GAHC010236002015

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

Case No. : WP(C)/4438/2015

ABDUL RAZZAK AHMED
S/O ALHAS RAJABUDDIN AHMED ALI AHMED NAGAR, 6TH MILE
KHANPARA GUWAHATI-22, DIST. KAMRUP M, ASSAM.

VERSUS

THE STATE OF ASSAM AND 2 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
A.H. and VETRINARY DEPARTMENT, DISPUR.

2:THE DEPUTY SECRETARY TO THE GOVT. OF ASSAM
A.H. and VETERINARY DEPARTMENT
GOVT. OF ASSAM, DISPUR, GUWAHATI-6.

3:THE DIRECTOR
DAIRY DEVELOPMENT ASSAM
KHANAPARA, GUWAHATI-22

Advocate for the Petitioner : MR.S K TALUKDAR
Advocate for the Respondent : MR. K. KONWAR, ADDL. AG, ASSAM, MR. M KATAKY

– BEFORE –

HON'BLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing & judgment : 18.01.2024

JUDGMENT & ORDER
(ORAL)

Heard Mr. S. K. Talukdar, learned counsel appearing on behalf of the petitioner. Also heard Mr. K. Konwar, learned Additional Advocate General, Assam, and Ms. M.

Kataky, learned Standing counsel, Animal Husbandry and Veterinary Department, appearing on behalf of the respondents.

2. The instant writ petition has been filed by the petitioner seeking a writ in the nature of certiorari for quashing the impugned orders dated 19.12.1997 and 24.09.2014 and further seeking a writ in the nature of mandamus directing the respondent authorities to release the petitioner's all retiral benefits, such as pension, gratuity, etc. including arrear pension.

3. The facts, as can be discerned from the pleadings on record, show that the petitioner herein, while serving as Assistant Director, Headquarter, Dairy Development Department, Assam, was suspended vide notification dated 26.11.1992 pending drawal of departmental proceedings. Thereupon, a preliminary enquiry was conducted by the Deputy Secretary to the Government of Assam, Veterinary Department, and a report was submitted on 16.11.1992 holding that the petitioner was negligent towards his duty, and proposing departmental enquiry against him including others for defalcation of certain public money. The petitioner thereupon challenged the said notification dated 26.11.1992 by filing a writ petition before this Court, which was registered as Civil Rule No. 639/1992. This Court, by an order dated 07.12.1992 stayed the said suspension order with further direction to the petitioner to file appeal before the competent authority. In pursuance thereto, vide another notification dated 11.12.1992, the Government suspended the earlier notification dated 26.11.1992. The petitioner thereupon submitted an appeal before the competent authority for revocation of the notification placing him under suspension. On 08.01.1993, a notification was issued by the Additional Secretary to the Government of Assam, Veterinary Department, disclosing consideration of the appeal submitted by the petitioner and upheld the notification dated 26.11.1992 placing the petitioner under suspension pending drawal of departmental proceedings. Thereupon, on 30.01.1993, a Charge Memo was issued to petitioner asking him to show cause *inter alia* against the charge of defalcation of Rs. 6,28,450.00 relating to Town Milk Supply Scheme. At

this stage, this Court finds it pertinent to quote herein-below the statement of allegation so made against the petitioner in the Charge Memo dated 30.01.1993:

> *"That while you were Superintendent, Town Milk Supply Scheme, Khanapara, you did not check the cash and accounts of the T.M.S.S. regularly as required as drawing and disbursing officer. You did not sign the Cash Book for months together, particularly in June, July and August in 1991. Also you defalcated an amount of Rs. 6,28,450.00 (Rupees Six Lakhs twenty-eight thousand four hundred fifty) only from the cash of the T.M.S.S. in collusion with Shri Aminoor Islam, Ex-Cashier, T.M.S.S., Khanapara."*

