GAHC010186912014

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

Case No. : WP(C)/5118/2014

FIRE MAN-270 SRI TAPAN BUZARBARUAH
S/O- SRI ADYA NATH BUZARBARUAH, R/O VILL.- BARKHALA, P.O. and P.S.- GHOGRAPAR, DIST.- NALBARI, ASSAM.

VERSUS

THE STATE OF ASSAM and 3 ORS,
REP. BY THE COMMISSIONER and SECY., HOME DEPTT., GOVT. OF ASSAM, DISPUR, GHY- 6.

2:THE DIRECTOR GENERAL OF POLICE
ASSAM POLICE HEAD QUARTER
ULUBARI
GHY- 7.

3:THE INSPECTOR GENERAL OF POLICE
ASSAM POLICE
ULUBARI
GHY- 7.

4:THE DIRECTOR
THE DIRECTOR
STATE FIRE SERVICE ORGANIZATION
PANBAZAR
GHY- 1
KAMRUP M, ASSAM

Advocate for the Petitioner : Mr. N. K. Kalita, Advocate

Advocate for the Respondents : Mr. C. S. Hazarika, Advocate.

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 11.05.2023

Date of Judgment : 11.05.2023

JUDGMENT AND ORDER (ORAL)

Heard Mr. N. K. Kalita, the learned counsel for the petitioner and Mr. C. S. Hazarika, the learned counsel for the respondents.

2. The instant writ petition has been filed challenging the order of discharge from service dated 28.12.2006 issued by the respondent No.4 and the order dated 17.08.2007 issued by the respondent No.3 and with a further direction to reinstate the petitioner in service with effect from the date of his alleged absence from duty along with all back wages for the said period of alleged absence from duty.

3. The facts involved herein is that the petitioner was appointed on 11.04.1989 as a Fireman under the Assam Fire Service Organization vide an order No. 771 issued by the Director of Fire Service Organization, S.F.S.O., Assam. The petitioner thereupon continued to render service. However, when the petitioner was posted at Guwahati Fire Station, he suffered from several illnesses and ultimately he had to leave the station on 26.08.2005 with verbal intimation to the Senior Station Officer, Guwahati Fire Station. However, it is the case of the petitioner that the Senior Station Officer vide his letter dated 30.08.2008 informed the Director, Fire Service Organization that the petitioner was absent from duty since 26.08.2005 without any leave or information to the Competent Authority. The Director of State Fire Service Organization thereupon vide an order dated 10.09.2005 kept the pay of the petitioner for the month of September, 2005 in hold on the ground of the alleged absence from duty. Thereupon the petitioner submitted an application dated 15.10.2005 along with medical certificates in original thereby informing the Director, Fire Service Organization that he has been suffering from several diseases since last few months, and after diagnosis, the doctor had ascertained that the petitioner has been suffering from Chronic active Hepatitis with

early cirrhosis of Liver and neurological deficiency. The petitioner further appraised the Director, Fire Service Organization that due to his neurological deficiency, his hands and legs keep vibrating at all time and as such requested that the petitioner be allowed to go for voluntary retirement as he was not physically fit to perform his duty as a Fireman. The petitioner also requested the Director, Fire Service Organization to release his salary for the month of September, 2005. Upon receipt of the said application dated 15.10.2005, the Office of the Director, Fire Service Organization under the seal and signature of the Fire Prevention Officer issued a notice dated 11/11/2005 thereby asking the petitioner to resume his duty within 3 days from the date of receipt of the notice and also warned the petitioner that if the petitioner failed to resume his duty within 3 days, departmental action will be taken against him. It is the case of the petitioner that no such action was taken in terms with the application dated 15.10.2005 whereby the petitioner sought for voluntary retirement.

4. The Office of the Director, Fire Service Organization further issued another notice dated 08.03.2006 directing the petitioner to resume his duty within 3 days from the date of receipt of the notice with a warming that if the petitioner fails to resume his duty within said period, departmental action would be taken against him. The petitioner upon receipt of the said communication submitted application dated 09.03.2006 along with medical certificates thereby praying before the Director, Fire Service Organization for posting him in the Head Quarter on the ground of his physical illness if the petitioner is not otherwise entitled to voluntary retirement.

