GAHC010194662021

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

Case No. : WP(C)/6467/2021

UBC/1965 MD. HUSSAIN ALI
S/O LATE JASIM UDDIN, A RESIDENT OF VILLAGE MAJAR CHAR, P.O. KALAIRDIYA, P.S. ALOPATI CHAR, DISTRICT BARPETA, PIN 781121.

VERSUS

THE STATE OF ASSAM AND 5 ORS
REPRESENTED BY THE PRINCIPAL SECRETARY TO THE GOVERNMENT OF ASSAM, HOME AND POLITICAL DEPARTMENT, DISPUR, GUWAHATI-781006.

2:THE COMMISSIONER AND SECRETARY

GOVERNMENT OF ASSAM
HOME AND POLITICAL DEPARTMENT
DISPUR
GUWAHATI-781006.

3:THE DIRECTOR GENERAL OF POLICE

ASSAM POLICE HEADQUARTERS
ULUBARI
GUWAHATI-781007.

4:THE DEPUTY INSPECTOR GENERAL OF POLICE (ADM.)
ASSAM
ASSAM POLICE HEADQUARTERS
ULUBARI
GUWAHATI-781007.

5:THE COMMISSIONER OF POLICE
GUWAHATI

OFFICE OF THE COMMISSIONERATE OF POLICE
PANBAZAR
GUWAHATI 781001

6:THE DEPUTY COMMISSIONER OF POLICE (ADMN)

GUWAHATI AND DISCIPLINARY AUTHORITY
OFFICE OF THE COMMISSIONERATE OF POLICE
PANBAZAR
GUWAHATI-781001

Advocate for the Petitioner : MR. S SARMA

Advocate for the Respondent : GA, ASSAM

BEFORE

THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Mr. S Sarma,
Mr. J Deka, Advocates

For the Respondents : Mr. D Nath, Sr. GA, Assam

Date of Hearing : 27.04.2022

Date of Judgment & Order :27.04.2022

JUDGMENT & ORDER(ORAL)

Heard Mr. S Sarma and Mr. J Deka, learned counsels for the petitioner. Also heard Mr. D Nath, learned Senior Government Advocate representing the State.

2. The present writ petition is filed assailing the impugned order dated 02.07.2021 issued by the Deputy Commissioner of Police (ADMN), Guwahati whereby the petitioner was suspended with immediate effect. The further

challenge is the order dated 11.10.2021 issued by the same authority dismissing the petitioner from service in exercise of power under Article 311 (2)(b) of the Constitution of India.

3. The background facts leading to filing of the present petition can be summarized as under:-

(I). On 01.07.2021, one Sri Pabitra Kr. Medhi, President, Bharatia Janata Party, Nagarbera Mandal, Kamrup, Assam lodged a FIR against the petitioner, inter-alia, alleging that the petitioner uploaded a post in Facebook, commenting 'Pakistan Zindabad', 'Hindustan Murdabad' and also made anti national comment against the police administration and Hon'ble Chief Minister of Assam.

(II). Pursuant to such FIR, the petitioner was arrested on the same date i.e. on 01.07.2021 from Police Reserve, Guwahati and was produced before learned jurisdictional Judicial Magistrate on 02.07.2021. Subsequently, this court by order dated 01.08.2021 passed in BA No. 1550/2021 granted bail to the petitioner.

(III). According to the petitioner on being released on bail, he went to Police Reserve to resume his duty on 17.08.2021 and on that date he was served with the impugned suspension order dated 02.07.2021.

(IV). The petitioner contends that he continued to remain present in the Police Reserve till 11.10.2021 and put his signature in the suspension register.

(V). Thereafter, on 11.10.2021, the impugned order of dismissal was passed in exercise of power under Article 311 (2) (b) of the Constitution of

India. The same is under challenged in the present writ petition.

(VI) The Investigating Officer of Nagarbera P.S. case No. 86/2021 registered on the basis of FIR dated 01.07.2021 has already filed final report under Section 173 of the Criminal Procedure Code being final report No. 6/2022 on 17.02.2022.

(VII) The said final report has been accepted by the Judicial Magistrate First Class, Boko, Kamrup. The said final report reflects the followings:

> "*After getting the Forensic report, I have forwarded the Original CD to SP Kamrup, with CFSL report for supervision and suggestion, accordingly, Addl. SP (HQ) Kamrup, Amingaon, suggested me to submit the case in FR as insufficient evidence against the arrested accused Md. Hussain Ali u/s 124(A)/153(A)/505(2) IPC R/W Sec. 67 of IT Act. Hence, I submit the case in FR as there is no prima facie to establish the case u/s 124(A)/153-A/505(2) IPC R/W Sec. 67 of IT Act against the arrested accused, and forwarded the FR to the Hon'ble Court. Further I pray to the Hon'ble Court to release the accused from this instant case. The result of the investigation has been informed to the complainant by serving notice. The CFSL report, seizure list copy enclosed with the FR*."

