



GAHC010225512014

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

Case No. : WP(C)/2557/2014

INDRAMANI BORDOLOI
S/O- LT. SUNDAR BORDOLOI, ASSTT. DIRECTOR AUDIT RETIRED, R/O -
REHABARI, GHY- 8, KAMRUP, ASSAM.

VERSUS

THE STATE OF ASSAM AND 2 ORS
REP. BY THE SECY. TO THE MINISTRY OF FINANCE, DISPUR, GHY- 6.

2:THE COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM
FINANCE DEPTT.
DISPUR
GHY- 6.

3:THE PRINCIPAL SECY.
FINANCE DEPTT.
DISPUR
GHY- 6

Advocate for the Petitioner : MR. D MAZUMDAR

Advocate for the Respondent : MS.A VERMA

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT & ORDER (ORAL)

Date : 20-12-2022

Heard Mr. S. Nath, the learned counsel appearing on behalf of the petitioner and
Mr. R. Borpujari, the learned counsel appearing on behalf of all the respondents.



2. The instant writ petition has been filed challenging the charge sheet bearing No. FEB.17/2005/9 dated 31/3/2006, the enquiry report dated 6/7/2010 issued vide letter No.FEB/17/2005/Pt/46 dated 22/1/2013 and the penalty order No. FEB.17/2005/Pt./56 dated 4/4/2013 as well the Notification No.FEB.17/2005/Pt./62 dated 22/7/2014 and for a further direction upon the respondents to release the death-cum-retirement-gratuity of the petitioner, full pensionary benefits, monthly pension including arrear monthly pension.

3. The brief facts of the instant case is that the petitioner while working as the Assistant Director of Audit, Assam, a disciplinary proceedings was initiated against him vide an Office Memorandum bearing No. FEB.17/2005/9, dated 31/3/2006 under Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964(for short 'the Rules of 1964') read with Article 311 of the Constitution. The said show cause notice issued on 31/3/2006 has been enclosed as Annexure-1 to the writ petition. The charges levelled against the petitioner as could be found out from the said show cause notice are that the petitioner had shown approval of the Government dated 31/12/2002 for appointment of 5 candidates from the select list of the selection board. It was alleged that the petitioner had misled and suggested for appointment directly, though the said approval of the Government was for promotion from the rank of UD Assistant to the rank of Assistant Audit Officer. The second charge was that in the said endorsement, the petitioner had mentioned of a proposal note to the Government for approval of 5 posts which had no base. The third charge was that the petitioner had mentioned the grounds as "at the duress of the candidates/guardians/the associates giving over pressure creating uncontrollable situation with mental torture and imbalance", which was baseless and having no record. It further transpires from the said show cause notice that the petitioner was further charged with the allegation that he had prepared a list in a pick and choose manner without taking into consideration the serial number in the select list and thereby violated the Government order with mala fide intention and misleading proposal placing the Government in an embarrassing position and



causing loss to the State exchequer. It was further mentioned that all the 23 candidates, whose names have been mentioned in the show cause notice, were picked up from the select list by the petitioner against non-existent post as a result of which the Government had to bear the financial burden of 31.72 lakhs and as such the petitioner was charged with the violation of the Government procedure causing unauthorized burden and loss to the Government exchequer.

4. Vide the said show cause notice the petitioner was asked to submit his written statement of defence within 10 days from the date of receipt of the communication, provided he did not intend to inspect the documents which have relevance with the issue under the enquiry. It was further provided that in case the petitioner intended to inspect the documents, the petitioner has to write to the Commissioner and Secretary to the Government of Assam, Finance Department, that he intended to inspect the documents within 7 days from the date of receipt of the said communication and submit the explanation within 10 days thereafter. It was further provided that if the petitioner desired to be heard in person, he should specify the same to the issuing authority. Further, the petitioner was also allowed to engage a Government servant approved by the Disciplinary Authority. However, it is relevant to take note that in the said show cause notice, there was no mention of any documents to be relied upon except in the list of witness, it was specified that it would be the Director, Audit, Assam.