4. Thereupon the petitioner duly submitted his reply to the aforesaid Show Cause notice. The petitioner had also approached this Court by filing a writ petition challenging the notification dated 08.01.1993, whereby the suspension of the petitioner was upheld. The said writ petition was registered and numbered as Civil Rule No. 192/1993. This Court, vide order dated 05.03.1993 directed the authorities to conclude the proposed departmental proceedings against the petitioner within two months from the date of receipt of a certified copy of the order passed this Court. It is, however, relevant to take note that the said order dated 05.03.1993, as alleged by the petitioner, was not complied with by the respondent authorities, for which a contempt proceeding was initiated by the petitioner. Upon filing of the said contempt proceeding, another notification was issued on 08.10.1993 thereby re-instating the petitioner in service. It is also relevant to take note that, in the meantime, by an order dated 14.09.1993, issued by the Commissioner and Secretary to the Government of Assam, Veterinary Department, an Enquiry Officer was appointed for the purpose of conducting enquiry into the charges framed against the petitioner. Pursuant to appointment of the Enquiry Officer, but before the said disciplinary proceeding could be brought to a logical conclusion, the Government of Assam decided to compulsorily retire the petitioner from service by giving three months' salary, as per FR-56(b) and, in that regard, an order was passed on 11.04.1994. The record also reveals that an enquiry report was submitted pursuant to the petitioner being compulsorily retired. Be

that as it may, the said enquiry report is not a part of the instant writ proceedings.

5. It is also relevant to mention that the order of compulsory retirement dated 11.04.1994 was challenged by the petitioner by filing an appeal before the Governor of Assam and, vide an order dated 03.06.1994, the said appeal of the petitioner was dismissed. Subsequent thereto, on 17.09.1996, a notice was issued to the petitioner asking him to furnish his reply against the decision of the Government to withhold/withdraw the entire pension including gratuity for alleged misappropriation of public money amounting to Rs. 6,28,450.00. The said notification has been enclosed as Annexure-14 to the writ petition, the contents of which are reproduced below:

> "*In inviting a reference on the subject cited above, I am directed to say that the Govt. have decided to withhold/withdraw your entire pension including gratuity etc. for misappropriation of Govt. money amounting to Rs. 6,28,450.00 while you were holding the office of the Superintendent, T.M.S.S., Khanapara, during 1991.*
>
> *You are requested to furnish your reply/representation, if any, within 15 days from the date of the receipt of this letter.*"

6. A perusal of the above-quoted notification would reveal that the Government had decided to withhold/withdraw the entire amount of pension, including gratuity etc. of the petitioner for misappropriation of Government money amounting to Rs. 6,28,450.00 while the petitioner was holding the office of the Superintendent, T.M.S.S., Khanapara during the year 1991. The petitioner was asked to furnish his reply within 15 days.

7. It has been stated in the writ petition that the petitioner submitted his reply and, pursuant thereto, on 19.12.1997, the impugned order was passed wherein it was observed that the petitioner was found guilty of misappropriation of Government money amounting to Rs. 6,28,450.00 while he was in service and for which it was decided by the Government to accept the enquiry report of the Enquiry Officer and to inflict the punishment for recovery of the misappropriated money from his pension. It

was also mentioned that the said order was passed for withholding/withdrawal of his entire pension including gratuity vide Section 9 of the Assam (Services) Pension Rules, 1969.

8. Thereupon the petitioner represented before the respondent authorities time and again, but to no avail. In the meantime, there were further developments in the matter inasmuch as on the basis of the allegation that the petitioner had misappropriated an amount of Rs. 6,28,450.00, an FIR was filed by the concerned authority and thereupon a Charge-sheet was submitted against the petitioner and two others, under Sections 120B/409 IPC and Section 13(2) read with Section 13(1)(c) of the Prevention of Corruption Act, 1988. The said case was registered as Special Case No. 80(A)/2001. The learned Special Judge, Guwahati, vide judgment and order dated 08.06.2010 held the petitioner guilty and convicted him under Section 409 IPC/120B of the IPC as well as Section 13(2) read with Section 13(1)(c) of the Prevention of Corruption Act, 1988 and sentenced him separately against each offence to undergo rigorous imprisonment for two years and pay a fine of Rs. 5,000/- and, in default of payment of fine, to undergo rigorous imprisonment for additional two months. It was also directed that all the sentences would run concurrently. The petitioner, being aggrieved by his conviction and sentence, preferred an appeal before this Court, which was registered as Crl. Appeal No. 98/2010. This Court, vide a detailed judgment and order dated 04.09.2013, set aside the said conviction and held that the petitioner was not guilty of the offence and, accordingly, he was acquitted of the same.