5. It further reveals from the writ petition that there were various other notices to join his duty and the petitioner repeatedly replied by taking the ground of his medical ailments. Subsequent thereto on 31.07.2006 the petitioner was issued a show cause as to why the penalties prescribed under Section 6 (2) of the Assam Fire Service Act, 1985 read with Section 7 of the Police Act and Article 311 of the Constitution of India read with Rule 66 of the Assam Police Manual, Part-II should not be inflicted upon him. On

the very date vide another order, the petitioner was put under suspension pending disposal of the Departmental Proceedings. It is further apparent from the perusal of the documents on record that on the very date on which the petitioner was issued the show cause notice, an Enquiry Officer was also appointed vide another order. The petitioner thereupon submitted a detail show cause reply denying to the allegations made in the show cause notice and with the prayer to drop the Departmental Proceedings against him and to consider the representation so submitted by the petitioner requesting for voluntary retirement. It further appears from the record the Enquiry Officer submitted a report on 19.12.2006.

6. It is the specific case of the petitioner that the petitioner had no knowledge of enquiry report as the same was not served upon him and instead vide an order dated 28.12.2006, i.e. after 9 days from the date of submission of the enquiry report, the Director of the State Fire Service Organization discharged the petitioner from service w.e.f 26.08.2005, i.e. the date on which it was alleged that the petitioner was on unauthorized leave.

7. At this stage, it may be relevant to take note of that there is a note prepared under the signature of the Director of State Fire Service Organization relating to the habitual indiscipline, misconduct, negligence in duties and disobedience to the superior officers by the petitioner. Pertinent herein to mention that the said note also do not mention anything about the fact that the enquiry report was served upon the petitioner and the petitioner was asked to show cause in respect to the said enquiry report.

8. Be that as it may, the petitioner being aggrieved by the said order dated 28.12.2006 filed an appeal before the Inspector General of Police, Assam. The said appeal, however, was dismissed vide an order dated 17.08.2007. It was also observed in the said order itself by Appellate Authority that the petitioner did not qualify for voluntary pensionary benefits as he had not completed 20 years of qualifying service. It was under such circumstances the Appellate Authority did not find it fit to interfere with the order dated

28.12.2006 issued by the Director, Fire Service Organization thereby discharging the petitioner. It appears from the record that thereafter the petitioner filed the instant writ petition on 18.09.2014.

9. It further appears from the record that an additional affidavit was filed by the petitioner on 08.12.2014 thereby explaining the reason as to why after a period of 7 years, the petitioner had approached this Court by filing a writ petition. It was mentioned in paragraph No.4 of the said additional affidavit that as the petitioner was a patient of neurological deficiency, he partially lost his mental balance due to his said illness. The petitioner was under continuous treatment under Dr. Pankaj Lochan Sarma, consultant Psychiatrist of Guwahati Psychiatric Hospital till 24. 08.2011. After that he was under treatment of Dr. Ashim Choudhury, Senior Medical Officer due to some difficulty in his nervous system. It further appears from the record, this Court vide an order dated 05.01.2015 admitted the instant writ petition after perusal of the additional affidavit dated 08.12.2014 explaining the delay in filing the writ petition.

10. The record reveals that the respondent no.4 had filed an affidavit-in-opposition on 16.03.2015. From a perusal of the said affidavit, it transpires that it is the stand of the respondent authorities to the effect that the petitioner was in unauthorized leave and the petitioner was given each and every opportunity to defend his case before the Enquiry Officer. Relevant herein to mention that it paragraph No.2 (iv) it has been mentioned that pursuant to the receipt of the enquiry report dated 19.12.2006 and upon perusal of the materials available on record, the Disciplinary Authority concerned taking into account that the petitioner is a habitual absentee and had committed gross misconduct, negligence of duties, indiscipline and disobedience to his higher authority passed the order of discharge w.e.f from 26.08.2005 vide order dated 28.11.2006 after issuance of the second show cause notice. It is relevant however to take note of that in the affidavit-in-opposition the second show cause notice was not enclosed. There is also no date mentioned as to when the second show cause notice was issued and when the second

show cause notice was received by the petitioner.

11. Be that as it may, this Court during the course of hearing requested the learned counsel appearing on behalf of the respondents as to whether there is any second show cause notice pursuant to the enquiry report being submitted on 19.12.2006 issued to the petitioner in the records or for that matter there is any document to show that the said second show cause notice was served upon the petitioner thereby enclosing the enquiry report. The record upon being produced, however, does not show that there was any second show cause notice which was sent to the petitioner or for that matter the enquiry report dated 19.12.2006 was sent to the petitioner and served so that the petitioner could have a say against the enquiry report.

12. In the backdrop of the above facts, let this Court take into consideration the respective submissions made by the learned counsel for the parties.

