GAHC010122452014

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

Case No. : WP(C)/393/2014

SMTI JAMINI DEVEE
W/O SRI BRINDABAN GOSWAMI, R/O BIRUBARI, PROFESSOR COLONY, KALAGURU PATH, H/NO.13, P.O. GOPINATH NAGAR, P.S. BHANGAGARH, GHY-16, DIST- KAMRUP, ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER and SECRETARY TO THE GOVT. OF ASSAM, FINANCE TAXATION DEPARTMENT, ASSAM, DISPUR, GHY-6

2:THE PRINCIPAL SECRETARY
FINANCE TAXATION DEPARTMENT
DISPUR
GHY-6

3:THE COMMISSIONER OF TAXES
ASSAM
KAR BHAWAN
G.S. ROAD
DISPUR
GHY-6

4:THE CERTIFICATE OFFICER TAXATION
KAMRUP
GUWAHATI
KAR BHAWAN
G.S.ROAD
DISPUR
GHY-

PRESENT

HON'BLE MR. JUSTICE DEVASHIS BARUAH

For the Petitioner : Mr.K.K.Mahanta, Sr. Advocate

For the Respondents: Mr.B.Gogoi, learned counsel, Finance Department, for Respondent Nos. 1 and 2

Date of hearing : 20.12.2022

Date of Judgment and order : 20.12.2022

JUDGMENT AND ORDER (ORAL)

Heard Mr. K.K. Mahanta, the learned senior counsel assisted by Mr. K.Sinha, the learned counsel appearing on behalf of the Petitioner as well as Mr. B.Gogoi, the learned counsel appearing on behalf of the Finance Department.

2. The question involved in the instant writ proceeding, is as to whether the imposition of penalty vide the order dated 08.11.2010 by the Govt. of Assam was in violation to the principles of natural justice as well as the judgment of the Supreme Court in the case of *Managing Director ECIL Hyderabad and Ors. Vs. B.Karunakar and Ors. reported in (1993) 4SCC 727*. The other questions herein raised in the instant writ petition are incidental to this broad question outlined herein above. Taking into account the said question involved, this Court proposes to deal with the brief facts narrated infra.

3. The petitioner received a show cause notice dated 11.02.2009, wherein, the petitioner was asked to show cause against the various allegations made therein against her. The petitioner replied to the said show cause on 21.02.2009, thereupon, another show cause was issued on 30.05.2009, under Rule 9 of the Assam Services (Discipline and Appeal) Rules 1964, (for short the Rules of 1964). The petitioner thereupon submitted her reply on 12.06.2009.

4. On the basis of the said reply submitted by the petitioner, the Commissioner and Secretary to the Govt. of Assam, Finance (Taxation Department) vide a Notification dated 05.10.2009 appointed one Sri. A.N.Bora, Director of Financial Inspection, Assam as the Enquiry Officer and Sri. L.D.Bania, Joint Commissioner of Taxes as the Presenting Officer to cause an enquiry into the departmental proceedings against the petitioner. Thereupon, the enquiry was conducted. It reveals from the record that the Enquiry Report was made on 15.12.2009. However, admittedly the said Enquiry Report was not furnished to the petitioner till 08.11.2010.

5. The petitioner retired from service on 31.03.3010. Subsequent thereto, vide an order dated 08.11.2010 which the petitioner had received it on 11.11.2010, the Governor of Assam had penalized the petitioner under Rule 7 of the Rules of 1964 read with Rule 21 of the Assam Service (Pension) Rules, 1969 by way of withholding of 33% of the gratuity amount entitled to her.

6. At this stage, this Court also finds it relevant to take note of that in terms

with Rule 21 of the Assam Service (Pension) Rules, 1969, (hereinafter for short referred to as "the Rules of 1969" and more particularly Sub-Rule(a) any departmental proceedings if instituted while the Officer was in service whether before his retirement or during his re-employment, shall after the final retirement of the Officer be deemed to proceedings under Rule 21 and shall be continued and concluded by the authority by which it was commenced in the same manner as if the Officer had continued in service. The Explanation to Rule 21(a) further stipulates that the continuation of the proceedings after the final retirement of the Officer shall be automatic under Rule 21 (a) and no fresh decision of the Governor and the appointing authority nor any show cause notice to the person concerned shall be necessary.

