

GAHC010243622022



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

Case No. : WP(C)/7768/2022

BARASHA BORAH BORDOLOI
W/O LT. DHARANI BORDOLOI, R/O AMAR ENCLAVE FLAT NO. D-41,
SURVEY BELTOLA GUWAHATI-28 P.O. BELTOLA AND P.S. BASISTHA DIST.
KAMRUP (M) ASSAM

VERSUS

THE STATE OF ASSAM AND 5 ORS
REP. BY THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM EXCISE
DEPP. DISPUR GUWAHATI-6

2:THE COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM EXCISE DEPP. DISPUR GUWAHATI-6

3:THE SECRETARY
TO THE GOVT. OF ASSAM EXCISE DEPP. DISPUR GUWAHATI-6

4:THE ADDITIONAL CHIEF SECRETARY
TO THE GOVT. OF ASSAM EXCISE DEPP. DISPUR GUWAHATI-6

5:THE COMMISSIONER OF EXCISE
ASSAM
HOUSEFED COMPLEX DISPUR GUWAHATI-6

6:THE DEPUTY COMMISSIONER
MORIGAON
ASSA

Advocate for the Petitioner : MR. J I BORBHUIYA

Advocate for the Respondent : SC, EXCISE DEPTT.

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 27.06.2023

Heard Mr. J.I. Borbhuiya, learned counsel for the petitioner and Mr. R.R. Gogoi, learned standing counsel for the respondents.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has assailed the impugned order dated 02.08.2022, issued by the Secretary to the Govt. of Assam, Excise Department, thereby placing the petitioner under suspension.

3. In brief, the case of the petitioner is that while she was posted as Superintendent of Excise at Morigaon, she was arrested on 29.07.2022 in connection with ACB P.S. Case No. 19/2022, registered under Section 7(a) of the Prevention of Corruption Act, 1988 on the basis of an FIR dated 28.07.2022, wherein it was alleged that she had demanded an amount of Rs.1,00,000/- which was scaled down to Rs.60,000/- for conversion of IMFL 'On' licence to IMFL 'Off' licence. Accordingly, the Secretary to the Govt. of Assam, Excise Department, by the impugned order under Memo no. EX.369/2011/Pt/28 dated 02.08.2022, placed the petitioner under suspension effective from the date of her arrest. The petitioner was released on bail vide order dated 14.09.2022, passed by the learned Special Judge, Assam. Thereafter, the petitioner had submitted her representation dated 30.09.2022 to the Secretary to the Govt. of Assam, Excise Department to revoke the suspension order and to reinstate her in service. Another representation dated 21.11.2022, was submitted by her before the Commissioner and Secretary to the Govt. of Assam, Excise Department for revoking the suspension order and for releasing her salary on

the ground that charge-sheet was not submitted on her. However, as the suspension order was not revoked, relying on the decision of the Supreme Court of India in the case of *Ajay Kumar Choudhary v. Union of India & Ors.*, (2015) 7 SCC 291, it was submitted that as charge-sheet had not been submitted within three months from the date of suspension, the impugned suspension order was liable to be quashed and that the petitioner had become entitled to be reinstated in service.

4. The learned counsel for the petitioner, by relying on the pleadings exchanged in this case had submitted that the respondent authorities had manufactured a back dated show cause notice dated 23.08.2022, but it was actually served on the petitioner on 10.12.2022, i.e. beyond 90 days of her suspension. It was submitted that the show cause notice could not have been served on the petitioner before 14.09.2022, as she was in judicial custody till then. It was also submitted that the petitioner would otherwise superannuate on 31.08.2023 and therefore, it would be just and appropriate to set aside the impugned order and direct the respondent authorities to allow the petitioner to resume her duties with all other service benefits.