4.1. The petitioner upon receipt of the said show cause notice submitted a reply on 21/4/2006.

4.2 On the charge of submitting misleading information which leads to appointment of 23 Assistant Audit Officer to non-existent post, the petitioner replied that he had done so on a mere dictation of his controlling officer, i.e. the Director of Audit. He further stated that he was not dealing with the said file and the contents were not fully within his knowledge. He further stated that he had signed across the dotted

lines, the note prepared by the Director and instructed by the Director on sincere belief on him.

4.3. On the allegation that the petitioner had moved to the Government a proposal which he had no basis. It was replied that the whole issue was designed cleverly by the Director, in as much as the petitioner was told to sign a readymade prepared note by the Director.

4.4. On the charge that the note submitted by the petitioner about the pressure of the candidates for appointment which led to mental torture and imbalance etc having no basis, the petitioner had replied that the note was readymade when he had signed. He stated that he was all along a field officer and was not aware of the implication of handling a file of such complicated establishment matter in that particular way inasmuch as in field duties, file job is different and very limited. He stated that on account of such shortfall of knowledge, the said incident happened. He further stated that he was under the impression that it was always the final authority upon whom the responsibility had rested.

4.5. On the allegation that the petitioner had presented not the actual list, and had exercised the pick and choose method to prepare the list, the petitioner in his reply had stated that the whole issue is the handiwork of the Director. He further stated that all along in his service life he has been a sincere officer and there has been no complain against him.

4.6. The petitioner further had stated that he accepted the responsibility of putting his signature on the note and that he had no mala fide intention or ulterior motive except the fact of his ignorance.

5. On the basis of the petitioner's reply, by a notification dated 25/5/2006 the Government of Assam appointed one Sri Vijayaendra, IAS, Secretary to the Government of Assam, Home and Finance Department as the Enquiry Officer under Rule 9(4) of the Rules of 1964 to enquire into the Articles of Charges in the



departmental proceedings drawn up against the Petitioner. Further to that, one Sri G. Borthakur, ACS, Deputy Secretary to the Government of Assam, Finance (EC-III), Department was appointed as the Presenting Officer under Rule 9(5) of the Rules of 1964. It further reveals that subsequently vide another notification dated 7/11/2007 the earlier enquiry officer was released and a new enquiry officer was appointed namely Sri P.D. Kalita to be the enquiry officer. Subsequent thereto again on 18th of September, 2009 the enquiry officer, Sri P.D. Kalita was again released and one Sri S.P. Nandi, IAS was appointed as the enquiry officer. On account of the releasing of the earlier enquiry officer and reappointing fresh enquiry officer, a period of 3 years have passed by for which the petitioner had submitted a representation to the Commissioner and Secretary to the Government of Assam, Finance Department seeking early disposal of the departmental proceedings. However nothing happened in the disciplinary proceedings. In the meantime, the petitioner retired on 31/8/2010. Even after the retirement of the petitioner, the disciplinary proceedings stagnated in the manner as before, which necessitated the petitioner to move a writ petition before this Court challenging the delay in completion of the disciplinary proceedings. The said writ petition was registered and numbered as W.P.(C) No.6205/2012.

6. This Court vide an order dated 19/12/2019 passed in W.P.(C) No. 6205/2012 disposed of the said writ petition directing the disciplinary authority, namely, the Commissioner and Secretary to the Government of Assam, Finance Department to complete the disciplinary proceedings initiated against the petitioner vide Office Memorandum dated 31/3/2006 within a period of 3 months from the date of the said order. It was however mentioned that if the disposal of the disciplinary proceedings is delayed for reasons which is attributable to the petitioner, the period of such delay would be excluded from the said period of 3 months.

