32 or Article 136 of the Constitution of India is circumscribed by limits of correcting errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice and it is not akin to adjudication of the case on merits as an appellate authority which has been earlier examined by this Court in State of T.N. v. T.V. Venugopalan [State of T.N. v. T.V. Venugopalan, (1994) 6 SCC 302 : 1994 SCC (L&S) 1385] and later in State of T.N. v. A. Rajapandian [State of T.N. v. A. Rajapandian, (1995) 1 SCC 216 : 1995 SCC (L&S) 292] and further examined by the three-Judge Bench of this Court in B.C. Chaturvedi v. Union of India [B.C. Chaturvedi v. Union of India, (1995) 6 SCC 749 : 1996 SCC (L&S) 80] wherein it has been held as under: (B.C. Chaturvedi case [B.C. Chaturvedi v. Union of India, (1995) 6 SCC 749 : 1996 SCC (L&S) 80] , SCC pp. 759-60, para 13) Page | 27

“13. The disciplinary authority is the sole judge of facts. Where appeal is

presented, the appellate authority has coextensive power to reappreciate the evidence or the nature of punishment. In a disciplinary enquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the court/tribunal. In Union of India v. H.C. Goel [Union of India v. H.C. Goel, (1964) 4 SCR 718 : AIR 1964 SC 364] this Court held at SCR p. 728 (AIR p. 369, para 20) that if the conclusion, upon consideration of the evidence reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued."

24. It is thus settled that the power of judicial review, of the constitutional courts, is an evaluation of the decision-making process and not the merits of the decision itself. It is to ensure fairness in treatment and not to ensure fairness of conclusion. The court/tribunal may interfere in the proceedings held against the delinquent if it is, in any manner, inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached or where the conclusions upon consideration of the evidence reached by the disciplinary authority are perverse or suffer from patent error on the face of record or based on no evidence at all, a writ of certiorari could be issued. To sum up, the scope of judicial review cannot be extended to the examination of correctness or reasonableness of a decision of authority as a matter of fact.

25. When the disciplinary enquiry is conducted for the alleged misconduct against the public servant, the court is to examine and determine: (i) whether the enquiry was held by the competent authority; (ii) whether rules of natural justice are complied with; (iii) whether the findings or conclusions are based on some

evidence and authority has power and jurisdiction to reach finding of fact or conclusion.

26. It is well settled that where the enquiry officer is not the disciplinary authority, on receiving the report of enquiry, the disciplinary authority may or may not agree with the findings recorded by the former, in case of disagreement, the disciplinary authority has to record Page | 28 the reasons for disagreement and after affording an opportunity of hearing to the delinquent may record his own findings if the evidence available on record be sufficient for such exercise or else to remit the case to the enquiry officer for further enquiry.

27. It is true that strict rules of evidence are not applicable to departmental enquiry proceedings. However, the only requirement of law is that the allegation against the delinquent must be established by such evidence acting upon which a reasonable person acting reasonably and with objectivity may arrive at a finding upholding the gravity of the charge against the delinquent employee. It is true that mere conjecture or surmises cannot sustain the finding of guilt even in the departmental enquiry proceedings.

28. The constitutional court while exercising its jurisdiction of judicial review under Article 226 or Article 136 of the Constitution would not interfere with the findings of fact arrived at in the departmental enquiry proceedings except in a case of mala fides or perversity i.e. where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at those findings and so long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained.

17] The same view has been reiterated in another Judgment of the Apex Court

in State of Karnataka and Anr. Vs. Umesh, reported in (2022) 6 SCC 563. The Apex Court in the said matter held that the Court does not act as an appellate forum over the findings of a disciplinary authority and does not re-appreciate evidence on the basis of which findings of misconduct have been arrived at in the course of disciplinary enquiry. The Apex Court held that the Court while exercising its jurisdiction under Article 226 of the Constitution in exercise of judicial review must restrict its review to determine whether (i) Rules of natural justice have been complied with; (ii) finding of misconduct based on some evidence; (iii) statutory rules governing conduct of disciplinary enquiry were followed; (iv) findings of the disciplinary authority suffer from perversity; and (v) penalty disproportionate to proved misconduct.

18] Under such circumstances, the writ petition is found to be devoid of any merit and therefore, the same is dismissed. Return the original records of the proceedings to the learned Additional Government Advocate.

Interim order , if any, stands vacated. Pending IA, if any, stands dismissed.

JUDGE

Comparing Assistant