



GAHC010053042021

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

Case No. : WP(C)/2055/2021

SAFIQUR RAHMAN
S/O LATE MOJIBUR RAHMAN, R/O HOUSE NO. 7, FRIENDS PATH,
HATIGAON, GUWAHATI, DIST. KAMRUP (M), ASSAM, PIN 781038

VERSUS

THE STATE OF ASSAM AND 4 ORS
REPRESENTED BY ITS CHIEF SECY. TO THE GOVT. OF ASSAM, JANATA
BHAWAN, DISPUR, GUWAHATI 6

2:PRINCIPAL SECY./ COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM

FINANCE DEPTT.
JANATA BHAWAN
DISPUR
GUWAHATI 6

3:COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM

PERSONNEL DEPTT.. JANATA BHAWAN
DISPUR
GUWAHATI 6

4:COMMISSIONER SECY. TO THE GOVT. OF ASSAM

HANDLOOM
TEXTILE AND SERICULTURE DEPTT.
JANATA BHAWAN
DISPUR
GUWAHATI 6

5:THE ACCOUNTANT GENERAL



MAIDAMGAON
BELTOLA
GUWAHATI
ASSAM

Advocate for the Petitioner : MR. B K DAS

Advocate for the Respondent : SC, FINANCE

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

JUDGMENT

Date : 25-11-2021

Much water has flown, however, the same error is being committed in spite of the law being settled with respect to the issue at hand. The question of law which has arisen for determination is that whether a disciplinary authority can direct a *de novo* enquiry against a delinquent after the enquiry conducted against him had culminated in a report favourable to him. The said question has been answered on a number of occasions and the settled law is that such action is forbidden as not contemplated by law. It is a different matter that it would still be open to the disciplinary authority to differ with the views of the Enquiry Officer which are favourable to the delinquent and in that event, there is a requirement of affording an opportunity by issuing a notice to represent on the tentative action of the Disciplinary Authority not to accept the findings favourable to the delinquent. However, law has been settled by laying down that if a *de novo* enquiry is permitted, the same would result in an unending process whereby the disciplinary authority would be at liberty to remand the matter for such *de novo* enquiry unless a report to the liking of the Disciplinary Authority is given by the Enquiry Officer. Apart from the fact that such action is not contemplated by law, the same would be in gross violation of the principles of natural justice.

2. To better appreciate the issue, it would be convenient to narrate the facts of the case in brief.

3. The petitioner is a retired Government servant. He had joined the Assam Financial Service in the year 1992 and during the relevant time in the year 2015, he was holding the post of Financial Adviser, Handloom, Textile and Sericulture Department of the Government of Assam. Vide an order 21.07.2015, the petitioner was placed under suspension on the principal ground that two opposite views in a file was recorded which was in violation of the order of the Hon'ble Chief Minister and was in ignorance of all financial procedure and Rules regarding procurement / supply of yarn / blanket which was recommended for administrative approval and financial sanction on the same day i.e., 09.03.2015. It is the case of the petitioner that though he was reinstated in service, a show cause notice dated 29.07.2016 along with a statement of allegation was served upon him which was just two days prior to his date of retirement from service which was 31.07.2016. Being unsatisfied with the reply, an enquiry was conducted in which evidence was adduced by the parties. The said enquiry had culminated in a report dated 22.08.2019 wherein a finding was arrived at that the charges against the petitioner could not be proved. However, on furnishing of the said report, the disciplinary authority had issued a second charge sheet dated 30.09.2020 based on the same set of allegations. It is the case of the petitioner that the impugned action of the Department in contemplating to conduct a fresh enquiry apart from being *ex facie*, illegal and arbitrary is also in gross violation of Rule 21 (b) (ii) of the Assam Services (Pension) Rules, 1969. Accordingly, the writ petition has been filed.

4. I have heard Shri BK Das, learned counsel for the petitioner whereas the contesting Finance Department, Assam is represented by Shri R Borpujari. The respondent no. 1-State of Assam is represented by Shri Rahul Dhar, learned State Counsel whereas the Accountant General, Assam is represented by its Standing Counsel, Shri Rupak Dhar.

5. Shri Das, learned counsel for the petitioner has drawn the attention of this Court to the show cause notice dated 29.07.2016 which contains four numbers of charges. The said show cause notice was stated to have been served under Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964 (hereafter the Rules, 1964) read with Article 311 of the Constitution of India. Without even going to the merits of the charges, the learned counsel has submitted that the timing of issuing the show cause notice is crucial inasmuch as just after two days, the petitioner was to retire on attaining the age of superannuation. It is also pertinent to note that the show cause notice was served almost after a year of placing the petitioner under suspension vide the order dated 21.07.2015 and that too, at the verge of his retirement.

