

GAHC010089762023



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

Case No. : WP(C)/2379/2023

BARBIE HAZARIKA
WIFE OF SRI LAKHINANDAN GOGOI,
RESIDENT OF TOWER 2A, FLAT 4C, UTTARAYAN VILLE, GANESH
TURNING, KAHILIPARA,
GUWAHATI- 781019.

VERSUS

THE STATE OF ASSAM AND 2 ORS
REPRESENTED BY THE ADDITIONAL CHIEF SECRETARY TO THE
GOVERNMENT OF ASSAM,
PERSONNEL (A) DEPARTMENT,
DISPUR, GUWAHATI- 781006.

2:THE SECRETARY TO THE GOVERNMENT OF ASSAM
PERSONNEL(A) DEPARTMENT
DISPUR
GUWAHATI- 781006.

3:THE DEPUTY SECRETARY TO THE GOVERNMENT OF ASSAM
PERSONNEL(A) DEPARTMENT
DISPUR
GUWAHATI- 781006

Advocate for the Petitioner : MR. K N CHOUDHURY

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Date : 08.05.2023

Heard Mr. K.N. Choudhury, the learned Senior Counsel assisted by Ms. N. Mahanta, the learned counsel for the petitioner. Mr. T.C. Chutia, the learned counsel appears on behalf of the respondent Nos. 1, 2 and 3.

2. The instant writ petition has been taken up for disposal at the motion stage itself.

3. The case of the petitioner herein is that the petitioner was suspended vide an order dated 2/6/2022 by the Secretary to the Government of Assam, Personnel (A) Department in exercise of the powers under Rule 6 (1)(a) of the Assam Service (Discipline and Appeal) Rules, 1964 (in short the Rules of 1964).

4. Pursuant to the suspension of the petitioner, the respondent no. 2 issued a show cause notice bearing No. AAP.101/2022/23 dated 10/6/2022 thereby asking the petitioner to show cause as to why the penalties enumerated under Rule 7 of the Rules of 1964 should not be imposed upon her on the charges of gross misconduct, insubordination tarnishing the image of the State before foreign dignitaries, dereliction of duty and violation of the provisions enumerated under Rule 3 of the Assam Civil Service (Conduct) Rules, 1965. A period of 10 days was given to the petitioner to submit her written statement in defence from the date of receipt of the notice.

5. It appears from the records the petitioner had submitted the written statement in defence thereby denying all the allegations leveled against the

petitioner and prayed that the petitioner be exonerated of all the charges framed against her which was without any basis.

6. Subsequent thereto, in exercise of the power under Rule 9 (4) of the Rules of 1964 vide an order dated 2/9/2024, an enquiry officer was appointed. Further, in exercise of the powers under Rule 9 (5) of the Rules of 1964 vide the same order a Presenting Officer was also appointed.

7. A perusal of the Annexures to the writ petition shows that on 21/10/2022 the petitioner was directed to appear in the enquiry proceedings on 26/10/2022. It further appears that the enquiry proceedings were fixed on various dates i.e. 20/2/2023, 16/3/2023, 20/3/2023, 22/3/2023 and on 4/4/2023. Relevant to mention that on 30/3/2023, the enquiry officer requested the prosecution witnesses to appear for recording their evidence. In the meantime, vide an order dated 24/3/2023, the suspension order of the petitioner was extended for another period of three months w.e.f. 2/3/2023 or until further orders.

8. On 4/4/2023 when the case was fixed for recording of the evidence of the prosecution witness, the Secretary to the Government of Assam Personnel (A) Department issued an order dated 4/4/2023 whereby in exercise of the powers under Rule 9(4) of the Rules of 1964, the earlier enquiry officer was replaced on the ground that there has been delay in completing the disciplinary proceedings and appointed a fresh enquiry officer one Sri Jadav Saikia to enquire into the charges against the petitioner as-is-where-is-basis in the proceedings and the new enquiry officer was directed to submit the enquiry report within a period of 6 weeks.

9. The petitioner is aggrieved by the order dated 4/4/2023 whereby the Enquiry Officer was changed. It is also the grievances of the petitioner that

although the petitioner had been suspended on 2/6/2022 but the petitioner have not been given the subsistence allowance since the date of her suspension. It is under such circumstances that the present writ petition has been filed seeking various reliefs.

10. I have heard the learned counsel for the parties and have also perused the materials on record.

11. Let this Court first take into consideration the issue as to whether the petitioner is entitled to the subsistence allowance from 2/6/2022. The fact that the petitioner has been suspended and there is a disciplinary proceedings going on, is an admitted fact as could be seen from the orders dated 2/6/2022 as well as 4/4/2023 referred to hereinabove. The petitioner in terms with FR 53 of the FR and SR as applicable to the State of Assam is entitled to the subsistence allowance. Denial of the said subsistence allowance to the petitioner would be contrary to FR 53 of the FR and SR as applicable to the State of Assam and consequently such action would be unreasonable and arbitrary which would violate the rights of the petitioner under Article 14 of the Constitution of India.

12. In that view of the matter this Court therefore directs the respondent authorities and more particularly the respondent Nos. 1 and 2 to forthwith pay the subsistence allowance to the petitioner for the period from 2/6/2022 till the completion of the departmental proceedings or the reinstatement of the petitioner whichever is earlier. The said exercise be completed within a period of 2 weeks from the date a certified copy of the instant order is served upon the respondent No. 2.

