

GAHC010115662016



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

Case No. : WP(C)/4407/2016

HORESWAR BARUAH
S/O LT. BIPIN BARUAH, VILL. BALIJAN MAHARANI, P.O. BARSAPORI, P.S.
PANITOLA, DIST- TINSUKIA, ASSAM, PIN-786163

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSIONER and SECY. TO THE GOVT. OF ASSAM, HOME
DEPTT., DISPUR, GUWAHATI, P.O. ASSAM SACHIVALAYA, P.S. DISPUR,
DIST- KAMRUP METRO, ASSAM, GHY-6

2:THE DIRECTOR GENERAL OF CIVIL DEFENCE and COMMANDANT
GENERAL OF HOME GUARDS
ASSAM BELTOLA
GUWAHATI-28
P.O. BELTOLA
P.S. BAISISTHA
DIST- KAMRUP METRO
ASSAM

3:THE SENIOR STAFF OFFICER G
O/O THE DIRECTOR GENERAL OF CIVIL DEFENCE and COMMANDANT
GENERAL OF HOME GUARDS
ASSAM BELTOLA
GHY-28
P.O. BELTOLA
P.S. BAISISTHA
DIST- KAMRUP METRO
ASSAM

4:THE DY. SECY. TO THE GOVERNOR

ASSAM
RAJ BHAVAN
GUWAHATI
P.O. UZAN BAZAR
P.S. LATASIL DIST- KAMRUP METRO
ASSAM
PIN-781001

5:THE COMMANDANT
ASSAM SPECIAL RESERVE FORCE BATTALION-II
KARAGAON
KARBI ANGLONG
ASSAM
P.O. BOKAJAN
P.S. KHATKHATI
DIST- KARBI ANGLONG
ASSAM
PIN-78248

Advocate for the Petitioner : MR.S K SINHA

Advocate for the Respondent : GA, ASSAM

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

ORDER

Date : 13-06-2024

Heard Mr. B.P. Sinha, learned counsel for the petitioner as well Ms. M. Bhattacharjee, learned Addl. Senior Govt. Advocate is present for the respondent.

2. In brief the case of the petitioner is that while serving as Constable in the Assam Special Reserve Force, Battalion-II at Karagaon in the district of Karbi Anglong, he had received information on 03.02.2002 that his father had expired. As per the medical advise issued by the Medical and Health Officer-I, Tinsukia Civil Hospital, Bipin Baruah, father of the petitioner, resident of Baliyan Maharani

village under P.O. Panitola, district Tinsukia was under his treatment since 20.12.2001 till his death as he was suffering from acute leukaemia and he expired on 03.02.2002.

3. The petitioner projects that before leaving the battalion, he had submitted an application for leave to Subedar Purnananda Buragohain and he was verbally allowed to perform the funeral and obsequial rites of his father. The petitioner returned to his platoon to resume his duty on 10.03.2002 with a prayer to allow him to join. However, the Platoon Commander accepted his joining and handed over a command certificate dated 10.03.2002 to report to the Company Commander at the Company Headquarter by wearing government uniform. Accordingly, the petitioner reported to the Company Headquarter and by submitting an application dated 12.03.2002, prayed for allowing him to resume his duty. However, he was not permitted to resume duty. Thereafter, the petitioner was served with a notice dated 08.08.2002 to resume duty along with his written explanation as to why disciplinary action should not be taken against him. On receipt of the same, the petitioner approached the Commandant on 21.08.2002 and prayed for resuming his duty. However, the petitioner was not allowed to resume his duty. Thereafter, the petitioner had submitted a representation dated 12.08.2003 to the Director General of Civil Defence and Commandant General of Home Guards, Assam with a prayer to allow him to resume his duty, wherein he had informed that his father had died on 03.02.2002 and he had submitted his leave application for performing the funeral and other rites of his father.

4. Thereafter, the Director General of Civil Defence and Commandant

General of Home Guards, Assam by a letter dated 09.09.2003, informed the Secretary to the Govt. of Assam Home (B) Department that the total number of dismissed and suspended personnel of 1st and 2nd Assam Special Reserve Force Battalion were 75 nos. dismissed and 13 nos. suspended, and that their cases could only be considered on filing an appeal to the Directorate against the orders of the Commandant and not otherwise. In the list of the dismissed personnel, the name of the petitioner was at Sl. No.3.