7. Further, it is also relevant to take note of that in terms of Rule 21, it is the Governor of Assam who has the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and also has the authority of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to the Government, if in a departmental or judicial proceedings the pensioner is found guilty of great misconduct on negligence during the period of his service, including the service rendered upon re-employment after retirement.

8. Therefore, in view of Rule 21, the order dated 08.11.2010 was passed, thereby, withholding 33% of the gratuity amount entitled to the petitioner. In the instant case, it is an admitted fact that the Enquiry Report was furnished to the petitioner along with the order of penalty dated 08.11.2010.

9. The petitioner being aggrieved, preferred an appeal before the Appellate Authority under Rule 15 of the Rules of 1964. The said appeal however was dismissed and the decision therein was relayed by the Commissioner and Secretary to the Govt. of Assam, Finance Taxation Department to the petitioner by an order dated 04.03.2011. The record further revealed that the petitioner had approached the Assam Administrative Tribunal, Guwahati challenging the order dated 08.11.2010 of imposition of penalty as well as the Appellate Order dated 04.03.2011. In the said appeal there were various grounds of objections taken including the ground of objection that principles of natural justice have been violated for not furnishing a copy of the Enquiry Report to the petitioner prior to imposition of the penalty under Rule 21 of the Rules of 1969.

10. The Assam Administrative Tribunal by the judgment dated 05.02.2013, dismissed the appeal. While dismissing the appeal, the Tribunal came to a finding that no prejudice had been caused to the petitioner for non-furnishing of the Enquiry Report for which the question of there being any violation of the principles of natural justice does not arise. The petitioner being aggrieved have therefore approached this Court under Article 226 of the Constitution of India. The record reveals that on 29.01.2014, this Court had issued Rule and in the meantime, directed the respondent authorities to release the provisional pension to the petitioner.

11. Further, it appears from the records that the respondent authorities have not filed any affidavit-in-opposition.

12. In the backdrop of the above preludes, let this Court take into consideration the respective contentions made by the learned counsels for the parties.

13. Mr.K.K.Mahanta, the learned senior counsel has submitted that the order dated 08.11.2010 was passed without offering the petitioner an opportunity to place her case against the Enquiry Report and this aspect of the matter would be clear from the self admission of the respondents itself, wherein, they have categorically stated that along with the order of imposition of penalty dated 08.11.2010, the Enquiry Report was furnished to the petitioner. He therefore submitted that the said order dated 08.11.2010 violates the principle of natural justice for which it needs to be interfered with. The learned senior counsel further submitted that from a perusal of the Enquiry Report, it would transpire that the said report had been submitted without taking into account the material facts as well as without considering the case of the petitioner. He therefore submitted that the said Enquiry Report on the face of it suffers from perversity and is therefore liable to be interfered with. The learned senior counsel also had submitted that the Appellate Authority under Rule 15 of the Rules of 1964, being the final authority on the question of facts and who has the right to even re-appreciate the evidence without any proper application of mind and in a most perfunctory manner have disposed of the appeal by stating that the Governor of Assam regrets his inability to entertain the appeal submitted by the petitioner. He submits that the Appellate Authority is bound to take into consideration all the grounds of objection and pass a reasoned order. The same having not been done, the order dated 04.03.2011 passed by the Appellate Authority is liable to be interfered with.

14. Further, the learned senior counsel has also submitted that the Assam Administrative Tribunal in its judgment dated 05.02.2013, have failed to take into consideration the valuable right of the petitioner to prove her innocence when such right is being trampled, the learned senior counsel submits that there is obviously a prejudice being caused, which was completely overlooked by the Administrative Tribunal in passing the impugned judgment dated 05.02.2013.