9. Pursuant to the aforesaid judgment passed by this Court in Crl. Appeal No. 98/2010, the petitioner submitted a representation dated 23.10.2013 before the concerned authority for release of his retiral benefits including pension. The representation so submitted by the petitioner was however rejected vide a communication dated 24.09.2014. Therefore, being aggrieved by the order dated 19.12.1997 imposing the penalty of withholding/withdrawing of his entire pensionary benefits, including gratuity, as well as the rejection of his representation vide

communication dated 24.09.2014, the instant writ petition has been filed by the petitioner.

10. The record reveals that this Court, vide order dated 14.03.2016, had issued notice. Thereupon, the respondent No. 3 filed an affidavit-in-opposition stating *inter alia* that there would be no impact of the acquittal of the petitioner in the criminal case on the result of the departmental proceedings inasmuch as the standard of proof in a criminal case and a departmental proceeding is quite different. It was also stated that while in a criminal case the accusation has to be proved beyond reasonable doubt, in a departmental proceeding the principle of preponderance of probability is applicable. It was further mentioned that if the prayer of the petitioner is allowed, it will amount to review of the order of compulsory retirement as well as the penalty imposed in the departmental proceeding, which cannot be done merely because of his acquittal in the criminal case. It is, however, relevant to take note that the said affidavit was filed on 29.08.2016 by the Director of Dairy Development Department, Assam. In the backdrop of the above pleadings, this Court has also heard the learned counsel appearing for the parties.

11. Mr. S.K. Talukdar, learned counsel appearing on behalf of the petitioner has submitted that the petitioner has limited grievance out here as regards imposition of penalty of withholding/withdrawing of his entire retiral benefits, including gratuity, vide the impugned orders dated 19.12.1997 and 24.09.2014. It was submitted that the petitioner herein has not challenged the order of his compulsory retirement. He further submitted that a perusal of the judgment passed by this Court in Crl. Appeal No. 98/2010 would clearly show that it was observed that the prosecution failed to adduce any substantive evidence against the petitioner and the findings arrived at by this Court in the said criminal appeal is to the effect that there was no legally admissible and substantive evidence which could have become the foundation for holding that there was criminal conspiracy for misappropriation of government money or that money belonging to the government was misappropriated by the accused-

appellant, i.e. the petitioner herein. He has submitted that when, on the same facts this Court had already held that there was no legally admissible and substantive evidence against the petitioner, the impugned order dated 19.12.1997 ought to have been recalled, for which the petitioner had duly submitted representation before the concerned authorities, which was not at all taken into consideration. Learned counsel for the petitioner had relied upon the recent judgment rendered by the Supreme Court in the case of ***Ram Lal vs. State of Rajasthan & Ors.,*** reported in ***(2024) 1 SCC 175.***

12. On the other hand, Mr. K. Konwar, learned Additional Advocate General, Assam, has submitted that the appreciation of evidence in a criminal trial cannot be equated with that in a departmental proceedings taking into account that in a criminal trial the prosecution has to establish the charge beyond reasonable doubt, whereas in a departmental proceedings it depends upon preponderance of probability. Drawing reference to the Charge-sheet, he submitted that there were 5 witnesses, of which two witnesses being the accused in the criminal trial, their evidence were not taken into consideration, which had materially affected the criminal trial. However, during the enquiry proceeding, the evidence of the said persons were duly taken note of and thereupon the enquiry report was duly submitted holding *inter alia* that the petitioner was guilty of misappropriation of the amount of Rs. 6,28,450.00. Mr. Konwar has further submitted that the remaining 3 witnesses, who were named in the Charge-sheet, were also not examined in the criminal trial. In order to substantiate his submission, Mr. Konwar has relied upon the judgment of the Supreme Court in the case of ***State of Rajasthan & Ors. Vs. Phool Singh***, reported in ***2022 SCC OnLine SC 1140***, more particularly, paragraph 10 thereof. Learned Additional Advocate General has also relied upon three other judgments of the Supreme Court in the cases of ***State of Karnataka and Another vs. N. Gangaraj***, reported in ***(2020) 3 SCC 423***, ***Karnataka Power Transmission Corporation Ltd. Vs. C. Nagraju and Anr.***, reported in ***(2019) 10 SCC 367*** and ***State Bank of Bikaner & Jaipur vs. Nemi Chand Nalwaya,*** reported in ***(2011) 4 SCC 584***, more particularly paragraph 10 thereof.