6. The learned counsel for the petitioner has thereafter referred to his reply dated 08.08.2016 whereby the charges have been categorically denied followed by the order dated 05.10.2016 of appointment of the Enquiry Officer and the Presenting Officer. While the enquiry proceeding was going on, the petitioner kept on representing for regularization of his period of suspension. The learned counsel submits that the petitioner was surprised to receive another show cause notice dated 30.09.2020 wherein identical allegations were levelled and it was only on invocation of the Right to Information Act, 2005 that the petitioner could come to know that with regard to the show cause notice dated 29.07.2016, an enquiry report was submitted, as per which none of the charges was held to be established. The further information sought for on behalf of the petitioner by his learned counsel with regard to the details of exoneration of one Shri Dilip Borthakur, IAS (Retd.), who was the then Commissioner and Secretary, Handloom and Textile and was charged with identical allegations, such details were denied with the reasoning that the same would not serve any public interest.

7. Though essentially, the writ petition has not been structured on the ground that a second enquiry based on the same set of allegation is not contemplated under the Rules and is mainly based on the ground that a retired employee cannot be proceeded with, the same being a point of law, was taken up during the arguments. As per the pleadings, the principal ground was violation of the provisions of Rule 21 (b) (ii) of the Assam Service (Pension) Rules, 1969 as a disciplinary proceeding was sought to be initiated for events which took place more than four years ago and in the meantime, the incumbent had retired. This Court has noticed that the show cause notice was issued on 29.07.2016 when admittedly, the petitioner was still in service. Therefore, without going into the aspect of malice in fact *qua* the date of retirement of the petitioner being two days thereafter, technically there was no bar under the Rules of 1969 to initiate such proceedings. In fact, under Rule 21 (a) of the said Rules, a delinquent is deemed to be in service for the purpose of the disciplinary proceeding till the same comes to a logical conclusion. Therefore, without making further observation on the merits of the challenge regarding the alleged violation of the Rules of 1969, the other point which has been raised during the argument is being considered as the said point is essentially a point of law and the powers conferred upon this Court by Article 226 of the Constitution of India would entail this Court to venture into the said arena to ensure that interest of justice is served.

8. Shri Das, learned counsel for the petitioner during the course of hearing has developed the

argument regarding the lack of jurisdiction to initiate a second show cause notice on the same set of allegations after publication of an enquiry report which is in favour of the delinquent. It is submitted that the Rules of 1964 do not contemplate such an avenue or scope and in absence of the same, the impugned action of issuing the charge sheet dated 30.09.2020 is *non est* in law. In support of his submissions, the learned counsel for the petitioner has placed reliance on the following case laws:

- i) 1971 (2) SCC 102, *KR Deb Vs. The Collector of Central Excise, Shillong*;
- ii) (1976) 1 SCC 234, *State of Assam & Anr. Vs. JN Roy Biswas*;
- iii) (2002) 10 SCC 471, *Union of India Vs. KD Pandey & Anr.*;
- iv) 2005 (3) GLT 457, *Bidyut Buragohain Vs. State of Assam & Ors.*;
- v) 2012 (3) GLT 394, *Bhupati Ranjan Mudoi Vs. State of Assam & Anr.*; and
- vi) (2015) 3 GLR 152, *Moloy Bora Vs. State of Assam & Ors.*

9. In the case of *KR Deb (supra)*, a 5 Judges Bench of the Hon'ble Supreme Court was considering a *pari materia* provision of the CCS (CCA) Rules, 1957 read with Article 311 (2) of the Constitution of India. It has been laid down that there is no provision in the Rule to set aside the report of the previous enquiry on the ground that it did not appeal to the Disciplinary Authority.

10. In the case of *JN Roy Biswas (supra)*, which was a case from the State of Assam, the Hon'ble Supreme Court has laid down that in absence of a Rule authorising the Government, reopening of the proceedings was held to be ultra vires and bad.

11. In the case of *KD Pandey (supra)*, the Hon'ble Supreme Court has held that a second enquiry on the same set of allegation after a report in the first enquiry in favour of the delinquent would amount to an abuse of the process of law.