7. Subsequent to the said order dated 19/12/2012 passed in W.P.(C) No. 6205/2012, the enquiry report was furnished to the petitioner vide a communication dated 22/1/2013 asking the petitioner to submit his comments on the report, if any,



within 1 week from the date of receipt of the said communication. The said enquiry report which is enclosed to the communication dated 22/1/2013 surprisingly is signed by one Mr. G. Borthakur, ACS, Joint Secretary to the Government of Assam, Finance and Establishment (B)Department. From a perusal of the enquiry report, it reveals that the same person who was initially appointed as the Presenting Officer on behalf of the Department under Rule 9 (5) vide the notification dated 25/5/2006 had submitted an enquiry report on 6/7/2010. This shocks and surprises this court inasmuch as a Presenting Officer earlier appointed cannot be made the enquiry officer. Be that as it may, it would be seen from the report of the enquiry officer that the Director of Audit(L.F.) was examined. While deciding the charge Nos. 1, 2 and 3, the enquiry officer had merely recited the charges and the reply and without any application of mind or disclosing any reasons has held that all the charges against the petitioner was proved. This aspect of the matter would be clear from a mere reading of the decision in respect to charge No. 1, wherein in the first two paragraphs the charge was mentioned and in the third paragraph, the reply of the petitioner was mentioned and in the last paragraph with a single sentence it was observed as follows :-

“the charged officer signed and misleading notice proved.”

8. Similarly in respect to charge No. 2, the charge was mentioned, the reply was mentioned and without any discussion whatsoever it was held “now it is proved that the note was in fact misleading”. In respect to charge No. 3, similarly the charge was mentioned, the reply was mentioned and it ended with the line “thus representing misleading facts is proved”. The reply so submitted by the petitioner was clear and unambiguous to the extent that he signed on the documents on the basis of the directions of the then Director. But surprisingly the enquiry officer in his inquiry report did not in any manner deal with the same.

9. The petitioner upon receipt of the communication dated 22/1/2013 submitted a representation to the Commissioner and Secretary to the Government of Assam,



Finance Department stating inter alia to reject the findings of the enquiry officer against the petitioner and to exonerate him from the charges leveled in the Office Memorandum dated 31/6/2006. Amongst the various reasons mentioned in the said representation, it was categorically mentioned that there was no examination of documents, witnesses and the petitioner was not afforded any opportunity to cross-examine.

10. At this stage, this Court finds it relevant to take note of a very relevant fact which had happened during the pendency of the departmental proceedings. The petitioner had retired on 31/8/2010. There is a Manual of departmental proceedings compiled and published by AR & T Department, Government of Assam. Paragraph 2.4 and 3.13.6 are very pertinent for the purpose of the instant dispute. The said two paragraphs are on the basis of Rule 21 of the Assam Service(Pension) Rules, 1969. In terms with Sub-Rule (a) of Rule 21, it has been mentioned that if any departmental proceedings is instituted while the officer is in service whether before his retirement or during his re-employment, the said departmental proceedings after the final retirement of the officer be deemed to be a 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) stipulates that the continuation of a proceedings after the final retirement of the officer shall be automatic under Sub-Rule (a) of Rule 21 and neither fresh decision of the Governor or the appointing authority nor any show cause notice to the person concerned shall be necessary.

11. In the backdrop of the above Rule, if this Court takes into consideration the Paragraphs 2.4 and 3.13.6, it would show how the departmental proceedings should continue pursuant to the final retirement of the delinquent officer. Paragraphs 2.4 and 3.13.6 are quoted herein below:-

“Para 2.4. (**Retirement of a Government servant under suspension**).

A departmental enquiry sanctioned against a government servant under suspension for taking action under the Assam Service(Discipline & Appeal) Rules, 1964 can be continued even after he retires from service for the purpose of considering action under Rule 21 of Assam Services (Pension) Rules, 1969, The details in this regard are furnished in para 3.13.6.