4. Mr. S Sarma, learned counsel for the petitioner submits that the condition precedent for invoking the extra ordinary power under Article 311 (2)(b) of the Constitution of India was not available in the given facts and circumstances of the present case inasmuch as a bare perusal of the impugned order dated 11.10.2021 reflects that there is no satisfaction regarding the non-practicability of holding a departmental proceeding.

5. The learned counsel further submits that a perusal of the impugned order it is clear that the same has been passed on the basis of a report from the

Superintendent of Police, Kamrup (Amingaon) and that on the basis of material gathered by the Superintendent of Police, the disciplinary authority was satisfied that the petitioner was involved in the offence beyond any reasonable doubt and accordingly the dismissal order was issued. Thus the impugned order was passed on the basis of satisfaction of guilt and without any proceeding and not on the ground of impracticability of holding Departmental Proceeding, Mr. Sarma, learned counsel submits.

6. Mr. Sarma, learned counsel for the petitioner also submits that when a person is dismissed in exercise of power under Article 311 (2) (b) of the Constitution of India, merit of the allegation cannot be determined, rather the disciplinary authority is to come to a satisfaction that it is not reasonably practicable to hold an enquiry and in the present case no such satisfaction is reflected either in the order impugned or in the affidavit-in-opposition filed by the respondent authority. In support of such submission, Mr. Sarma relies on the judgment of Hon'ble Apex court passed in ***Reena Rani vs. State of Haryana and Others reported in (2012) 10 SCC 215*** and the case of ***Hari Niwas Gupta vs. the State of Bihar and another reported in (2020) 3 SCC 153***.

7. The learned counsel for the petitioners submits that the final report was filed as no sufficient material was gathered against the petitioner. He asserts that the Face Book account does not belong to the petitioner. Accordingly, the learned counsel for the petitioner prays that the impugned order be set aside and petitioner be re-instated in his service.

8. Per contra, Mr. D Nath, learned Senior Government Advocate submits that the scope of judicial review of an order passed in exercise under Article 311 (2) (b) of the Constitution of India is very limited. The disciplinary authority has come to a conclusion that the involvement of the petitioner was established and such action of the petitioner being a part of disciplined force is not acceptable inasmuch the conduct on the part of the petitioner is unbecoming of an official serving to protect the integrity of the country. Such subjective satisfaction of the employer cannot lightly be interfered in exercise of power of judicial review.

9. It is submitted by Mr. Nath that when a member of disciplined force makes objectionable comment against the sovereignty of the country and against the Hon'ble Chief Minister, it is not practicable to hold an enquiry more so in view of the fact that report of the Superintendent of Police, Kamrup clearly establishes involvement of the petitioner in committing the offence. Relying on the judgment of the Hon'ble Apex Court passed in ***Satyavir Singh and Other vs Union of India and others reported in (1985) 4 SCC 252***, Mr. Nath urges that as the authority by giving due reason passed the order, this court may not like to sit as an appellate authority to decide the relevancy of such reason like a court of appeal.

10. Mr. Nath further submits that this court while having judicial review of the order impugned, needs to consider the then prevailing situation. Mr. Nath submits that when a member of disciplined force acts in a way which is detrimental to the sovereignty of the country itself and brings the highest elected leader of the State i.e. the Hon'ble Chief Minister to disrepute, in such a situation it is not reasonably practicable to continue with a disciplinary

proceeding more so when his involvement was established by a report of none other than the Superintendent of Police. In fact, such action is detrimental to the security of the State. Therefore, Mr. Nath submits that the writ petition is devoid of any merit and liable to be dismissed.

11. Since the issue involves exercise of power under Article 311 (2) (b) of the Constitution of India, the same is quoted hereinbelow:

> "*311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.-*
>
> *[(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.]*
>
> *[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:*
>
> *Provided further that this clause shall not apply-]*
>
> *(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or"*

12. There is no dispute that the service of the petitioner is governed by Police Act, 1861 and Assam Police Manual. Section 7 of the Act, 1861 being relevant is quoted hereinbelow:

> "*7. Appointment, dismissal, etc., of inferior officers.-[Subject to the provisions of Article 311 of the Constitution, and to such rules] as the [State Government] may from time to time make under this Act, the Inspector- General, Deputy Inspectors-General, Assistant Inspectors General and District Superintendents of Police may at any time dismiss, suspend or reduce any police officer of the subordinate ranks] whom they shall think, remiss or negligent in the discharge of his duty or unfit for*

the same;

[or may award any one or more of the following punishments to any police officer [of the subordinate ranks] who shall discharge his duty in a careless or negligent manner, or who by any act of his own shall render himself unfit for the discharge thereof, namely:-

(a) fine to any amount not exceeding one month's pay;

(b) confinement to quarters for a term not exceeding fifteen days, with or without punishment-drill, extra guard, fatigue or other duty;

(c) deprivation of good conduct pay;

(d) *removal from any office of distinction or special emolument.]* "

13. Rule 66 of the aforesaid Manual provides the followings:

"*66.*

III. No order of major punishment shall be passed on a member of the service (other than an order based on facts which have led to his conviction in a criminal court) unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time to put in a written statement on his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so directs an oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the grounds thereof.