5. In support of his submissions, the learned counsel for the petitioner has placed reliance on the following cases, viz., (i) *State of Assam v. Mrigen Haloi*, 2021 (4) GLT 682, (ii) *State of Assam & Anr. v. Ajit Sonowal & Ors.*, WA No. 114/2022, decided on 02.03.2023, (iii) *Rakibuddin Ahmed v. The State of Assam & Ors.*, WP(C) 3218/2017, decided on 04.10.2019, (iv) *Nipu Kalita v. The State of Assam & Ors.*, WP(C) 853/2020, decided on 22.04.2021, and (v) *Rafed Ali Ahmed v. The State of Assam & Ors.*, WP(C) 455/2023, decided on 17.02.2023.

6. Per contra, the learned standing counsel for the Excise

Department had submitted that this Court by order dated 19.12.2022, passed in this writ petition had observed to the effect that "... *The respondents may provide Mr. J.I. Borbhuiya, learned counsel for the petitioner a copy of the said show cause notice and the same under the law to be understood that the show cause notice had been served on the petitioner.*" Therefore, though the petitioner had accepted that she was served with show cause notice dated 23.08.2022, on 10.12.2022, in addition, the show cause notice was also deemed to be served on 19.12.2022. However, by producing the record of the Excise Department, it was shown by the learned departmental counsel that the petitioner had submitted her show cause reply on 12.12.2022, wherein she had admitted the receipt of show cause notice on 10.12.2022. It was submitted that the petitioner had informed the respondent authorities for the first time vide representation dated 30.09.2022 and therefore, the three month period to serve show cause notice on the petitioner would commence on and from 30.09.2022 and therefore, as the show cause notice was served on the petitioner on 10.12.2022, no case has been made out by the petitioner for revocation of her suspension.

7. At the outset, it may be stated that there is no dispute at the bar with regard to the ratio laid down by the Supreme Court of India in the case of *Ajay Kumar Choudhary (supra)*, and other decisions cited by the learned counsel for the petitioner, wherein the case of *Ajay Kumar Choudhary (supra)* was followed.

8. The only point is when the period of serving show cause notice on the petitioner would commence because admittedly from 29.07.2022 to 14.09.2022 the petitioner was under arrest and placed in judicial custody. During the said period of time, it would have been impossible for the

respondent authorities to serve show cause notice dated 23.08.2022 to the petitioner. The petitioner, for the first time, through her representation dated 30.09.2022, had informed the respondent authorities that she was released on bail by trial Court order dated 14.09.2022. Thereafter, the said show cause notice dated 23.08.2022 was served upon the petitioner on 10.12.2022 and that the petitioner had admitted the receipt thereof on 10.12.2022 in her show cause reply and moreover, the acknowledgement dated 10.12.2022, of the petitioner has been brought on record as Annexure-G to the affidavit-in-opposition filed by the respondent no. 3. Be that as it may, the show cause notice was also deemed to be served on 19.12.2022, which appears from the order dated 19.12.2022 passed in this proceeding.

9. In the cases cited by the learned counsel for the petitioner, the issue similar to one in this case was not present and/or discussed as to what would happen if the delinquent officer is in judicial custody and show cause notice cannot be served. This issue was raised and discussed in the case of *Rafed Ali Ahmed v. The State of Assam & Ors.*, WP(C) 455/2023, decided on 17.02.2023, by the coordinate Bench of this Court. This Court had observed and held as follows:-

“16. This Court, at this stage, would take note of the fact that the judgment in the case of Ajay Kumar Choudhury (supra) did not deal with the issue of deemed suspension. However, the Division Bench of this Court in the case of Rakibuddin Ahmed (supra) opined that the case of deemed suspension also the principles as laid down in the case of Ajay Kumar Choudhury (supra) would be applicable. However, the Division Bench in the case of Rakibuddin Ahmed (supra) did not deal with the question as to how the judgment in the case of Ajay Kumar Choudhury (supra) would apply and from when the period of three months would be reckoned. This Court finds it relevant at this stage to take note of Rule 6 (2) of the Rules of 1964 which is quoted herein below:-

“6(2). A Government servant who is detained in custody, whether on a criminal charge or otherwise, for a period exceeding forty-eight hours shall be deemed to have been suspended with effect from the date of such detention, by an order of the Appointing Authority and shall remain under suspension until further orders.

