



GAHC010134202017

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

Case No. : WP(C)/4118/2017

ABDUL KADER
S/O. LT. B. ALI, R/O. HOUSE NO. 14, SIJUBARI ROAD, NEAR SBI, P.S.
HATIGAON, GUWAHATI-38, DIST. KAMRUP M, ASSAM.

VERSUS

THE STATE OF ASSAM and 3 ORS
REP. BY THE COMM. and SPL. SECY. TO THE GOVT. OF ASSAM, PUBLIC
WORKS ROADS DEPTT., DISPUR, GHY.-06.

2:THE SECRETARY
TO THE GOVT. OF ASSAM
PUBLIC WORKS ROADS DEPTT.
DISPUR
GHY.-06.

3:THE COMMISSIONER and SECY.
TO THE GOVT. OF ASSAM
FINANCE DEPTT.
DISPUR
GHY.-06.

4:THE CHIEF ENGINEER

PUBLIC WORKS ROADS DEPTT. CHANDMARI
GHY.-03

Advocate for the Petitioner : MRP BHARDWAJ

Advocate for the Respondent :



**BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA**

JUDGMENT & ORDER (ORAL)

Date : 30-03-2023

Heard Mr. M Sarma, learned counsel for the petitioner. Also heard Mr. R Dhar, learned Additional Senior Government Advocate for the respondents in the State of Assam.

2. The petitioner was serving as a Superintending Engineer in the respondent Public Works Department and while he was in service he was issued a show cause notice dated 04.07.2015, under Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964 (in short, Rules of 1964) read with Article 311 of the Constitution of India requiring him to show cause as to why penalty prescribed under Rule 7 of the Rules of 1964 shall not be imposed on the petitioner in respect of the two charges that are provided in the show cause notice itself. The petitioner submitted his reply dated 24.07.2015. The proceeding initiated against the petitioner resulted in the order dated 03.03.2017 of the Secretary to the Government of Assam in the Public Works Roads Department.

3. The relevant provisions of the order passed in the disciplinary proceeding against the petitioner dated 03.03.2017 is extracted as below:

“And whereas in the Meeting of the Public Accounts Committee, Assam Legislative Assembly held on 23rd September, 2016, the Chairman on Para 2.2.3 (above mentioned C&AG’s report) has decided and directed to (1) re-instate the service of the Superintending Engineer (Sri Kader) immediately and recover the remaining amount during his service period and (2) to submit a report before the committee by March, 2017 regarding the other punishment taken against the Executive Engineer.

Now, after careful consideration of all the aspects and non-recovery of

considerable amount of Govt. money from the contractor concerned, the Govt. in PWD decided to re-instate Sri Abdul Kader Superintending Engineer, PWRD revoking the suspension order issued vide No.CON.33/2015/101 dated-18-06-2015 in service with the following penalties.

- 1. The period of suspension is to be treated as on duty only for pensionary purpose and salary for the suspension period shall be limited to subsistence allowance received or to be received by him.*
- 2. Whole of his DCRD is to be recovered and his pension is limited to 50% of his net pension."*

4. A reading of the aforesaid-extracted provisions of the order dated 03.03.2017 makes it discernable that as per the meeting of the Public Accounts Committee of the Assam Legislative Assembly held on 23.09.2016 there was a decision to reinstate the petitioner in his service as Superintending Engineer and to recover the remaining amount during his service tenure.

5. Accordingly, by the said order the petitioner was reinstated as Superintending Engineer, PWRD upon revocation of the order dated 18.06.2015 but certain penalties were imposed. One of the penalties imposed upon the petitioner by the order dated 03.03.2017 is that the period of suspension shall be treated to be on duty only for the pensionary purpose and the salary for the suspended period shall be limited to subsistence allowance already paid to the petitioner. A further penalty is imposed that the whole of his DCRG which is understood to be a pensionary benefit is to be recovered and his pension be limited to 50% of his net pension.

6. Being aggrieved by the order dated 03.03.2017 the present writ petition is instituted.

7. It is informed to the Court that the tenure of service of the petitioner upon superannuation came to an end on 31.03.2017. We have noticed that the order

of punishment is dated 03.03.2017.