Para 3.13.6 (Conversion of departmental proceeding into proceedings under Rule 21 of the Assam Services (Pension)—)

- (a) A departmental proceeding initiated against a Government servant during the period of service either before his retirement or during the period of his re-employment after retirement of will be deemed to be a proceeding under rule 21 of the Assam Services (Pension) Rules, 1969 and the proceeding will be continued and concluded in the same manner as if the officer had continued in service.
- (b) The penalties that may be inflicted on the officer upon conclusion of the proceeding mentioned in clause (a) above, are as follows—
- (i) Withholding or withdrawing a pension or any part of the pension either permanently or for a specified period ;
 - (ii) Recovery from a pension including D.C.R. Gratuity and Family Pension of the whole or a part of any pecuniary loss caused to Government.
 - (iii) If the pensioner is found guilty of grave misconduct or negligence during the period of his service including the service rendered upon re-employment after retirement in a departmental or judicial proceeding.
- (c) The right of inflicting the above punishment is reserved to the Governor of Assam.
- (d) Such departmental proceeding if not instituted while the officer was in service whether before his retirement or during his re-employment.
- (i) should be instituted with the sanction of the Governor of Assam; and
 - (ii) should be conducted by such authority in such place as the Governor of Assam may direct and in accordance with the procedure applicable to a departmental proceeding in which an order of dismissal from service could be made in relation to the officer during his service.
- (e) No such departmental or judicial proceeding if not instituted while the officer was in service, whether before his retirement or during his re-employment after retirement, should be instituted in respect of action which arose or an event which took place more than 4 years before such institution.
- (f) The Assam Public Commission will have to be consulted in all cases of departmental proceeding under rule 21 of the Assam Services (Pension) Rules, 1969.
- (g) A departmental proceeding will be deemed to be instituted on the date on which the statement of charges is issued to the officer or the pensioner or if the officer or the pensioner or if

the officer Ha been placed under suspension, or such date of suspension.

(h) A judicial proceeding will be deemed to be instituted.

(i) in the case of a criminal proceeding on the date on which the complaint or the report of the police officer, on which the Magistrate takes cognizance, is made; and

(ii) in the case of a civil proceeding, on the date of presentation of the plaint in the court.”

12. A reading of Rule 21 with Paragraph 3.13.6 (c) would show that it is the Governor of Assam who reserves himself the right of withholding or withdrawing pension or any part thereof and the right of inflicting the said punishment is only reserved upon the Governor of Assam. Further a perusal of Clause 3.13.6 (f) would show that the Assam Public Service Commission would have to be consulted in all cases of departmental proceedings under Rule 21 of the Rules of 1969.

13. In the backdrop of the above, let this Court further delve on the facts involved in the instant proceedings

14. On the basis of the representation so submitted, the Commissioner and Secretary to the Government of Assam, Finance Department vide an order dated 04/04/2013 exercised the power under Rule 21 of the Rules 1969 and passed the order –(a) to fully withdraw the DCRG of the petitioner (since retired) and (b) to withdraw 25% of his monthly pension for a period of 3 years. A perusal of the entire order would not show in any manner that the Assam Public Service Commission was consulted which is requirement of Para 3.13.6(f), or the said order has been passed by the Governor of Assam who has the power in terms to Rule 21 read with Para 3.13.6 (c).

15. The petitioner thereupon preferred an appeal before the Governor of Assam i.e. the Appellate Authority. However, the said Appeal was turned down by the notification dated 22/7/2014. Therefore, being aggrieved, the petitioner has approached this Court under Article 226 of the Constitution.

16. The records of the instant case reveal that this Court had issued notice on 23/4/2014.



17. Pursuant to the said notice, the Respondent No. 2 had filed an Affidavit-in-Opposition. From a perusal of the said Affidavit-in-Opposition, it reveals that the statements made therein are primarily based upon the materials already discussed hereinabove. However, apart from that, it has also been mentioned that the petitioner had admitted in his representation dated 19/6/2013 that the then Director of Audit gave him a dictation to prepare a note and accordingly he took his dictation only. It has been also mentioned that the petitioner had also admitted that by another representation dated 21/6/2006 that " the note was readymade which he had to sign". It has been mentioned that the petitioner being the senior most responsible gazetted officer, the same matter has been communicated to the Government in different ways by the petitioner and thus he (a) furnished misleading report for the personal benefit with mala fide intention placing the Government in an embarrassing position and causing loss to the State exchequer and (b) violated Government orders with mala fide intention and causing loss to the Government exchequer for giving appointment to 5 more Assistant Audit Officers by direct recruitment against 5 sanctioned posts which were to be filled up by promotion from departmental candidates as per Service Rule.