13. From the materials on record, it reveals that the a departmental proceedings were initiated against the petitioner while he was in service and, thereupon, after the petitioner was compulsorily retired in terms with FR-56(b), proceedings were initiated in terms with Rule 21 of the Assam Services (Pension) Rules, 1969 and were concluded vide order dated 19.12.1997 directing withholding/withdrawing the entire retiral benefits of the petitioner, including gratuity, under Rule 9 of the Assam Services (Pension) Rules, 1969. This order dated 19.12.1997 was never put to challenge by the petitioner till filing of the present writ petition on 22.06.2015. It is further relevant to mention that, in the meantime, Charge-sheet was submitted in the year 2001 and, thereupon, vide judgment and order dated 08.06.2010, the learned Special Judge, Guwahati, convicted the petitioner. The petitioner thereupon preferred an appeal, which was registered as Crl. Appeal No. 98/2010 and, vide the judgment and order dated 04.09.2013, the petitioner was acquitted of the charges, as already mentioned above, on the ground that there was no legally admissible and substantive evidence which could have become the foundation for holding that there was criminal conspiracy for misappropriation of government money or that money belonging to the government was misappropriated by the accused-appellant/ petitioner herein. It is only thereafter the petitioner approached this Court by filing the instant writ petition after submitting representation dated 23.10.2013 before the respondent authority, which was rejected vide the impugned order dated 24.09.2014. In the backdrop of the above facts, let this Court therefore consider the judgments, which have been relied upon the learned counsel appearing on behalf of the parties.

14. In the case of ***Nemi Chand Nalwaya*** (supra), the Supreme Court categorically observed at paragraph 10 that the acquittal given by a criminal court subsequently by giving the benefit of doubt will not in any way render a completed disciplinary proceeding invalid, nor will affect the validity of the finding of guilt or consequential punishment. It was categorically observed that the standard of proof required in criminal proceedings being different from the standard of proof required in

departmental enquiries, the same charges and evidence may lead to different results in the two proceedings. This is more so because departmental proceedings are more proximate to the incident, in point of time, compared to the criminal proceedings. It was pertinently observed that the findings arrived at by a criminal court will have no effect on a previously concluded domestic enquiry when an employee allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by non-challenge, and there can be no challenge to the decision after several years on the ground that subsequently the criminal court has acquitted him. Paragraph 10 of the said judgment is quoted herein-below:

> "*10. The fact that the criminal court subsequently acquitted the respondent by giving him the benefit of doubt, will not in any way render a completed disciplinary proceedings invalid nor affect the validity of the finding of guilt or consequential punishment. The standard of proof required in criminal proceedings being different from the standard of proof required in departmental enquiries, the same charges and evidence may lead to different results in the two proceedings, that is, finding of guilt in departmental proceedings and an acquittal by giving benefit of doubt in the criminal proceedings. This is more so when the departmental proceedings are more proximate to the incident, in point of time, when compared to the criminal proceedings. The findings by the criminal court will have no effect on previously concluded domestic enquiry. An employee who allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by non-challenge, cannot after several years, challenge the decision on the ground that subsequently, the criminal court has acquitted him."*

15. The Supreme Court had observed in the case of ***Phool Singh*** (supra) that a departmental proceeding is different from a criminal proceeding inasmuch as the fundamental difference between the two is that whereas in a departmental proceeding a delinquent employee can be held guilty on the basis of "preponderance of probabilities", in a criminal court the prosecution has to prove its case "beyond reasonable doubt". It was further observed that the Supreme Court had consistently held that merely because a person has been acquitted in a criminal trial, he cannot be *ipso facto* reinstated in service. In the said judgment, referring to the judgment rendered by the Supreme Court in the case of ***Capt. M. Paul Anthony vs. Bharat Gold Mines Ltd. & Anr.***, reported in ***(1999) 3 SCC 679,*** it was observed that there in ***Capt.***