15. On the other hand, Mr. B.Gogoi, the learned counsel appearing on behalf of the Finance and Taxation Department of the Govt. of Assam had submitted that the stand of the respondent department have been already mentioned in the affidavit-in-opposition filed before the Assam Administrative Tribunal which is the part of the record of the instant case and as such no fresh affidavit was filed. The learned counsel submitted that the power under Article 226 of the Constitution of India to interfere with the enquiry proceedings as well as the penalty so imposed is very limited and in that regard he has referred to recent judgment of the Supreme Court in the case of *Union of India Vs. Subrata Nath reported in 2022 SCC Online SC 1617* and more particularly to paragraph no.21. He has also referred to another judgment of the Supreme Court in the case of *Union of India Vs. P. Gunasekaran reported in (2015) 2 SCC 610*, wherein, the Supreme Court had observed that a High Court cannot act as an Appellate Authority in the disciplinary proceedings by re-appreciating the evidence before the Enquiry Officer. It has also been observed that the said judgment as pointed out by Mr. B.Gogoi that it is only on a limited sphere that a High Court can exercise jurisdiction, that is to see as to whether (a) the enquiry is held by a competent authority; (b) the enquiry is held according to the procedure

prescribed in that behalf; (c) there is violation of principle of natural justice in conducting the proceedings; (d) the authorities have disabled themselves from reaching a fair conclusion by some consideration extraneous to the evidence and merits of the case; (e) the authorities have allowed themselves to be influenced by irrelevant or extraneous consideration; (f) the conclusion on the face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion; (g) the disciplinary authority have erroneously failed to admit admissible and material evidence; (h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the findings and (i) the finding of fact is based on no evidence. The learned counsel therefore submitted that in the instant case, the Enquiry Report would show that everything has been taken into consideration and there being no irregularities or illegalities involved for which the exercise of jurisdiction under Article 226 of the Constitution of India is not called for.

16. On the question of the violation of the principle of natural justice, the learned counsel relying on the judgment of the Supreme Court in the case of *Aligarh Muslim University Vs. Mansoor Ali Khan reported in (2000)7 SCC 529,* the learned counsel submitted that there are certain exceptions to the principles of natural justice as has been observed in the said judgment. He submitted that if no prejudice can be said to have been caused to the petitioner, the question of principles of natural justice being violated does not arise as in the facts of the instant case.

17. I have heard the learned counsels for the parties and have also perused the materials on record. As already observed the question which arises for

consideration is as to whether the imposition of penalty upon the petitioner vide the order dated 08.11.2010 without providing the petitioner an Enquiry Report is in accordance with law. The answer to the said query can be found from the judgment of the Constitution Bench of the Supreme Court in the case of *Managing Director ECIL Hyderabad and Ors. (Supra)*. The primary question involved in the said proceedings before the Supreme Court, was whether the report of the Enquiry Officer/Authority who/which is appointed by the Disciplinary Authority to hold an enquiry into the charges against the delinquent employee, is required to be furnished to the employee to enable him to make proper representation to the Disciplinary Authority before such authority arrives at his own finding with regard to the guilt or otherwise of the employee and the punishment if any to be awarded to him? In deciding the said question involved, the Supreme Court took into consideration Article 311 (2) which stood prior to the 42nd Amendment of the Constitution as well as post 42nd Amendment. The Supreme Court observed that the right to receive the Enquiry Officer's Report and to show cause against the findings in the report was independent of the right to show cause against the penalty proposed. Both the rights i.e., the right to represent against the findings of the report as well as the right to show cause against the penalty proposed (the later one which was taken away by the 42nd Amendment of the Constitution) has been succinctly explained in paragraph no.25 which is reproduced herein below:

"*25. While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted.*

It is the second right exercisable at the second stage which was taken away by the Forty-second Amendment."

18. From the above observations, quoted herein above, it would appear that the right to show cause against the findings of the report is a right to prove innocence whereas the right to show cause against the penalty is a right to plead for either no penalty or a lesser penalty although the conclusions regarding the guilt is accepted. The Supreme Court had observed that the 2nd right to show cause against the penalty have been taken away by the 42nd Amendment. This Court further finds it relevant to refer to paragraph no.26 and 27 of the said judgment which further clarifies the two rights and the requirement as to why the right to show cause against the findings is a very essential right of the delinquent. Paragraph nos. 26 and 27 reads as follows:

"*26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However,*

when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it.