18. I have heard the learned counsel for the petitioner as well as the learned counsel appearing on behalf of the respondents.

19. This Court vide an order dated 26/7/2019 had admitted the instant writ petition and it was also observed that the records have been received by the standing counsel for the Finance Department.

20. Thereafter the matter has been listed on various occasions. On 13/12/2022 when the instant petition was taken up for hearing, the learned counsel for the respondents could not place the records for which a chance was given to the learned counsel for the respondents to place the records on 15/12/2022 with a clear observation that taking into account that the writ petition pertains to the year 2014,



no further chance would be given to the respondents beyond the next date fixed. However, on 15/12/2022 also, the learned counsel appearing on behalf of the respondent/Finance Department submitted that a final opportunity may be given for production of the records and it was submitted by the learned counsel for the Department that if the Department is not in a position to produce the records, the Court shall proceed with the matter on the basis of the pleadings available on record. Accordingly, this Court gave another chance to the learned counsel for the respondent to produce the records. Today also the learned counsel appearing on behalf of the respondent/Finance Department submits that the records have been misplaced and as such the said records could not be produced.

21. Taking into account the clear observations made by this Court on 13/12/2022 and 15/12/2022, this Court have therefore taken the decision to go forward on the basis of the materials available on record, more so, when the matter pertains to a retired officer of the State who retired as far back as on 31/8/2010, who on account of the penalty imposed have been deprived of his pensionary benefits. Further de hors the records also in the opinion of this Court, the matter can be examined.

22. From the materials on record, it is clear that the departmental proceedings was initiated on the basis of the show cause notice dated 31/3/2006. At that relevant point of time the petitioner was in service. It is an admitted fact that the petitioner retired on 31/8/2010. Therefore, by dint of the provisions of Rule 21 of the Rules of 1969 read with Para 2.4 quoted hereinabove, such departmental proceedings has to be continued in terms with Rule 21 of the Rules of 1969. From the records, it is apparent that on 25/6/2006, one Sri Vijayaendra was appointed as the Enquiry Officer pursuant to the reply submitted by the Governor of Assam. By the same notification with a different number one Sri G. Borthakur, ACS, Deputy Secretary to the Government of Assam, Finance (EC-III) Department was appointed as the Presenting Officer in terms to Rule 9(5). From the notification dated 7/11/2007 enclosed as Annexure-5 to the writ petition, it transpires that Sri Vijayaendra who was initially appointed vide the



notification dated 25/5/2006 was replaced by one P.D. Kalita, Joint Secretary to the Government of Assam, Finance, Taxation Department and a copy of the said notification was given to various persons including one Sri G. Borthakur Joint Secretary to the Government of Assam, Finance (EC-III) Department who was the Presenting Officer appointed vide the notification dated 25/5/2006. Surprisingly vide the notification dated 26/3/2009, the said Presenting Officer Sri G. Borthakur was appointed as the Enquiry Officer. It surprises this Court how the same can be done inasmuch as the same on the face of it would violate the basic principles of natural justice. It is this Enquiry Officer i.e. Sri G. Borthakur, who had submitted the inquiry report on 6/7/2010. The manner in which the enquiry was made wherein it was held that the charges have been proved against the petitioner had already been detailed above. A perusal of the said enquiry report clearly shows that it suffers not only from non-application of mind but no reasons have been assigned on the basis of which the findings have been arrived at. It is well settled that when an authority passes an order without application of mind, it violates the mandate of Article 14 of the Constitution inasmuch as arbitrariness is writ large on the face of it. At this stage, this Court finds it relevant to take note of the judgment of the Supreme Court in the case of **East Coast Railway & Anr. Vs. Mahadev Appa Rao** and others reported in (2010) 7 SCC 678 and more particularly to paragraph 23 which is quoted herein below :

“23. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable.”

