

GAHC010295792019



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

Case No. : WP(C)/8987/2019

NIDANUL ISLAM
S/O MD. MOKBUL HAQUE, R/O NAMAR GAON, P.O.-RADHAMADHAB HAT,
P.S.-MAKCACHAR, DIST-SOUTH SALMARA MANKACAH, PIN-783131

VERSUS

THE STATE OF ASSAM AND 4 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, HOME DEPARTMENT, DISPUR, GUWAHATI-6

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

3:THE ADDL. DIRECTOR GENERAL OF POLICE (T AND AP)
ASSAM
ULUBARI
GUWAHATI-7

4:THE SUPERINTENDENT OF POLICE
JORHAT
P.O.
P.S. AND DIST-JORHAT
ASSAM
PIN-785001

5:THE ENQUIRY OFFICER NAMELY SHRI. PRAKASH SONOWAL
APS
-CUM- ADDL. SUPERINTENDENT OF POLICE (HQ)
JORHAT
ASSAM

P.O. AND DIST-JORHAT
ASSAM
PIN-78500

Advocate for the Petitioner : MR. U K NAIR

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY**

ORDER

Date : 28-03-2024

1. Heard Mr. R. Islam, learned counsel for the petitioner. Also heard Mr. T. C. Chutia, learned Additional Senior Government Advocate, Assam representing the respondents.
2. The petitioner is presently serving as Inspector in the Office of the CID, Ulubari. While the petitioner was posted as In-Charge, at Deberapar Police Outpost under Moriani Police Station, Jorhat, Assam, an incident of firing by police took place, wherein one minor boy was killed and another person got injured.
3. On the backdrop of the aforesaid incident, the Superintendent of Police, Jorhat, Assam issued a show cause notice dated 23.08.2013 under Section 65 of the Assam Police Act 2007 read with Rule 66 of Assam Police Manual Part-III and Article 311 of the Constitution of India and also under Rule 7 of the Assam Service (Disciplinary & Appeal) Rules 1964, asking the petitioner as to why any penalties prescribed in the said Rules should not be inflicted upon the petitioner on the three charges framed

4. The charges are quoted herein below:-

I. While you were posted at Deberapara OP as I/C on 18.08.2013 at about 8:30 P.M., at Dhodoralu near Hemlai TE 10/15 police personnel under your leadership fired upon a mob indiscriminately. As a result of which one innocent Sri Sujit Nayak of Hemlai TE died at the spot and other Sri Rajib Nayak of Hemlai TE got grievous injuries of his person. In this regard a case has been registered at the Teok PS vide case No. 211/2013 U/S 326/302 IPC.

II. Being a member of a disciplined force your above act is gross in-disciplined and misconduct.

III. You are therefore charged for willful indiscipline and misconduct”.

5. Thereafter, the petitioner replied to such charges and denied such allegations. An Enquiry Officer was appointed to enquire into the matter. In the departmental enquiry, the petitioner fully participated. After completion of the enquiry, the Enquiry Officer submitted his report.

6. The findings of the Enquiry Officer were to the effect that due to assault by mob upon the police party and to save the life of the police personnel and to save public property from damage, blank firing was resorted to inasmuch as the petitioner and other police personnel were badly beaten up by the unruly crowd. It was also a finding that the crowd tried to pull the petitioner as well as one Tuleswar Gogoi and tried to cut them into pieces with sharp deadly

weapons. The Enquiry Officer further concluded that as already two police men were badly injured, finding no other alternative to defend themselves from the violent armed mob, which had intention to kill the police party at the spot, controlling fire was opened into the air by the police. The Enquiry Officer exonerated the petitioner from all the charges.

7. On the basis of such Enquiry Report, the Disciplinary Authority, passed an order on 17.01.2015 agreeing with the findings of the Enquiry Officer and concluded as follows:-

I. After going through the Departmental Proceeding file & the findings of the Enquiry Officer, weighing the pros and cons of the evidence adduced and applying my mind, I Shri Abhijit Bora, the Disciplinary Authority come to the conclusion that the charges brought against the delinquent of willful in-disciplined conduct and misconduct for violation of provision of the Section 65 of the Assam Police Act 2007 R/W Rule 66 of APM Part-III Article 311 of Constitution of India & Rule 7 of the Assam Service (Disciplinary & Appeal) Rules 1964 are not proved beyond all reasonable doubts as circumstances & the right of private defense come into play. Accordingly, I agree with the findings of the Enquiry Officer, Md. Hussain, APS, Deputy Superintendent of Police (HQr), Jorhat.

II. Hence I, Shri Abhujit Bora, Superintendent of Police and also being the Disciplinary Authority order for dropping the departmental proceeding subject to the verdict of the trial of Teok P.S. Case No. 2011/13 U/S 326/302 IPC. The delinquent is thus absolved of the

charge brought against him. Let the copy of this order be served on the delinquent and all concerned. The Departmental proceeding is disposed off accordingly. The Reserve Officer, Bongaigaon for D.O. and entry into the Service Sheet”.

8. Thereafter on 02.08.2018, a fresh show cause notice was issued proposing a de-novo enquiry. The petitioner replied to such show cause notice and also raised a challenge to the authority to initiate such de-novo enquiry. Thereafter, by an order dated 29.10.2019, an enquiry officer was appointed.