27. It will thus be seen that where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached. The employee's right to receive the report is thus, a part of the reasonable opportunity of defending himself in the first stage of the inquiry. If this right is denied to him, he is in effect denied the right to defend himself and to prove his innocence in the disciplinary proceedings."

19. It was observed in paragraph no.27, that where the Enquiry Officer is other than the Disciplinary Authority, the disciplinary proceedings breaks into two stages. The first stage ends when the disciplinary authority arrives at its conclusion on the basis of the evidence, Enquiry Officer's Report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of the conclusions. It was observed that if the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached. The employee's right to receive the report is thus a part of the reasonable opportunity of defending him in the first stage of the enquiry and if this right is denied to him, he is infact denied the right to defend himself and prove his innocence in the disciplinary proceedings.

20. The above observation of the Constitution Bench of the Supreme Court

therefore takes into consideration two aspects for the purpose of the instant case. First, the imposition of penalty upon the petitioner without giving her the opportunity of submitting a show cause against the findings of the Enquiry Officer is a denial of a right to the petitioner to defend herself and prove her innocence in a disciplinary proceedings. The Supreme Court has categorically mandated this in the said judgment and more particularly in paragraph no.30(i), that the same would amount to violation of the principles of natural justice and therefore invalid. Secondly, the submission made by the learned counsel, appearing on behalf of the respondents to the effect that no prejudice has been shown to have been caused to the petitioner, for which the question of violation to the principles of natural justice would not apply is also rendered misconceived, inasmuch as, when a valuable right of petitioner to prove her innocence had been taken away by not allowing the petitioner to submit a show cause against the findings arrived by the Enquiry Officer, by operation of law, prejudice has been caused upon the petitioner. In view of the above findings, this Court therefore interferes with the order dated 08.11.2020, whereby, there was an imposition of penalty upon the petitioner by way of withholding 33% of gratuity amount entitled to her.

21. The learned counsel for the petitioner had made various allegations that the Enquiry Report is perverse and is not based upon material evidence. As this Court had interfered with the order dated 08.11.2010 on the ground that no opportunity was given to the petitioner of filing a show cause against the findings arrived at by the Enquiry Officer, this Court gives the petitioner liberty to submit a representation/objection against the Enquiry Report before the Disciplinary Authority i.e. the Commissioner and Secretary to the Govt. of

Assam, Finance and Taxation Department, Government of Assam, thereby, raising all objections to the Enquiry Report and thereby requesting the said Disciplinary Authority to reject the Enquiry Report. Taking into consideration that the Enquiry Report is enclosed as Annexure 6 to the writ petition, the petitioner is given 30(thirty) days from today for filing her objections/representation to the said Enquiry Report; and the Disciplinary Authority shall consider the same and pass appropriate orders as deemed fit. As already observed the petitioner would be entitled to raise all such objections against the Enquiry Report as deemed fit.

22. In view of the setting aside of the order dated 08.11.2020 for the reasons above mentioned, the order dated 04.03.2011 by the Appellate Authority as well as the order dated 05.02.2013 by the Assam Administrative Tribunal are also interfered with as they cannot stand in absence of the order dated 08.11.2010. It is made clear that if the petitioner fails to submits her representation/show cause against the Enquiry Report dated 15.12.2009 within the said period of 30(thirty) days the concerned Authority shall be at liberty to pass appropriate order(s) or including imposition of penalty as deemed proper. The Disciplinary Authority shall after taking into consideration the said objection/show cause to the findings arrived at by the Enquiry Officer, shall pass appropriate orders as deemed fit within a period of 60(sixty) days.

23. It is made clear that this Court have only interfered with the orders dated 08.11.2010, 04.03.2011 as well as 05.02.2013 by the Disciplinary Authority, Appellate Authority as well as the Assam Administrative Tribunal only on the question of failure to serve the Enquiry Report prior to imposition of penalty. The instant judgment shall not be construed in any manner to have interfered

with the Enquiry Report dated 15.12.2009 and the concerned Authority shall be at liberty to accept or reject the Enquiry Report as well as to impose penalty, independent of the findings given in the instant judgment.

24. With the above observations and directions, the writ petition stands disposed of.

JUDGE

Comparing Assistant