M. Paul Anthony (supra) there were two distinguishing features. Firstly, there was an admitted fact that the petitioner therein was not given any subsistence allowance during his period of suspension and therefore he was not in a position to face the departmental proceedings in Karnataka, while he was residing in Kerala. Secondly, the petitioner therein was being charged on the same set of facts in the two proceedings and, therefore, he had requested the departmental authorities to stay the departmental proceedings till the conclusion of the criminal case, which was denied. Paragraph 10 of the said judgment being relevant, is quoted herein-below:

> "*10. Capt. M. Paul Anthony was working in the year 1985 as a 'Security Officer' with 'Bharat Gold Mines Ltd.', which was engaged in the mining of gold in the Kolar Gold mines in Karnataka. On 02.06.1985 a raid was conducted by the Superintendent of Police at the residence of Capt. M. Paul Anthony (whom we should refer here also as the 'petitioner'), from where a sponge gold ball weighing 4.5 grams and 1276 grams of 'gold bearing sand' were recovered. He was immediately suspended from his services and the same day an F.I.R. was registered. The next day petitioner received a charge sheet and hence departmental proceedings were also initiated against him. The petitioner then moved an application before his disciplinary authorities praying that the departmental proceedings be stayed till the conclusion of the criminal proceedings, but his request was turned down. Meanwhile he returned to his home State of Kerala and requested for an adjournment of the disciplinary proceedings. This request was also turned down. The departmental proceedings went ex-parte against the petitioner where he was found guilty of misconduct. On 07.06.1986 petitioner was dismissed from service. During his entire period of suspension, he was not given any subsistence allowance.*
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> *On 03.02.1987 Capt. M. Paul Anthony was acquitted in the criminal trial, on the grounds that the prosecution had failed to establish its case, particularly the police raid on which the entire case was based. The petitioner, immediately after his acquittal, placed a copy of the judgment of the criminal court before his departmental authorities and prayed for his reinstatement. This was denied and consequently the petitioner filed a departmental appeal which was also dismissed. He then approached the High Court of Karnataka, where his writ petition was allowed by the Court and his reinstatement was ordered on the ground that on the same set of charges, the petitioner has been acquitted by a criminal court and hence he must be reinstated in service. The State filed a special appeal before the Division Bench which was allowed and the order of the learned Single Judge was set aside. The petitioner (Capt. M. Paul Anthony) then challenged the order of the Division Bench of the Karnataka High Court before this Court.*
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> *There were two factors which weighed with the Supreme Court, while deciding that case. The first was the admitted fact that the petitioner was not given any subsistence allowance during his period of suspension and therefore, he was not in a position to face*

the departmental proceedings in Karnataka while he was residing in Kerala. The second aspect was that the petitioner was being charged on the same set of facts in the two proceedings and therefore, he had made request to the departmental authorities to stay the departmental proceedings till the conclusion of the criminal case, a request which was denied. This aspect seems to be the most important factor weighing in the mind of this Court, as this Court was of the opinion that the charges, (both in the criminal court and with the department), involved a complicated question of fact and law, relating to the "raid" made by the police, and therefore the departmental proceedings should have been stayed and it should have awaited the result of the criminal proceedings. It was in the raid made by the Police that the 'Gold sponge ball' and 'Gold bearing sand' were allegedly recovered from his residence. This factum of "raid and recovery" which was the fulcrum of the case, stood disproved. Under these circumstances, it was held that the petitioner was liable to be reinstated. Capt. M. Paul Anthony thus must be appreciated for its unique facts and to our mind it does not lay down a law of universal application."