5. Thereafter, the petitioner was served with a show-cause notice dated 15.10.2003, responding to 3 (three) charges made against him, which was supported by statement of allegations in connection with DP no.5/2003, list of documents and list of witnesses submitted his show-cause reply dated 11.11.2003.

6. On consideration of the inquiry report, the petitioner was served with a second show-cause notice dated 23.03.2004, informing that the charges against him was proved and he was asked to submit representation, if any, within 10 days as to why he should not be removed from service.

7. Thereafter, by order dated 06.02.2009 issued by the Commandant, Assam Special Reserve Force Battalion-II, the petitioner was dismissed from active service of the Battalion with immediate effect and the period of absence from 04.02.2002 till 06.02.2009 was treated as *dias non* and accordingly, DP no.5 of 2003 was disposed of.

8. The petitioner had approached the Court by filing WP(C) 1310/2006 and this Court by order dated 03.05.2015, disposed of the writ petition by directing the Director General of Civil Defence to pass an appropriate order in reference to order dated 09.09.2003, if not already passed, as expeditiously as possible.

9. Thereafter, an order dated 29.05.2013 was passed pursuant to order passed by this Court in WP(C) 1310/2006 wherein it is mentioned that the petitioner was dismissed from service. The petitioner thereafter filed a petition dated 19.08.2013 before the Director General of Civil Defence and Commandant General of Home Guards, Assam praying for review of the order dated 29.05.2013.

10. By a letter dated 05.09.2013, the petitioner was informed that his petition dated 13.05.2013 and 12.08.2013 had already been disposed of for which his application dated 19.08.2013 could not be considered.

11. The petitioner thereafter filed a petition dated 07.01.2014 before the Governor of Assam with a prayer for review of the order dated 29.05.2013 and 05.09.2013 passed by the Director General of Civil Defence and Commandant General of Home Guards, Assam. The said petition was forwarded for consideration to the Director General of Civil Defence and Commandant General of Home Guards, Assam and on receipt of the same, by a response dated 14.07.2014 addressed to the Deputy Secretary to the Govt. of Assam, reasons were assigned for holding that the petitioner was an indisciplined personnel and was unfit to be retained in a disciplined force and that his reinstatement will ruin

the force discipline in the long run and create bad precedence in the Force and accordingly, the representation of the petitioner was summarily rejected.

12. The case of the petitioner was that Taser Ali Ahmed who was the then General Secretary of the Assam Special Reserve Force Battalion, Unnayan Samity was called for reinstatement in service pursuant to which by an order dated 26.10.2004, the said person was reinstated in service without holding any disciplinary action, but the petitioner though not involved in the said Samity was removed from service though he was not associated with the said Unnayan Samity.

13. Accordingly, by filing this writ petition under Article 226 of the Constitution of India the petitioner has prayed for setting aside and quashing of the orders dated 06.02.2009 by which he was removed from service; order dated 29.05.2013 passed by the respondent no.2; order dated 05.09.2013 passed by the respondent no.3 and order dated 14.07.2014 passed by the respondent no.3.

14. The learned Addl. Senior Govt. Advocate has referred to the stand taken in the affidavit-in-opposition filed by the respondent nos.2 and 3 and separately filed by the respondent no.5.

15. As per the first show-cause notice dated 15.10.2003, the petitioner was asked to show cause based on the three following charges:

“Charge No.1: That while you were posted to 'A' Coy, you were

found absent from duty without authority w.e.f. 4-2-02 A. N. but till date you have neither reported for duty nor sent any information regarding your inability to resume duty which is quite unbecoming on the part of a force personnel like you.

You are therefore charged with gross misconduct.

Charge No.2: During your unauthorised absence from duty, a notice was issued to you vide NomAS RF Bn. II/R/PF/378/02/198/- 6605-06 Dtd. 08-8-02 asking you to resume duty immediately. But till date you have neither reported for duty nor sent any information.