12. The present Rules in question, namely, the Rules of 1964 were the subject matter of deliberation in the cases of *Bidyut Buragohain (supra)*, *Bhupati Ranjan Mudoi (supra)* and *Moloy Bora (supra)*. This Court after discussing the provisions of the Rules as well as the law laid down by the Supreme

Court has consistently held that no specific power has been vested in the Disciplinary Authority by the provisions of the Rules which would enable the same authority to hold a fresh / *de novo* enquiry in case the Disciplinary Authority is in disagreement with the findings of the Enquiry Officer which are in the lines of exoneration of the delinquent. Apart from the Rules of 1964, in the case of **Bhupati Ranjan Mudoi** (*supra*) this Court has also discussed the Manual of Departmental Proceedings, more specifically, para 6.18.1 of Chapter-VI. The observations made by this Court in the aforesaid case are extracted hereinbelow:

“10. For a ready reference, the aforesaid provision on the subject of fresh/further enquiry is reproduced below:

6.18.1. Where the Disciplinary Authority, on a contention raised by the person proceeded against or otherwise finds that any material irregularities have been committed and they have caused or they may cause prejudice to the person charged or such irregularities are likely to vitiate the proceedings, it will consider:

- (1) whether the whole enquiry should be set aside and a fresh enquiry started denovo; or*
- (2) whether the enquiry be set aside from the stage of occurrence of the irregularity and it be ordered to be started afresh from that particular stage.*

8.18.2 As far as possible, where ends of justice can be served and so long as the person proceeded against is given reasonable opportunity of being heard, efforts should be made to resume the enquiry from the stage at which the irregularity occurred.

11. The aforesaid provision is applicable only when the disciplinary authority finds that any material irregularity has been committed and the same might cause prejudice to the persons charged or such irregularity are likely to vitiate the proceeding. It is only in such circumstances, it is to be considered as to whether the whole enquiry shall be set aside or fresh enquiry should be initiated de novo.

12. From the above, what is seen is that the aforesaid provision for fresh/further enquiry has been made to remove any prejudice caused to the officer against whom the proceeding is initiated. Even otherwise also, the said provision cannot override

the provision of Assam Services (Discipline & Appeal) Rules, 1964. Rule 9 of the said Rules laying down the detailed procedure for imposing penalties, provides that on the conclusion of the enquiry, the enquiring authority shall prepare the enquiry report and the disciplinary authority would consider the same towards recording its own findings on each charge. There is no provision for remanding the matter back to the enquiring authority, more particularly on the ground of there being inconsistencies in the report, as indicated in the impugned notification dated 20.22.2010 (Annexure-18).

13. There is also no indication in the impugned notification that the disciplinary authority considered the report in reference to the charges and came to any conclusion. Only finding recorded in the notification is that the report is incomplete and inconsistent. If the course of action adopted by the respondent/disciplinary authority by issuing the impugned notification is allowed to stand, same will cause serious prejudice to the delinquent officer. On each and every occasion it will be the tendency of the disciplinary authority to remand the matter back to another enquiry officer, if it finds that the enquiry report is not favourable to it.”

12. *Per contra*, Shri R Borpujari, learned Standing Counsel, Finance Department has submitted that the contentions of the petitioner do not make out a case for interference by this Court. By drawing the attention of this Court to the affidavit -in-opposition dated 21.09.2021 filed by the Finance Department, the learned Standing Counsel has submitted that the findings arrived at by the Enquiry Officer in the initial report were not findings on merit and rather, observations were made that the charges were vague. The learned Standing Counsel, accordingly argues that in absence of a conclusion arrived on the merits of the case regarding exoneration of the petitioner from the allegations, there would be no bar for directing a *de novo* enquiry. In support of his submissions, Shri Borpujari, learned Standing Counsel has placed reliance upon the following decisions:

- i) (1980) 1 SCC 252, *Anand Narain Shukla Vs. State of Madhya Pradesh*; and**
- ii) (2007) 7 SCC 81, *UP Cooperative Federation Ltd. Vs. LP Rai*.**

13. In the case of *Anand Narain Shukla (supra)*, the Hon'ble Supreme Court had interfered with the order of the High Court which had held a second enquiry to be barred. However, the distinguishing factor in this case is that the first enquiry was vitiated owing to a technical defect. Under those conditions, the interference was made by the Hon'ble Supreme Court by making the remark that the observations of the Court in the last paragraph of the judgment in *JN Roy Biswas (supra)* are not applicable to the facts of the case. In any case, the Hon'ble Supreme Court in the case of *Ambica Quarry Works Etc. Vs. State of Gujarat & Ors.*, reported in AIR 1987 SC 1073 has laid down that the ratio of a decision must be understood in the background of the facts of that case and that a case is only an authority for what it actually decides and not what logically follows from it.