This rule shall not apply where the person concerned has absconded or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, in exceptional cases for special and sufficient reasons to be recorded in writing, be waived where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged."

14. Section 7 of the Act, 1861 empowers certain officials to dismiss, suspend or reduce in rank any police officer, if they are satisfied that remiss or negligent in discharge of their duties or unfit for the same, subject to provision of Article 311 of the Constitution of India. The relevant police rule provides that no major punishment shall be passed on a member of police unless he has been informed in writing of the grounds on which it is proposed to take action and the said provision further mandates that such person shall be afforded an adequate opportunity of defending himself. Such proposed grounds needs to be reduced to the form of definite charge(s), which is further required to be communicated to the person concerned. Thus it is apparent that the Police Act read with the Police Manual contemplates adherence of Article 311 and principle of natural justice.

15. The Constitution Bench of the Hon'ble Apex Court in the case of ***Union of India vs. Tulsiram Petal reported in (1985) 3 SCC 398*** extensively dealt with the provision of Article 311 including Sub-Article 2 (b). The judgment relied on by Mr. Sarma, learned counsel, i.e. Reena Rani (supra) and Hari Niwas Gupta (supra), and judgment relied on by Mr. Nath, learned Senior Government Advocate i.e. Satyaveer Singh (supra) also followed Tulsiram (supra). The ratio relating to Article 311 (2) (b) are discernable at paragraphs 130 to 134 of Tulsiram (supra). The ratio of the said judgment can be summarized as follows:

(I). The condition precedent for applying proviso (b) is satisfaction of disciplinary authority that "it is not reasonably practicable to hold" the enquiry contemplated by Sub-Article 2 of Article 311 of the Constitution of India.

(II). Whether it was practicable to hold the enquiry or not must be judged in the context whether it was practicable to do so.

(III). The requisite is that the holding of enquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.

(IV). The practicability of holding of enquiry is a matter of assessment to be made by disciplinary authority.

(V). The finality given to the decision of disciplinary authority by Article 311 (3) is not binding upon the court so far its power of judicial review is concerned and in a given case, the court can strike down order dispensing with enquiry as also order imposing penalty.

(VI). Writing reason for satisfaction that it was not reasonably practicable to hold the enquiry contemplated under Article 311, is a constitutional obligation and if such reason is not recorded in writing, the order dispensing with the enquiry and order of penalty following thereupon would, both be void and unconstitutional.

(VII). The recording the reason in writing for dispensing with enquiry must precede the order imposing penalty.

(VIII). The reason of dispensing with enquiry need not contain detail particulars, but reason must not be vague or just a repeatation of the language of clause (b) of the second proviso.

16. Now coming to the impugned order, a bare reading of the same reflects the followings:

(I). The disciplinary authority is satisfied that it is not necessary to hold any further enquiry.

(II). The reason for such satisfaction is the sufficiency of evidence regarding involvement of the petitioner in committing the crime, and such evidences are available in the report of Superintendent of Police dated 09.07.2021.

(III). On the basis of such report the disciplinary authority came to a conclusion that involvement of the petitioner has been proved beyond any doubt and therefore the disciplinary authority was satisfied that it is not necessary to hold any further enquiry.

(IV). The further conclusion is that the disciplinary authority is satisfied that continuation of service of the petitioner is detrimental to the society, threat to peace and tranquility of the society and sovereignty of the country.

(V). It is the further satisfaction of the disciplinary authority that the action of the petitioner will adversely affect the discipline, accountability, integrity and image of Assam Police and will affect the greater interest of police department in rendering service.

17. Therefore, it is crystal clear that the aforesaid order of dismissal was passed on being satisfied with the merit of allegation against the petitioner and disciplinary proceeding was not dispensed with for any reason of impracticability.

18. The impugned order of dismissal nowhere reflects any satisfaction that it

was not practicable to hold an enquiry. No assessment even was made to come to such a conclusion. No separate reason in writing for dispensing with enquiry were recorded or preceded the order impugned.

19. Therefore, this court unhesitantly holds that while issuing the order of dismissal, the respondent authority has failed to perform its constitutional obligation under Article 311 of the Constitution of India inasmuch as without there being any reason in writing dispensing with regular enquiry contemplated under Article 311 of the Constitution of India and under Rule 66 of Police Manual, the petitioner could not have been dismissed from service and therefore the impugned order dated 11.10.2021 is set aside and quashed.

20. The impugned order dated 11.10.2021 reflects that the petitioner was put under suspension for the reason of he being arrested and detained in custody. As the investigating authority has already submitted final report and the same also been accepted, therefore there cannot be any necessity to continue with the suspension. Accordingly, in the given facts and circumstances of the case, the suspension order is also set-aside.

21. Consequently, it is directed that the petitioner be re-instated in his service with all consequential benefits forthwith.

22. However, it is made clear that this order shall not be a bar for the respondents to proceed with the petitioner strictly in accordance with law, if so advised.

23. In the aforesaid terms, this writ petition is allowed, however no order as to cost.

JUDGE

Comparing Assistant