8. We have particularly noticed that the dominant penalty imposed upon the petitioner is that the whole of his DCRG is to be recovered and that his pension would be limited to 50% of his net pension. In other words the order of penalty is in the nature of a penalty by which the pensionary benefits which the petitioner otherwise would have been entitled had been interfered to a certain extent.

9. We have already noticed that as per the show cause notice dated 04.07.2015 the petitioner was asked to show cause as to why the penalties prescribed under Rule 7 of the Rules of 1964 should not be imposed upon the petitioner.

10. Rule 7 of the Rules of 1964 is extracted as below:

“7. Nature of penalties – The following penalties may for good and sufficient reason and as hereinafter provided, be imposed, on a Government servant, namely –

- i) Censure;*
- ii) Withholding of increments of promotion;*
- iii) Recovery from pay of the whole or part of any pecuniary loss caused by negligence or breach of orders to the Government of Assam or the Central Government or any other State Government, or any local or other authority to whom services of a Government servant had been lent;*
- iv) reduction to a lower service, grade or post, or to a lower time-scale, or to a lower stage in a time-scale;*
- v) compulsory retirement;*
- vi) removal from service which shall not be a disqualification for future employment;*
- vii) dismissal from service which shall ordinarily be a disqualification for future employment.”*

11. The provisions of Rule 7 (iii) of the Rules of 1964 would be that one of the

punishments that can be meted to a government servant upon a disciplinary proceeding being held is to recover the loss caused to the Government from his pay either in whole or any part.

12. In the instant case although the order impugned dated 03.03.2017 is not very clear, but it has to be understood that the recovery from the DCRG of the petitioner and the pension to be limited to 50% of his net pension is in furtherance of the requirement of the disciplinary authority to recover the pecuniary loss that the petitioner may have caused in connection with the charges against him in the disciplinary proceeding.

13. The recovery of the loss caused to the Government by a government servant related to the charges in a disciplinary proceeding under Rule 7 (iii) of the Rules of 1964 can be recovered from the salary allowance but Rule 7 nowhere provides that such recovery can also be made from otherwise the pensionary benefits that the government servant would be entitled upon his retirement.

14. The concept of DCRG and pension are definitely related to the pensionary benefits and not related to the pay and salary of a government servant during his service tenure. But again Rule 21 of the Assam Services (Pension) Rules, 1969 (in short, Rules of 1969) do provide for recovery from the pensionary benefits of a government employee after his retirement. But such recovery from the pensionary benefits would have to be under Rule 21 of the Rules of 1969 and it cannot be understood or construed that recovery from the pension would be under Rule 7(iii) of the Rules of 1964.

15. Accordingly, as the impugned order dated 03.03.2017 of the Secretary to the Government of Assam in the Public Works Roads Department is in exercise



of the power under Rule 9 of the Rules of 1964, it would be in excess of the jurisdiction to order for recovery from the pensionary benefits of the petitioner in a disciplinary proceeding where the order had been passed during the tenure of service and accordingly, we are of the view that the same would be unsustainable in law. As a consequence, the order dated 03.03.2017 is set aside on the technical reason as indicated above that the recovery from the pensionary benefits cannot be ordered during the tenure of the service of a government employee pursuant to a disciplinary proceeding under Rule 9 of the Rules of 1964. But as the interference is made on a technical ground, we are of the view that the ends of justice would require that the proceeding that was initiated under Rule 9 of the Rules of 1964 by the show cause notice dated 04.07.2015 should be brought to its logical end by following the due procedure of law. As the petitioner had in the meantime retired from service on 31.03.2017, it has to be understood that the said proceeding would now have to be continued under Rule 21 of the Rules of 1969.

15. An issue has been raised by the petitioner that it is beyond four years since the petitioner had retired from service and therefore, the proceeding cannot be continued under Rule 21 of the Rules of 1969.