16. This Court further finds it relevant to take note of the judgment of the Supreme Court rendered in the case of ***C. Nagraju*** (supra), wherein the Supreme Court had, at paragraph 13 thereof, categorically observed that the disciplinary authority is not bound by the judgment of the criminal court if the evidence that is produced in the departmental inquiry is different from that produced during the criminal trial. Paragraph 13 of the said judgment, being relevant, is quoted herein below:

> "*13. Having considered the submissions made on behalf of the Appellant and the Respondent No.1, we are of the view that interference with the order of dismissal by the High Court was unwarranted. It is settled law that the acquittal by a Criminal Court does not preclude a Departmental Inquiry against the delinquent officer. The Disciplinary Authority is not bound by the judgment of the Criminal Court if the evidence that is produced in the Departmental Inquiry is different from that produced during the criminal trial. The object of a Departmental Inquiry is to find out whether the delinquent is guilty of misconduct under the conduct rules for the purpose of determining whether he should be continued in service. The standard of proof in a Departmental Inquiry is not strictly based on the rules of evidence. The order of dismissal which is based on the evidence before the Inquiry Officer in the disciplinary proceedings, which is different from the evidence available to the Criminal Court, is justified and needed no interference by the High Court."*

17. In the backdrop of the above judgments, this Court also finds it very pertinent to refer to the recent judgment of the Supreme Court in the case of ***Ram Lal*** (supra), wherein the Supreme Court duly interfered with the order of the disciplinary authority on the basis of the acquittal in the criminal proceeding. In the said judgment, the Supreme Court observed that a writ court's power to review the order of the

disciplinary authority is very limited. It was also observed that the scope of enquiry is only to examine whether the decision-making process is legitimate. It was further observed that the courts exercising power of judicial review are entitled to consider whether the findings of the disciplinary authority have ignored material evidence and if it so finds, courts are not powerless to interfere. The Supreme Court duly observed that mere acquittal by a criminal court will not confer on the employee a right to claim any benefit, including reinstatement. It was however observed in the said judgment that if the charges in the departmental enquiry and the criminal court are identical or similar, and if the evidence, witnesses and circumstances are one and the same, then the matter acquires a different dimension. It was opined that if the court in exercise of the powers of judicial review concludes that the acquittal in the criminal proceeding was after full consideration of the prosecution evidence and that the prosecution miserably failed to prove the charge, the Court in judicial review can grant redress in certain circumstances. Further to that, the Supreme Court opined that the court will be entitled to exercise its discretion and grant relief, if it concludes that allowing the findings in the disciplinary proceedings to stand would be unjust, unfair and oppressive. Paragraphs 10, 11 and 12 of the said judgment are quoted herein-below:

> "*10. We have examined both the questions independently. We are conscious of the fact that a writ court's power to review the order of the Disciplinary Authority is very limited. The scope of enquiry is only to examine whether the decision-making process is legitimate. [See State Bank of India vs. A.G.D. Reddy, 2023:INSC:766 = 2023 (11) Scale 530]. As part of that exercise, the courts exercising power of judicial review are entitled to consider whether the findings of the Disciplinary Authority have ignored material evidence and if it so finds, courts are not powerless to interfere. [See 5 United Bank of India vs. Biswanath Bhattacharjee, 2022:INSC:117 = (2022) 13 SCC 329]*
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> *11. We are also conscious of the fact that mere acquittal by a criminal court will not confer on the employee a right to claim any benefit, including reinstatement. (See Deputy Inspector General of Police and Another v. S. Samuthiram, (2013) 1 SCC 598).*
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> *12. However, if the charges in the departmental enquiry and the criminal court are identical or similar, and if the evidence, witnesses and circumstances are one and the same, then the matter acquires a different dimension. If the court in judicial review concludes that the acquittal in the criminal proceeding was after full consideration of the prosecution evidence and that the prosecution miserably failed to prove the*

charge, the Court in judicial review can grant redress in certain circumstances. The court will be entitled to exercise its discretion and grant relief, if it concludes that allowing the findings in the disciplinary proceedings to stand will be 6 unjust, unfair and oppressive. Each case will turn on its own facts. [See G.M. Tank vs. State of Gujarat & Others, (2006) 5 SCC 446, State Bank of Hyderabad vs. P. Kata Rao, (2008) 15 SCC 657 and S. Samuthiram (supra)]"