You are therefore charged with gross indiscipline conduct.

Charge No.3: That while you were absent from duty without authority w.e.f. 4-2-02 A. N. you had been found to associate yourself with an unrecognized association in the name & style of "Assam Special Reserve Force Bn. Unnayan Somity". Such action is contrary to rule-23 of Assam Civil Services (Conduct) Rules- -1965.

You are therefore charged with gross misconduct.

16. As per the statements of allegation in DP no.5 of 2003 wherein it is stated that the petitioner is found absent from duty from the afternoon of 04.02.2002, without any permission from the competent authority and till the date of the statement of allegations (i.e. 15.10.2003), the petitioner had neither reported for duty nor informed anything about his inability to resume duty which was unbecoming on the part of the Force Personnel. It was also stated that during the unauthorised absence from duty, notice dated 08.08.2002 was issued to him and he was asked to resume duty immediately but he did not reported for duty or sent any information. It was also stated that while the petitioner was absent from duty he was found to have been associated himself with an unrecognized association in the name and style of Assam Special Reserved Force Battalion Unnayan Samity which was contrary to the Rule 23 of the Assam Civil Service (Conduct) Rules, 1965.

17. Four documents were entered in the list of documents and two witnesses namely, Sub. Purmananda Buragohain and Sub. W. Hussain, R.I. were entered in the list of witness.

18. In the reply dated 11.11.2003, the petitioner has given an explanation that since his father had expired and he was the only son to do the last funeral ceremony and obsequial rites, it is stated that no leave certificate was given to him and that he was not allowed to resume his duty or to join after reporting to the Company Commander on 12.03.2002. It is also stated that after receiving notice dated 08.08.2002, he had gone to the Battalion Headquarter for resuming duty by submitting an application dated 21.08.2002, he was not allowed to join. The petitioner had also denied that he is involved with the said Association and had also denied that he had committed any of the charges mentioned in the first show cause notice.

19. The learned Addl. Senior Govt. Advocate by referring to the stand taken in the affidavit-in-opposition filed by the respondent nos.2 and 3 as well as separate affidavit-in-opposition filed by the respondent no.5 has submitted that there is no procedural illegality in conduct of the departmental proceedings and as per the record, the petitioner did not participate during the departmental inquiry as well as he was not present and did not cross-examine any of the departmental witness. It is also submitted that as the petitioner was unauthorisedly absent from duty, no ground is made out by the petitioner for interference against the order passed in the departmental proceeding by which the petitioner was removed from service or to interfere with the appellate order.

20. In the present case in hand, it is not in dispute that the father of the petitioner had expired on 03.02.2002. It cannot be the stand of the State respondents that a person who belongs to the uniformed force cannot be permitted to go to the place where his father had expired to perform the funeral ceremony and other last rites.

21. The projection of the respondents is that the petitioner had left the place of posting without submitting any application for leave and without obtaining any order to leave the post. Para-3 of the writ petition wherein the petitioner has projected that he has submitted a leave application to Sub. Purnananda Boragohain who had verbally allowed him to perform funeral and obsequial rites of his father.

22. On a perusal of the inquiry report in respect of the three charges framed against the petitioner in the departmental proceeding, the Inquiry Officer had recorded that the Incharge Coy. Commander Sub. Purnananda Buragohain had stated in his statement that the petitioner was absent from duty without permission and Company Headquarter from 04.02.2002 afternoon though expected to return on 08.02.2002, and when he did not return on 08.02.2002, the Commandant was informed regarding the absence through WT message. From the said statements of the witness no.1, it is difficult to accept because it is the pleaded case of the petitioner that he left his post on 03.02.2002 and not on 04.02.2002 as claimed by the said witness. Moreover, if the said witness no.1 of the respondents was not informed by the petitioner that he was leaving the post, on what basis the said witness got an idea that the

petitioner would be returning on 08.02.2002. The said knowledge of the witness no.1 is indicative of the fact that the petitioner must have given him some verbal information and that is why the absence of the petitioner from 04.02.2002 till 07.02.2002 was not reported.