23. There is an allegation made in the writ petition to the effect that the petitioner has not been afforded the opportunity of cross-examining the witness i.e. the Director of Audit (L.F.). No records have been placed by the respondent authorities to show



otherwise. Therefore, the same violates Rule 9(6) of the Rules of 1969. This is so far as the inquiry report in question is concerned which on the face of it violates the principles of natural justice, Article 14 of the Constitution as well as the Rules of 1969.

24. Now coming to the question of the order dated 4/4/2013, it surprises this Court to take note of that the said order has not been passed by the Governor of Assam or in his name which is the requirement of Rule 21 of the Rules of 1969. There is also no indication whatsoever that the Assam Public Service Commission had been consulted which is requirement in terms with para 3.13.6(f) prior to the issuing the order dated 4/4/2013. Therefore, the order dated 4/4/2013 not only is bad on the ground that the enquiry proceedings is bad for the reasons stated herein above but, it is also illegal for non-compliance to Rule 21 of the Rules of 1969 as well as Para 3.13.6 (c) & (f). Therefore, the enquiry report dated 6/7/2010 as well as the order dated 4/4/2013 is set aside and quashed.

25. Now the question which arises as to what course of action should be adopted in the instant case taking into account that the proceedings was initiated as far back as in the year 2006 and 16 years have been passed in the meantime and the petitioner had retired on 31/8/2010. The petitioner is presently aged about 72 years, if not more, and taking account that the petitioner has suffered a lot, this Court would like to refer to the judgment of the Supreme Court rendered in the case of **Narinder Mohan Arya Vs. United India Insurance Co. Ltd and Ors.** Reported in (2006) 4 SCC 713 and more particularly to paragraphs to 49, which is reproduced herein below.

“49. For the foregoing reasons the impugned judgments cannot be sustained which are set aside accordingly. Although, the consequence of setting aside of the said orders would have been to remit the matter back to the disciplinary authority for consideration of the matter afresh on merit, but having regard to the fact that the disciplinary proceedings were initiated against the appellant as far back in 1976, we refrain ourselves from doing so. He, indisputably, has suffered a lot. However, the question which arises is what relief should be granted to the appellant. The appellant shall be



reinstated in service. We, however, while directing reinstatement of the appellant, keeping in view the fact that no work had been taken from him, direct that only 50% of the back wages shall be payable. The appeal is allowed with the abovementioned directions.”

26. This Court is of the opinion that, in view of the observations of the Supreme Court in the above quoted paragraphs, the same can be applied to the facts of the instant case taking into account that the petitioner is already 72 years and the departmental proceedings have been pending since 2006. Further taking into account the allegation that the Director was not allowed to be cross-examined and there being no records to prove otherwise, Rule 9(6) of the Rules of 1964 can only be met if the said Director is allowed to be cross examined. However, a difficulty arises as has been admitted that the said Director who was a witness had also retired long back and may have been even prior to the petitioner and it may not be feasible to get him back at this juncture as a witness. Under such circumstances, this Court instead of remitting the matter back to the disciplinary authority for consideration of the matter afresh by holding the enquiry from the stage of evidence, directs the respondent authorities to release the death-cum-gratuity of the petitioner and all the pensionary benefits including the monthly pension, as well as the arrear monthly pension to the petitioner as per the permissible law. The said exercise of releasing the pensionary benefits be done within a period of 3 months from the date a certified copy of this judgment is served upon the Commissioner and Secretary to the Government of Assam, Finance Department.

27. With the above observations and directions, the instant writ petition stands allowed.

JUDGE

Comparing Assistant