18. This Court further finds it very significant to take note of the facts in ***Ram Lal*** (supra) wherein the appellant was dismissed from service vide order dated 31.03.2004 and the attempt made by the appellant therein to have the order reviewed and the penalty imposed reconsidered was also in vain. Almost after three years thereafter, the appellant therein was acquitted by the appellate court in the criminal appeal thereby setting aside his conviction. The above facts, which have been narrated in the case of ***Ram Lal*** (supra), would show that merely because a person has been already dismissed from service or any order of disciplinary proceeding has been passed, it would not preclude the delinquent employee to submit representation for reconsideration of the imposition of penalty and, thereupon, to file a writ petition. Therefore, the question which would be required to be decided in the instant proceedings is as to whether the conviction has been set aside on the same set of allegations and taking into consideration that the evidence, witnesses and the circumstance are one and the same.

19. This Court also finds it relevant to observe that in the case of ***Nemi Chand Nalwaya*** (supra), the Supreme Court had categorically observed that the fact that a delinquent employee has been acquitted by giving him the benefit of doubt, will not, in any way, render a completed disciplinary proceedings invalid nor affect the validity of the finding of guilt or consequential punishment. Whereas, in the case of ***Ram Lal*** (supra) the Supreme Court categorically observed that the charges against the appellant therein were not just "not proved" and, in fact, the charges have stood "disproved" by the very prosecution evidence. Therefore, taking into account the above two judgments, it is to be seen as to whether the prosecution evidence stood disproved in the instant case and it is only under such circumstances this Court can

exercise discretion and grant appropriate relief.

20. This Court also finds it very pertinent to mention that in paragraph 26 of the judgment in the case of ***Ram Lal*** (supra) the Supreme Court observed that the findings of the appellate judge clearly indicated that the facts were "disproved" and enunciated when a fact is disproved. It was observed that when, after considering the materials before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. This Court also finds it relevant to take note that in the said judgment the entire basis of the disciplinary proceeding was the evidence of one Shravan Lal (PW-4 in the departmental proceeding and PW-6 in the criminal case) that the appellant Ram Lal, in drunken state, had informed him that he had received his job by fooling the Government. It was alleged that the appellant Ram Lal stated that he had received the job by altering his date of birth as 21.04.1972 in his mark sheet, whereas his actual date of birth was 21.04.1974. The Supreme Court in the judgment categorically observed that the Appellate Judge had duly taken note of Exhibit P-3 therein, which was the original mark sheet, which carried the date of birth as 21.04.1972, and other documents produced by the prosecution. It was observed that a reading of the judgment of the Appellate Court it clearly indicated that the appellant therein was acquitted in the criminal proceeding after full consideration of the prosecution evidence and that the prosecution miserably failed to prove its charge.

21. Moving forward, a perusal of the facts in the instant case would show that the Co-ordinate Bench of this Court, in its judgment and order dated 04.09.2013, in Crl. Appeal No. 98/2010, had duly taken note of the evidence of 17 prosecution witnesses. On consideration of the said evidence, this Court in the said criminal proceeding had categorically held that the prosecution had miserably failed to adduce evidence to show, far less proving, that the appellant/petitioner herein had maintained the Cash Book in question at the time of handing over the charge by the appellant (petitioner

herein) and had not given a sum of Rs. 6,28,450.00 to the officer who had relieved him. It was also observed that there was no legally admissible and substantive evidence, which could have become the foundation for holding that there was criminal conspiracy for misappropriation of government money or that money belonging to the government was misappropriated by the accused-appellant (petitioner herein). This Court however finds it very pertinent to mention that from the judgment passed by the Co-ordinate Bench in Criminal Appeal No. 98/2010, it is not seen that the witnesses mentioned in the list of witnesses to the Charge Memo dated 30.01.2013 were examined.