23. The third charge against the petitioner is that he had associated himself with an unrecognized Association in the name and style of Assam Special Reserved Force Battalion Unnayan Samity which was contrary to the Rule 23 of the Assam Civil Service (Conduct) Rules, 1965. By statement made in para-51 of the writ petition, the petitioner has projected that one Taser Ali Ahmed, who was the General Secretary of the said Samity had filed a petition before the Director General of Civil Defence and Commandant General of Home Guards, Assam for reinstating him in service and the said authority by an order dated 26.10.2004 reinstated the same person in service. The said statement of the petitioner has not been denied and the respondent nos. 1 and 2 in their affidavit-in-opposition has clearly stated that the petitioner was charged for his association with the said Unnayan Samity. The respondent no.5 in his affidavit-in-opposition has offered no comment to the statement made in paragraph-51 of the said writ petition. Therefore, owing to non-denial of specific allegation, the said fact is deemed to be admitted by the respondents.

24. From the document annexed to the writ petition as *Annexure-U*, it is seen that the Senior Staff Officer (G) of the Office of the Director General of Civil Defence and Commandant General of Home Guards, Assam had addressed a letter to said Taser Ali Ahmed by referring him to as the General Secretary, ASRF Unnayan Samity, granting permission to him to meet the Director General

of Civil Defence and Commandant General of Home Guards, Assam. The said Samity was definitely known to the respondents.

25. As per the inquiry report, in respect of charge no.3 the specific finding is to the effect that the two witnesses did not say anything about the charge no.3 levelled against the petitioner in departmental proceeding as such as charge no.3 is concerned, we did not find any material on record to sustain such charges.

26. The petitioner has annexed to this writ petition a copy of the letter no. CG.33/2000/300 dated 09.09.2003 which is written by the Director General of Civil Defence and Commandant General of Home Guards, Assam and was addressed to the Secretary to the Govt. of Assam, Home (B), Department. By referring to the subject of meeting of the Committee on petition, Assam Legislative Assembly wherein it is informed to the said authority that 75 nos. of personnel of 1st and 2nd ASRF Battalion had been dismissed from service and in the said communication a reference has been made to appeal petitions filed amongst other by the petitioner, referring him to be a dismissed personnel from the 2nd ASRF Battalion. The statement to that effect is made in paragraph-10 of the writ petition and in response to the same the respondent nos. 2 and 3 in their affidavit-in-opposition has stated that it was due to communication gap from the petitioner's Headquarter that he was shown to be dismissed but at that time he was not dismissed from service.

27. It is seen that although the said affidavit-in-opposition is stated to be

filed on behalf of respondent nos.2 and 3, but the said affidavit was sworn by a Senior Staff Officer in the office of the respondent no.2 and he had stated that he has been authorized to swear the affidavit on behalf of respondent no.2. The authorization letter is not annexed to the affidavit-in-opposition and the reply to statement made in para-10 of the writ petition is made in para-6 of the affidavit-in-opposition is neither verified to be true to his knowledge. However, it is stated that the statement is verified to be matter of record. No records are produced to show that the said statement was subsequently modified to inform the competent authorities that the petitioner was not dismissed from service. It is again in the stand of the respondents, because if the petitioner is not removed from service, why did the respondent nos.2 and 3 acknowledge the receipt of an appeal. There could not have been an appeal filed before any conclusion was drawn because as on 09.09.2003 the departmental proceeding was not even initiated. The departmental proceeding was initiated by issuance of a show-cause notice dated 15.10.2002.

28. Once the petitioner has been able to demonstrate that he was removed from service as communicated by letter dated 09.09.2003, the disciplinary proceedings initiated against the petitioner itself becomes a questionable act of the respondents.

29. Even otherwise, the unauthorised absence of the petitioner on account of death of his father for the purpose of performing the funeral and other last rites is an explanation that has to be considered by the respondent authorities as a mitigating factor and therefore, the order of dismissal of service appears to be disproportionate and has shocked the conscience of the Court.