13. The next question which arises is whether the exercise of powers under Rule 9 (4) to change the enquiry officer in the midst of an enquiry proceedings

was in accordance with law and permissible as has been done vide the impugned order dated 4/4/2023.

14. It appears from a perusal of the writ petition itself that the petitioner was put under suspension on 2/6/2022. Pursuant to that the departmental proceedings was initiated by the issuance of the show cause notice dated 10/6/2022. It further appears that on 12/7/2022 the petitioner had already replied to the show cause notice denying all the allegations leveled against her. Thereupon on 2/9/2022 the Enquiry Officer was appointed in exercise of the powers under Rule 9(4) of the Rules of 1964. A perusal of the communications enclosed as Annexure I, J(colly) & L would show the tardy pace at which the Departmental proceedings are going on. The above Annexures therefore show that almost 6 months have gone by but till date, the stage of recording of the prosecution witness is yet to be over. It is under such circumstances, the impugned order dated 4/4/2023 was issued whereby taking into account the delay in completion of the enquiry proceedings, the respondent No. 2 has changed the Enquiry Officer and appointed one Shri Jadav Saikia to proceed with the enquiry as-is-where-is-basis of the proceedings and with a further mandate that the said Enquiry Officer shall submit the enquiry report within a period of 6 weeks without fail.

15. Be that as it may, it is pertinent to take note of the submission of Mr. K.N. Choudhury, the learned Senior Counsel who while challenging the order dated 4/4/2023 had drawn the attention of this Court to a judgment of the Constitution Bench of the Supreme Court in the case of **K.R. Deb Vs. The Collector of Central Excise, Shillong** reported in **(1971) 2 SCC 102**. Referring to paragraph No. 12, the learned Senior Counsel submitted that it is not permissible in terms with Rule 9(4) of the Rules of 1964 to change the

Enquiry Officer if the Enquiry Officer is to the disliking of the authority. Paragraph No. 12 of the said judgment to which the reference has been made being the edifice of the said submission is quoted herein below:

“12. It seems to us that Rule 15, on the face of it, really provides for one inquiry but it may be possible if in a particular case there has been no proper enquiry because some serious defect has crept into the inquiry or some important witnesses were not available at the time of the inquiry or were not examined for some other reason, the Disciplinary Authority may ask the Inquiry Officer to record further evidence. But there is no provision in Rule 15 for completely setting aside previous inquiries on the ground that the report of the Inquiring Officer or Officers does not appeal to the Disciplinary Authority. The Disciplinary Authority has enough powers to reconsider the evidence itself and come to its own conclusion under Rule 9.”

16. A perusal of the above quoted paragraph would reveal that there is a reference to Rule 15 of the Classification and Control Rules which is paramateria to Rule 9 (1) of the Rules of 1964. It further reveals that from the said paragraph that Rule 15 of the Classification and Control Rules envisages for one enquiry. But it has been further observed that it is possible in a particular case where there was no proper enquiry because of some serious defects, the Disciplinary Authority may ask the Enquiry officer to record further evidence. It was observed that there is no provision in Rule 15 for completely setting aside the previous enquiry on the ground that the report of the Enquiry Officer/Officers does not appeal to the Disciplinary Authority. It was further observed by the Supreme Court that the Disciplinary Authority have enough power to reconsider the evidence itself and come to its own conclusion under Rule 9 of the Rules of 1964.

17. A perusal of the above paragraph however in the opinion of this Court cannot be applied to the facts of the instant case inasmuch as the enquiry so held by the earlier Enquiry Officer was at a nascent stage where the evidence of

the Department was yet to be completed as could be seen from the communication dated 30/3/2023 (Annexure-N). Therefore the question of setting aside the enquiry further does not arise as no enquiry is yet to be completed. Furthermore, in the impugned order dated 4/4/2023, the new enquiry officer had been directed to proceed as-is-where-is basis of the proceedings. It is therefore, the opinion of this Court that the said submission of the petitioner is misconceived as at present there is no enquiry report so submitted and as such the judgment in the case of K.R. Deb(supra) is misplaced. Moreover, the Disciplinary Authority would be within its authority to replace the Enquiry Officer and the delinquent employee, in the opinion of this Court, would have no right to challenge the change in the enquiry officer unless a ground of malafide/bias can be alleged and proved against the newly appointed enquiry officer. Nothing of such sort appears in the present petition. Further to that, the new Enquiry Officer having been directed to complete the enquiry within a period of 6 weeks without fail, for which this Court finds no reason for interfering with the order dated 4/4/2023.

18. Consequently the instant writ petition stands disposed off with the following observations and directions :-

- (i) The order dated 4/4/2023 is in accordance with the provisions of Rule 9(4) of the Rules of 1964 and calls for no interference.
- (ii) The petitioner is entitled to the subsistence allowance from the date of her suspension dated 2/6/2022 and accordingly the respondent 1 and 2 are directed to forthwith disburse/release the subsistence allowance to the petitioner, if already the said amount has not been paid. The subsistence allowance be paid from the date

of the suspension dated 2/6/2022 till date within a period of 2 weeks from the date a certified copy of the instant order is served upon the respondent No. 2.

(iii) Further to that till the completion of the departmental proceedings or reinstatement of the petitioner whichever is earlier, the respondent authorities shall continue to pay the subsistence allowance in terms with FR 53 of the FR and SR as applicable to the State of Assam.

(iv) There shall be no order of costs in the present facts.

JUDGE

Comparing Assistant