Provided that where the detention is made on account of any charge not connected with his position as a Government servant or continuance in office is not likely to embarrass the Government or the Government servant in the discharge of his duties or the charge does not involve moral turpitude, the Appointing Authority may vacate the suspension order made or deemed to have been made when he is released on bail or is not otherwise in custody or imprisonment.”

17. A perusal of the above Rules would show that the Government servant who is detained in custody, whether on a criminal charge or otherwise, for a period exceeding forty-eight hours shall be deemed to have been suspended with effect from the date of such detention, by an order of the Appointing Authority and shall remain under suspension until further orders. The proviso to said Rule mandates that where the detention is made on account of any charge not connected with the delinquent officer's position as a Government servant or continuance in office is not likely to embarrass the Government or the Government servant in the discharge of his duties or the charge does not involve moral turpitude, the Appointing Authority may vacate the suspension order made or deemed to have been made when he is released on bail or is not otherwise in custody or imprisonment.

18. The said provision, therefore, would show that if a Government servant who is in custody for a period exceeding 48 hours shall be deemed to be suspended with effect from the date of such detention by an order of the Appointing Authority and the Government servant shall continue to remain in suspension until further orders. Therefore, till the Government servant remains in custody or imprisonment after the initial period of 48 hours he/she shall continue to remain under suspension. The judgment of the Supreme Court in the case of Ajay Kumar

Choudhury (supra) neither dealt with a case of suspension under Rule 6 (2) of the Rules of 1964 nor dealt with the issue of deemed suspension which was on account of person remaining in custody or imprisonment after the initial period of 48 hours. The said judgment of the Supreme Court also do not deal with the question as how a person in custody or imprisonment can be served with the Memorandum of charges/chargesheet or for the matter whether the delinquent employee would have a reasonable opportunity as required under Article 311 (2) of the Constitution when the delinquent officer is in custody or imprisonment.

19. The above aspect of the matter can also be seen from another angle. By virtue of Section 6 (2) of the Rules of 1964, a Government servant, upon being detained in custody for a period of exceeding 48 hours, would be deemed to have been suspended with effect from the date of such detention by an order of the Appointing Authority and shall remain under suspension until further orders. The said Sub-Rule, therefore, mandates that till the Government servant who had been suspended is not released on bail or not otherwise in custody or imprisonment, shall remain suspended. The question of setting aside the suspension till the Government servant remains in custody or imprisonment cannot arise and if it is held that such Government servant is to be reinstated for not serving the Memorandum of charges/charge-sheet upon completion of 3 (three) months from the date of suspension, it would be contrary to Rule 6 (2) of the Rules of 1964 which continues to hold the field. Now coming to the judgment of the Supreme Court in the case of *Ajay Kumar Choudhury (supra)*, it would be seen that reasons behind the directions in paragraph Nos.20 & 21, as quoted above, have been spelt out in paragraph Nos.11 & 12 of the said judgment. In the opinion of this Court, the directions in paragraph No.21 of the said judgment in *Ajay Kumar Choudhury (supra)* can only be applied when the Government servant is released on bail or otherwise not in custody or imprisonment.