16. The Rule of 21 of the Rules of 1969 is extracted as below:

21. The Governor of Assam reserves to himself the right of withholding or withdrawing a person or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if, in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement provided that –

(a) such departmental proceeding, if instituted while the officer was in service, whether before his retirement or during his re-employment, shall, after the final



retirement of the officer, be deemed to be a proceeding under this rule 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;

18. A reading of the provisions of the Rule 21 (a) of the Rules of 1969 makes it discernable that in the event the Governor of Assam would like to reserve himself the right of withholding or withdrawing a pension or any part of it, if in a departmental or a judicial proceeding, the pensioner is found to be guilty of grave misconduct or negligence during the period of service, such departmental proceeding, if instituted while the officer was in service, shall after the final retirement of the officer be deemed to be a proceeding under Rule 21 (a) and shall be continued and concluded by the authority by which the proceeding was initiated in the same manner as if the officer had continued in service. In other words, under Rule 21 of the Rules of 1969 there is no such embargo as regards the period that may be elapsed from the date when a government servant had retired from service. All that Rule 21 (a) provides is a legal fiction that if a departmental proceeding has been initiated but could not be concluded and in the meantime the government officer retires from service there is a deemed provision that the said proceeding henceforth from the date of retirement would be a proceeding under Rule 21 (a) of the Rules of 1969 and it would be continued by the disciplinary authority who had instituted the disciplinary proceeding and bring an end to the same proceeding as if the government servant had not retired from service.

19. On the other hand, Rule 21 (b) provides that if the departmental proceeding contemplated under Rule 21 was not initiated while the officer was in service, in such event, as per the provisions of Rule 21 (b)(ii), it shall not be instituted in respect of any event which took place more than four years before



such institution. The embargo of four years for instituting a disciplinary proceeding after retirement would be applicable only in such cases where the disciplinary proceeding had not been instituted. But on the other hand if the disciplinary proceeding had been instituted, it would be covered by the provisions under Rule 21(a) i.e. there would be a legal fiction that it would be deemed that the disciplinary proceeding would now be continued as a proceeding under Rule 21(a).

20 Similarly, the provisions of Rule 21(c) that such judicial proceeding also cannot be instituted in respect of a cause of action which arose or an event which took place more than four year before such institution, would also be inapplicable in the case of the petitioner inasmuch as, the provisions of Rule 21(c) are also circumscribed to the condition precedent that if the judicial proceeding was not instituted at the time of retirement.

21. In the instant case, as the disciplinary proceeding had already been instituted and as it is not a case that it was not instituted at the time of retirement of the petitioner on 31.03.2017, we are unable to accept the contention raised by the petitioner that the proceeding cannot be continued any further because it is more than four years since the petitioner retired from service.

22. Accordingly, while setting aside the order dated 03.03.2017, the respondent disciplinary authority is allowed to continue with the proceeding and bring the same to its logical end, as per law on a understanding that Rule 21(a) is applicable in the instant case and the initial proceeding by the show cause notice dated 04.07.2015 is now converted to a proceeding under Rule 21(a). Further as the order dated 03.03.2017 had been interfered, no such deduction from the pensionary benefits from the petitioner shall be made henceforth till



such reasoned order may be passed in continuation of the disciplinary proceeding. Whatever deduction had been made till date shall be subject to any such reasoned order that may be passed in the disciplinary proceeding and if the order in the disciplinary proceeding is in favour of the petitioner, the deducted amount shall be refunded back to the petitioner.

23. Mr. M. Sarma, learned counsel for the petitioner raises a contention that as the order has been interfered therefore all the amounts that have been deducted from the pensionary benefits of the petitioner should be refunded.

24. We are in disagreement with the said contention for the reason that the interference is on technical ground giving liberty to continue with the proceeding, as per law. However, it is clarified that if eventually the order that may be passed in the disciplinary proceeding is in favour of the petitioner, he would be refunded back the amount that had already been deducted and if it is against the petitioner, the provisions of the order that may be passed shall prevail in respect of the amount that had already been deducted.

Writ petition stands allowed as indicated above.

JUDGE

Comparing Assistant