9. This Court under its order dated 09.12.2019, while issuing notice, stayed the further proceeding initiated pursuant to the impugned order dated 29.10.2019.

10. Mr. Islam, learned counsel for the petitioner argues that when, after a detailed departmental enquiry the petitioner has been exonerated by the employer, the employer shall have no right to initiate a de-novo enquiry on the same set of facts inasmuch as the employer has clearly concurred with the finding of the Enquiry Officer.

11. Per contra, Mr. Chutia, learned counsel representing the respondent/employer submits that though the petitioner was exonerated by the department after a due enquiry, however, the de-novo enquiry has been initiated by virtue of recommendation of “One Man Enquiry Commission” to enquire into the incident that took place at Hemlai TE, in Jorhat District on 18.08.2013.

12. Mr. Chutia, learned counsel contends that the Government of

Assam, by its notification dated 11.09.2019 appointed a "One Man Enquiry Commission" to enquire into the incident of firing in question. Thereafter, One Man Enquiry Commission suggested for fixing responsibility on the petitioner, who was In-Charge of Deberapara Out Post. Accordingly, the Joint Secretary to the Government of Assam, Home and Political Department, by its communication dated 01.11.2017 requested the Director General of Police, Assam for taking disciplinary action against the petitioner for failing to tackle the situation as directed by the Enquiry Commission and accordingly, on the basis of such communication, the Director General of Police, Assam set aside the order of Disciplinary Authority dated 17.01.2015 and ordered for a de-novo departmental proceeding against the petitioner and accordingly, the impugned show cause notice was issued.

13. Mr. Chutia, learned counsel further submits that as the Enquiry Commission has recommended and suggested for a departmental proceeding against the petitioner, the State is left with no other option but to initiate a de-novo proceeding. Therefore, such action cannot be termed as an arbitrary action and therefore, such departmental proceeding should not be interfered with.

14. This Court has given anxious consideration to the submissions advanced by the learned counsel for the parties.

15. Perused the materials available on record. Mr. Chutia, learned counsel also produced the recommendation of the One Man Enquiry Commission, which is also perused.

16. The disciplinary proceeding was conducted in terms of Assam Services (Disciplinary and Appeal) Rules' 1964. Sub-rule 9 of Rule 9 of the Rules 1964 does not empower or vest any power in the disciplinary authority enabling the said authority to hold a fresh / de-novo enquiry, in the event the disciplinary authority is in disagreement with the finding of the enquiry officer. While dealing with similar rule i.e. Rule 15 of the CCS (Classification Control and Appeal) Rules, 1957 the Hon'ble Apex Court in **K.R. Dev vs Collector of Excise, Shillong** reported in **AIR 1971 SC 1447** laid down certain principles as regards power of de-novo enquiry, which is culled out as follows:

- I. The normal rule is that there can be only one enquiry.
- II. In certain circumstances a "further enquiry" can be done, when it has been concluded that there has been no proper enquiry for reason of some serious defects or when some important witnesses were not available at the time of enquiry or they were not examined for some other reasons.
- III. The report submitted by the enquiry officer, if not acceptable to the disciplinary authority, the same cannot be a reason for ordering a second enquiry.

17. The principle is by now too well settled that a second departmental enquiry cannot be ordered on the same set of allegations and on the basis of similar charges, after a departmental enquiry is already over and a public servant has been exonerated, subject to the principle as discussed hereinabove.

18. In the case in hand, admittedly the disciplinary authority passed the order dated 17.01.2015 agreeing with the findings of the enquiry officer, after going through the material available in the departmental proceedings, after analysing finding of the enquiry officer and after appreciating the evidence.

19. Therefore, in absence of any conclusion by the disciplinary authority of existence of the conditions, as detailed hereinabove, required to initiate a de-novo proceedings and that too after agreeing with the finding of the enquiry officer and exonerating the petitioner, the disciplinary authority shall have no sanction and authority under law to take the impugned decision.

20. Under the Rules 1964, more particularly under Rule 9(9), the disciplinary authority can either accept and agree with the findings and recommendation of the enquiry officer or such authority is having power to reconsider/re-appreciate the material gathered during the enquiry by itself and may come to their own conclusion. However, as discussed herein above, the first course of action was adopted, which is clear from the order dated 17.01.2015. That being the position, on this count also the disciplinary authority is not within its competence and jurisdiction under law, more particularly under the Assam Service (Discipline and Appeal) Rules, 1964 and under Rule 66 of Assam Police Manual framed under the Assam Police act, 2007 to initiate the de-novo enquiry.

21. So far relating to the recommendation made by "One Man Commission", it is an admitted position that the request to take

disciplinary action against the petitioner was made by the Joint Secretary of the Home and Political Department on 01.11.2017 and therefore, on such date even without having knowledge of such recommendation the departmental proceeding was initiated, concluded and the petitioner was exonerated on 17.01.2015. Therefore, the recommendation of the One Man Commission was already implemented. Therefore, the action of the Director General of Police issuing a show cause only on the ground of recommendation of the One Man Enquiry Commission is nothing but non application of mind to the given facts of the present case. Therefore, on this count also, such action is liable to be set aside.

22. Accordingly, the impugned departmental proceeding initiated by issuing show cause notice dated 02.08.2018 and the order dated 29.10.2019 appointing enquiry officer are set aside and quashed.

23. Parties to bear their own cost.

JUDGE

Comparing Assistant