20. A very pertinent question, therefore, arises as to from which period the directions in paragraph No.21 of the judgment of the Supreme Court in the case of *Ajay Kumar Choudhury (supra)* shall apply in the case of Deemed Suspension. It would be seen that the judgment of the Division Bench of this Court in the case of

Rakibuddin Ahmed (supra), however, with due respect, did not deal with this question. An insight to the same can be unraveled from the proviso to Rule 6 (2) of the Rules of 1964. The proviso speaks upon the following conditions upon which the Appointing Authority may vacate the suspension order when the Government servant is released on bail or is not otherwise in custody or imprisonment. They are:-

- (i) Where the detention is made on account of any charge not connected with the Government servant's position; or*
- (ii) Where the detention is not likely to embarrass the Government or the Government servant in discharge of his duties; or*
- (iii) Where the charge does not involve moral turpitude.*

However, upon applying the judgment of the Supreme Court in the case of Ajay Kumar Choudhury (supra) and the judgment of the Division Bench of this Court in the case of Rakibuddin Ahmed (supra), a fourth condition can be culled out, i.e.:-

- (iv) Where the Memorandum of charges/ charge-sheet is not served upon the delinquent officer/employee within 3 (three) months from the date of release on bail or released from any custody or imprisonment and if the Memorandum of charges/charge-sheet is served, a reasoned order must be passed for the extension of suspension.*

Now the question, therefore, arises that when the above mentioned conditions can be taken into consideration by the Appointing Authority. In the opinion of this Court, the conditions above noted can only be taken into consideration when the delinquent officer/employee brings the fact that he/she has been released on bail or otherwise not in any custody or imprisonment to the Appointing Authority who has the power to vacate the suspension order.

21. Now coming to the instant case, it would be seen that it was only on 07.12.2022 that the petitioner was released on bail. There is not a single mention in the writ petition to the effect that as to whether the petitioner had informed the Appointing Authority that he has been released on bail. Be that as it may, this Court having issued notice on 01.02.2023 would deem that the respondent

authorities have notice that the petitioner has been released on bail on 07.12.2022. Taking into account the said date of issuance of notice, i.e. on 01.02.2023, the respondent authorities have time till 30.04.2023, i.e. 3 (three) months to take appropriate steps in terms with the observations made in paragraph No.20 herein above as well as Paragraph No.21 of the judgment in the case of Ajay Kumar Choudhury (supra). It is further observed that the above observations shall not preclude the Appointing Authorities to reinstate the petitioner to his office in the attending facts, if during this period upto 30.04.2023, the Appointing Authority deems it proper to reinstate the petitioner.

22. It is made clear that that if within 30.04.2023, the Memorandum of charges/charge-sheet is not served upon the petitioner, the further continuance of suspension vide the impugned order dated 15.10.2022 would be in violation to the order passed by the Supreme Court in the case of Ajay Kumar Choudhury (supra). Consequently, the concerned Appointing Authorities would have to reinstate the petitioner forthwith thereafter.

23. With the above observations and directions, the instant writ petition stands disposed of."

10. I respectfully concur with the ratio laid down in the herein before referred case that it would become incumbent on the disciplinary authority to serve show cause notice on the delinquent employee within 90 days from the date of knowledge of the authorities that the delinquent employee is out on bail. It may also happen that the delinquent officer is absconding to evade arrest and is nowhere to be found. Under such circumstances, it would be impossible for the disciplinary authority to serve show cause notice to the delinquent and such officer would be able to reap the benefit of evading his arrest and acknowledging receipt of show cause notice and securing his/her reinstatement in the interregnum.

11. In light of the discussions above, the Court is inclined to hold

that the petitioner had informed the Secretary to the Govt. of Assam, Excise Department (respondent no. 3) that she was released on bail vide representation dated 30.09.2022. Therefore, it was incumbent on the said authority to serve show cause notice to the petitioner within three months thereafter, and such duty had been discharged by the Secretary to the Govt. of Assam, Excise Department (respondent no. 3) on 10.12.2022, i.e. within the three month period from the date of representation dated 30.09.2022 by the petitioner.

12. Therefore, the petitioner is not found to be entitled to reinstatement in service by revoking her suspension. Accordingly, this writ petition fails and the same is dismissed.

13. The parties are left to bear their own cost.

JUDGE

Comparing Assistant