14. In the case of *UP Cooperative (supra)*, a direction for a *de novo* enquiry was made on the ground that no proper enquiry was held and the charges levelled against the employee were not of a minor or trivial nature. The underlying basis of such direction is that the enquiry itself was held to be defective which is unlike the facts of the present case where the charges were held not to be proved.

15. The learned Standing Counsel, while placing the records of the case in original has fairly conceded that there has been recommendation by the Secretary for dropping disciplinary proceeding of the petitioner and treating the period of suspension as on duty. In another note of the Principal Secretary, a *de novo* enquiry was understood not to be initiation of fresh enquiry.

16. Shri R Dhar, learned State Counsel, while endorsing the submissions of Shri Borpujari, learned Standing Counsel has submitted that no prejudice has been caused to the petitioner by the action impugned. By referring to the affidavit-in-opposition filed on 04.09.2021 on behalf of the Personnel Department, Shri Dhar, learned State Counsel has submitted that all information sought for on behalf of the petitioner were furnished.

17. Rejoining his submissions, Shri Das, learned counsel for the petitioner has contended that the averments made in the affidavit-in-opposition of the Finance Department have been categorically refuted in the affidavit-in-reply of the petitioner filed on 26.10.2021. By drawing the attention of this Court to the Rules of 1964, more particularly, Rule 9 (9), it is submitted that the Disciplinary Authority has been vested with powers to consider the records of the enquiry and record its finding on each



charges.

18. It is submitted that the impugned action would amount to allowing the respondent authorities to take advantage of their own wrong. It is further submitted that the entire premises based on which this writ petition has been filed has been categorically admitted by the Finance Department in its affidavit-in-opposition filed on 21.09.2021 in paragraph 18 which is extracted hereinbelow:

“18. That with regard to the statements made in paragraph 20 of the writ petition, the answering deponent begs to state that the contention of the petitioner is not correct. The finding recorded on note sheet dated 13.01.2020 was the view of Sri U Hazarika, Secretary to the Govt. of Assam, Finance (Establishment-B) Department. This view was not agreed upon by the higher authority and hence a proposal for de novo enquiry was initiated by the Principal Secretary to the Govt. of Assam, Finance Department vide note dated 21.02.2020. This was agreed upon by the appointing authority.”

19. What transpires from the aforesaid discussions of the facts and circumstances is that the point of law which arises for determination, namely, the action to initiate a *de novo* enquiry after the enquiry report is published holding the incumbent not to be guilty is clearly established in the present case which is also an undisputed position. Therefore, this Court would have no hesitation to follow the settled law holding the field that such action to initiate a *de novo* enquiry on the same charges after completion of the earlier enquiry culminating with findings of exoneration of the petitioner is wholly without jurisdiction and accordingly declared as *non est* in law. If such impugned action is permissible, the same would amount to giving liberty to the Disciplinary Authority to keep on directing such *de novo* enquiry till a report to his satisfaction is made. This Court on earlier occasions have already criticised such action as being not in consonance with law.

20. Since Rule 9 (9) of the Rules of 1964 was referred to by the learned counsel for the petitioner, this Court is also reminded of the law laid down by the Hon'ble Supreme Court in an identical situation that in case, the Disciplinary Authority wishes to differ with the findings of the Enquiry Officer which are in favour of the delinquent, there is a requirement to issue a further show cause, as at each and



every stage, a delinquent is entitled to be afforded all necessary procedural safeguards. In this connection, one may gainfully refer to the case of *Punjab National Bank Vs. Kunj Behari Misra*, reported in (1998) 7 SCC 84 and *Yoginath D. Bagde Vs. State of Maharashtra*, reported in (1999) 7 SCC 739.

21. Accordingly, the writ petition stands allowed and the impugned second show cause notice dated 30.09.2020 issued by the Principal Secretary to the Government of Assam, Finance Department is held to be unsustainable in law. The Disciplinary Authority is therefore, required to pass appropriate final order(s) based on the enquiry report dated 22.08.2019 and in view of the fact that none of the charges have been proved, to pass appropriate order(s) for regularization of the period of suspension i.e., 31.07.2015 to 04.02.2016 and consequential payment of salaries for the said period and also for payment of all post retirement benefits in accordance with law. Such order(s) be passed within a period of 45 days from the date of receipt of a certified copy of this order.

22. No order as to cost. The records of the case are returned back to Shri A Chaliha, learned Standing Counsel, Finance Department, Assam.

JUDGE

Comparing Assistant