30. In view of the fact that as the respondent no.2 authority being the Director General of Civil Defence and Commandant General of Home Guards, Assam vide his communication dated 09.09.2003 has already sent a report to the competent authorities in the Home Department of the State regarding removal of the petitioner. The very process of the departmental inquiry as stated above is questionable and therefore, the initiation of the departmental proceedings by issuance of a show-cause notice dated 15.10.2003 is not found sustainable as because before issuance of such show-cause notice, the respondent authorities must take a decision as to whether the petitioner was removed from service or not as communicated to the Home Department. Moreover unless the said communication under Memo no.CG/33/2000/300 dated 09.09.2003 by the respondent no.2 to the Secretary to the Govt. of Assam (Home) (B), Department is not recalled or rectified for all purposes, the said document would be indicative of the fact that the respondent authorities would have first dismiss the petitioner from service and thereafter, conducted the disciplinary proceeding against him.

31. Moreover, there is another issue which has been highlighted by the petitioner. In paragraph-21 of the writ petition, the petitioner has made a statement to the effect that the notice about the inquiry was served on him on 03.12.2003, requiring him to be present at the Battalion headquarter for giving evidence in the departmental proceedings on 04.12.2003. He has stated that the said notice was served on 03.12.2003 with an object to not give reasonable and sufficient time to the petitioner to participate in the inquiry and that no person ever went to his house to serve notice about the inquiry before

03.12.2003. He has further stated that he had gone to the Battalion headquarter to participate in an inquiry but he was not allowed to enter into the Battalion area as per the order of the then Commandant. The respondent nos.2 and 3 have merely stated in their response to the said allegations that there is no available record that the petitioner was denied entry to the Battalion headquarter and there is no deny to the fact that notice was served on 03.12.2003. The respondent no.5 in their affidavit-in-opposition and in reply to paragraph-21 of the writ petition has stated that the argument of the petitioner that their object to not give reasonable and sufficient time to the petitioner to participate is imaginary and contradicted by the petitioner himself by stating that the petitioner went to the Battalion headquarter to participate in the inquiry. Therefore, the respondent no.5 has not denied that the petitioner never went to the Battalion Headquarter to participate in the inquiry. There is still no explanation as to why notice was served on 03.12.2003 for an inquiry to commence from 04.12.2003. Therefore, it appears that the petitioner has not been given opportunity of defending himself and the principles of natural justice was not complied with which is another reason for interfering with the departmental inquiry report dated 05.01.2004. Consequently, the impugned order dated 06.02.2009 vide no. ASRF BN.II/R/DP/Ct.378/09/57 issued by the Commandant, ASRF Bn.II, Karagaon as well as the appellate order no.CG.26/2006/67 dated 29.05.2013 are liable to be set aside and quashed hereby.

32. It is further provided that in the event the Director General of Civil Defence and Commandant General of Home Guards, Assam, is given the liberty that in the event he desires to proceed *de novo* inquiry against the petitioner,

the said authority shall have to produce the communication to the petitioner by which the said authority had withdrawn the letter no.CG.33/2000/300 dated 09.09.2003 issued to the Secretary to the Govt. of Assam, Home (B) Department, by which the name of the petitioner was shown as dismissed from the 2nd ASRF Battalion. The said authority shall also ensure that the petitioner was in service till his order of termination dated 06.02.2009 was issued by the Commandant, ASRF-Bn.II, Karagaon and only on that satisfaction, he may authorise the Commandant, ASRF Battalion-II to proceed *de novo* inquiry against the petitioner. The respondent authorities shall take a decision to commence a *de novo* proceeding against the petitioner and would also pass necessary orders as to how to treat the petitioner during the commencement of the *de novo* trial.

33. In the event, the respondent authority do not envisage a *de novo* departmental proceeding against the petitioner, the petitioner shall be entitled to be treated in service for the entire period. As the petitioner has not been under service from 03.02.2002 till date, he would be entitled to 50% of his back wages and the said period will be treated as *dias non* and consequential orders shall be passed by the respondent authorities.

34. Necessary orders in respect of both options left open to the respondent no.2 shall be passed within an outer limit of 1 (one) month from the date of receipt of the certified copy of this order.

35. This writ petition stands allowed with aforesaid observations.

JUDGE

Comparing Assistant