13. Mr. N. K. Kalita, the learned counsel for the petitioner duly submitted that the non-furnishing of the enquiry report dated 19.12.2006 and the petitioner not being given an opportunity to have a say on the enquiry report to the Disciplinary Authority has taken away the petitioner's rights under Article 311 of the Constitution apart from being violative of the principle of natural justice. In that regard the learned counsel for the petitioner has referred to the judgment of the Supreme Court in the case of ***Managing Director Ecil Hyderabad vs. B. Karunakar***, reported in ***(1993) 4 SCC 727*** as well as the judgment of this Court in the case of ***Jamini Devee vs. the State of Assam***, reported in ***2022 SCC OnLine Gau 2002***. The learned counsel for the petitioner further submitted that it is the requirement of law that a Presenting Officer has to be appointed. However, in the instant case, no Presenting Officer was appointed. The Enquiry Officer also took up the role of the Presenting Officer which vitiated the enquiry proceedings. The learned counsel for the petitioner further submitted that the petitioner was not informed that he was entitled to a Defence Assistant and for such reason, the petitioner had no clue as regards how to conduct the proceedings which had resulted in the petitioner not cross-examining the various witnesses during the course of the enquiry proceedings and

corollary thereto to prejudice was caused to the petitioner.

14. On the other hand, Mr. C. S. Hazarika, the learned counsel appearing on behalf of all the respondents submitted that from a perusal of the affidavit-in-opposition it would transpire that the petitioner was a habitual absentee, and as such, the finding so recorded in the enquiry report cannot be interfered with in a proceedings under Article 226 of the Constitution. The learned counsel for the respondents further submitted that the scope of jurisdiction under Article 226 of the Constitution is limited in so far as the Departmental Proceedings are concerned. It is also the submission of the learned counsel for the respondents that although the petitioner is raising the issue pertaining to the violation of natural justice, Article 311 of the Constitution, the Presenting Officer and the Enquiry Officer is one and the same as well as that the petitioner was never informed that he could have appointed a Defence Assistant, but these aspects of the matter were never called in question in the appeal where the petitioner ought to have done so. The learned counsel for the respondents further submitted that there has been considerable delay in challenging the impugned order, i.e. almost after 7 years, and as such, on account of delay and laches this Court should not exercise the discretionary remedy under Article 226 of the Constitution.

15. I have heard the learned counsel for the parties and have perused the materials on record including the records which were produced by the learned counsel appearing on behalf of the respondents.

16. Let this Court before proceeding to decide on the questions on merit, decide as to whether this Court should decide the present lis on account of delay and/or laches. The materials on record clearly would show that the order of discharge was passed on 28.12.2006 and the Appellate Order was passed on 17.08.2007. Thereafter it was held only on 18.09.2014 that the writ petition was filed. It further appears from record that this Court had on 26.09.2014 raised the question pertaining to the delay in filing the writ petition. Subsequent thereto, on 07.11.2014, the petitioner took time for filing an additional affidavit. It further appears that on 05.01.2015, this Court after considering the contents of the additional affidavit so filed on 08.12.2014 admitted that instant writ petition by issuing

Rule. Thereupon the instant writ petition has been pending for last 8 years before this Court. The order dated 05.01.2015 by which this Court had admitted the writ petition shows that this Court having been satisfied with the reasons assigned in the additional affidavit had admitted the instant writ petition. In the said order there is no mention whatsoever that the question of delay or laches would be taken up again at the later stage or keeping the question of delay/laches open. There being no challenge to the order dated 05.01.2016, this Court is constrained to observe that at the present stage to dismiss the petition on the ground of delay/laches would not be proper and the order dated 05.01.2015 would apply as *res judicata*. This Court in that regard finds it relevant to refer to a judgment of the Supreme Court in the case of ***Hirday Narain vs Income-Tax Officer, Bareilly***, reported in **(1970) 2 SCC 355** wherein the Supreme Court was dealing with a question as to whether the High Court was justified in relegating the petitioner therein to an alternative remedy after being admitted the writ petition and having heard on merit. The Supreme Court observed that it was not proper on the part of the High Court to do so. This Court is also of the opinion that after having admitted the writ petition on 05.01.2015 by this Court and the parties having contested on merit in the instant proceedings by filing their affidavits, it would not be proper at this stage to dismiss the petition on the ground of delay/laches.