22. It is also pertinent to mention that this Court had heard the instant writ petition on 18.07.2023 and directed the respondent authorities to produce the records on various dates, i.e. 08.08.2023, 14.11.2023 and 09.01.2024 but the records were not produced before this Court on the ground that the records being very old were not traceable. It is also seen that the enquiry report, which forms the basis on which the penalty was imposed, is not a part of the instant writ proceeding. It is clear from the Charge Memo dated 30.01.1993 that there were 5 witnesses, but it is not known as to whether these 5 witnesses had adduced evidence during the enquiry proceedings which resulted in the findings against the petitioner. This Court has also duly taken note of the preliminary report, which is enclosed to the writ petition as well as the depositions of the 3 of the witnesses, as mentioned therein.

23. From the above facts, the question therefore arises as to whether the instant case falls within the category of cases where "the facts being totally disproved". The petitioner had approached this Court seeking relief on the basis of the judgment passed by this Court in the Criminal Appeal and it is the opinion of this Court that the petitioner has to prove that it was on the same set of evidence, witnesses and the circumstances that the Co-ordinate Bench this Court in the Criminal Appeal had arrived at a finding that the facts against the petitioner were totally disproved. The petitioner, however, had failed to do so.

24. There is another very pertinent aspect, which requires consideration that the petitioner had approached this Court almost after 18 years and the petitioner allowed the disciplinary proceedings to reach a quietus. Therefore, the exceptional circumstances when this Court can exercise its powers of judicial review, as held by the Supreme Court in ***Ram Lal*** (supra) cannot be applied to the present case. Rather the observations made by the Supreme Court in ***Nemi Chand Nalwaya*** (supra) and, more particularly, paragraph 10 thereof, as quoted above, applies.

25. Taking into account the above, this Court therefore finds no ground for interference with the impugned order dated 19.12.1997.

26. This Court, however finds it very relevant to observe that pension as well as pensionary benefits are emoluments which accrues upon an employee after having toiled throughout his/her period of employment. It is also well settled by the Supreme Court that pension is not a bounty, but is earned by rendering long and satisfactory service which is a social security plan consistent with the socio-economic requirements of the Constitution of India. The findings of the Co-ordinate Bench of this Court in the Criminal Appeal show that this Court had categorically observed that the evidence adduced by the prosecution was not legally admissible and substantive evidence. Under such circumstances, a question duly arises on the proportionality of the penalty imposed to deprive the petitioner of his pension as well as his pensionary benefits. It is well settled by various judgments of the Supreme Court that principle of proportionality involves "balancing test" and "necessity test". The "balancing test" permits scrutiny of excessive and onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations. The "necessity test" requires infringement of human rights to be through the least restrictive alternatives. Paragraph 31 of the judgment of the Supreme Court in the case of ***Kerala State Beverages (M & M) Corporation Ltd. Vs. P.P. Suresh and Ors.***, reported in ***(2019) 9 SCC 710,*** states as to when an administrative decision can be said to be proportional. The same is quoted herein below:

"*31. An administrative decision can be said to be proportionate if:*

(a) The objective with which a decision is made to curtail fundamental rights is important;

(b) The measures taken to achieve the objective have a rational connection with the objective; and

(c) The means that impair the rights of individuals are no more than necessary."

27. In view of the above proposition of law, the question whether the penalty of deprivation of the entire pension and pensionary benefits of the petitioner can be said to be proportionate taking into consideration that in the criminal proceedings this Court had held that there was no legally admissible and substantive evidence and, most importantly, deprivation of the entire pension and pensionary benefits infringes severally upon the rights of a person and, more particularly, a retired pensioner. Another question duly arises as to whether the penalty so imposed satisfied both the "balancing test" and the "necessity test". At the cost of repetition, this Court reiterates that pension and pensionary benefits are akin to human rights and deprivation thereof at the fag end of one's life, when the necessity is the utmost, would have to be adjudged on the touchstone of the principles of proportionality.

28. Under such circumstances, this Court permits the petitioner to submit a representation to the Principal Secretary to the Government of Assam, Animal Husbandry and Veterinary Department, along with a certified copy of this judgment and the said authority is directed to consider the representation so submitted taking into account the aforesaid observations on the question of proportionality of the penalty imposed and pass an order within three months from the date of submission of the representation along with the copy of the judgment.

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

JUDGE

Comparing Assistant