17. The next questions which arises or for that matter the pivotal questions for the purpose of disposal of the instant writ petition are as to whether the enquiry report was served upon the petitioner and as to whether not issuing a second show cause notice giving the petitioner an opportunity to have his say thereby requesting the Disciplinary Authority not to accept the enquiry report on account of legal as well as factual fallacies was fatal.

18. As narrated herein above, it would reveal that the enquiry report was submitted on 19.12.2006 and the order of discharge was passed on 28.12.2006 which is after a period of 9 days. There is no material on record to show as to when the enquiry report was sent and served upon the petitioner thereby asking the petitioner to show cause as to why the Departmental Authority should not accept the enquiry report. Neither any show cause notice as stated in paragraph No.2 (iv) of the affidavit-in-opposition was enclosed nor the same

could be seen from the perusal of the record produced. The respondents have failed to show any document to the effect that the said enquiry report as well as the notice was served upon the petitioner. This Court therefore is of the opinion that there was no second show cause notice along with the enquiry report served upon the petitioner before passing the order of discharge on 28.12.2006.

19. Now, therefore, the question arises whether the non-furnishing of the enquiry report or affording an opportunity to have a say on the enquiry report is fatal to the order of discharge dated 28.12.2006. The answer to the said question can be found from the judgment of the Constitution Bench of the Supreme Court in the case of ***Managing Director Ecil Hyderabad*** (supra). A perusal of the said judgment would show that the primary question involved in the said proceedings before the Supreme Court, was whether the report of the Enquiry Officer/the Authority who/which is appointed by the by the disciplinary authority to hold an inquiry 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 its own finding with regard to the guilt or otherwise of an 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) of the Constitution which stood prior to the 42nd amendment of the Constitution as well as the post 42nd amendment. The Supreme Court observed that the right to receive the Inquiry 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 right to show cause against the penalty proposed (the later one which was taken away by the 42nd amendment of the Constitution) was elaborately explained in paragraph No.25 of the judgment in the case of ***Managing Director Ecil Hyderabad*** (supra) which 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."

20. From the above observation quoted, it would appear that the right to represent against the findings of the report is right to prove innocence whereas the right to show cause against the penalty is the right to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. The Supreme Court had further observed that the second right to show cause against the penalty has been taken away by the 42nd amendment. The Supreme Court further at paragraph Nos.26 & 27 of the said judgment clarified the two different and distinct rights and the requirement as to why the right to show cause against the finding is a very essential right of the delinquent. Paragraph Nos.26 & 27 of the judgment in the case of ***Managing Director Ecil Hyderabad*** (supra) are quoted herein under:

"***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."*

21. From a reading of the above two paragraphs and more particularly paragraph No.27, it would be seen that when 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 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 himself in the first stage of the inquiry and 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. 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 him the opportunity of submitting a show cause against the findings of the Enquiry Officer is a denial of the right to the petitioner to defend himself and prove his innocence in Disciplinary Proceedings. The Supreme Court had categorically mandated that 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. The second aspect pertains to when a valuable right of the petitioner to prove his innocence had been taken away by not allowing the petitioner to submit a reply against the findings of the Enquiry Officer, by operation of law, prejudice is caused.

22. In that view of the matter, taking into account the petitioner has not been given the opportunity by serving upon him the enquiry report along with the opportunity to have a say in respect to the legal and factual fallacies in the enquiry report in respect to the instant case, the order of discharge dated 28.12.2006 is bad in law and accordingly stands set aside and quashed.

23. Another question therefore arises in respect to the submission made by Mr. N. K. Kalita, the learned counsel for the petitioner to the effect that there was no Presenting Officer appointed and the petitioner was also not informed about his rights to appoint a Defence Assistant which has caused prejudice to the petitioner. In the opinion of this Court, these aspects of the matter can be very well taken as ground of objection to the enquiry report where the Disciplinary Authority issue a show cause along with the enquiry report.

24. Taking into account the above, this Court therefore sets aside the order of discharge dated 28.12.2006 and consequently also sets aside the order dated 17.08.2017 in view of the fact that the Appellate order cannot remain in absence of the original order of discharge being set aside. The respondent authorities and more particularly the Disciplinary Authority would be within its jurisdiction to take such action as deemed fit by issuing a second show cause notice upon the petitioner thereby enclosing the enquiry report so that the petitioner can reply to the said show cause notice.

25. The petitioner would be at liberty to take such legal and factual grounds as permissible under law.

26. In view of the above observations and directions, the instant petition stands disposed of.

JUDGE

Comparing Assistant