GAHC010084042022

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

Case No. : WP(C)/3069/2022

FAIZUR RAHMAN
S/O- LATE EYAR MAHMUD, R/O- TALTOLA, SATGAON, P.O. AND P.S. SATGAON, PIN- 781027, DIST.- KAMRUP(M), ASSAM

VERSUS

THE STATE OF ASSAM AND 4 ORS
TO BE REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF ASSAM, DEPARTMENT OF HOME, DISPUR, GUWAHATI-781006.

2:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI
GUWAHATI-781007
ASSAM

3:THE ASSISTANT DIRECTOR GENERAL OF POLICE (ADMN.)
ULUBARI
GUWAHATI-781007
ASSAM

4:THE COMMISSIONER OF POLICE
GUWAHATI
PANBAZAR
GUWAHATI-781001
ASSAM

5:THE JOINT COMMISSIONER OF POLICE CUM APPELLATE AUTHORITY
POLICE COMMISSIONERATE
GUWAHATI-781001
ASSA

Advocate for the Petitioner : MR I RAFIQUE

Advocate for the Respondent : GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

Date of hearing : 12.09.2023
Date of judgment : 12.09.2023

JUDGMENT & ORDER

The issue which has been raised in this writ petition is with regard to a penalty of dismissal of service pursuant to a disciplinary proceeding. The challenge is based on the grounds of illegality both procedural and substantial and parity in imposition of the penalty.

2. The petitioner was appointed as a Police Constable (UB) and at the relevant time was serving as the Head Constable at the Dispur Police Station. An FIR was lodged in the said Police Station on 04.02.2019 by three informants with regard to illegal seizure of certain gold biscuits allegedly by the Officers of the Dispur Police Station. The FIR however does not contain names of any accused persons. Be that as it may, the petitioner was arrested in connection with the said FIR which was registered as Dispur Police Station Case No. 363/2019 under Section 392 of the IPC. Owing to such arrest, the petitioner was placed under suspension on 09.02.2019 which was followed by initiation of a disciplinary proceeding by issuance of a show-cause notice dated 06.04.2019. The petitioner had replied to the show-cause notice and not being satisfied, an

enquiry was initiated by appointment of an Enquiry Officer. It is the case of the petitioner that though the enquiry was held, none of the relevant witnesses were produced and only one witness was produced whose version does not implicate the petitioner with any offence. The petitioner was served with a second show-cause notice with only the findings of the Enquiry Report without furnishing the entire report.

3. On 25.11.2019, the petitioner has submitted his reply and vide order dated 27.02.2020, the petitioner was dismissed from service. The departmental appeal preferred by the petitioner has also been rejected and accordingly the writ petition has been filed.

4. I have heard Shri I. Rafique, learned counsel for the petitioner. I have also heard Ms. M. Bhattacharyya, learned Additional Senior Government Advocate representing all the respondents. The learned State Counsel has also produced the original records of the disciplinary proceeding.

5. Shri Rafique, learned counsel for the petitioner has structured the present challenge on two broad grounds. Firstly, it is contended that the entire proceeding is vitiated as the procedure established in law was not followed at all and the petitioner was not given an effective opportunity to safeguard himself. He further submits that apart from the procedural irregularities, materials have been relied upon in a manner which is not permissible under the law. The learned counsel for the petitioner has also taken the plea of discrimination in imposition of the penalty by citing the example of another co-delinquent, namely, Shri Nipu Kalita, who was the SI against whom the penalty imposed was only stoppage of one increment with cumulative effect. The learned counsel highlights that the reasons for the lesser penalty is non-examination of the relevant witnesses and the same reason was also available so far as the

petitioner is concerned.

6. It is submitted that the FIR was the genesis of the departmental proceeding in which there were three number of informants and all the said informants were made witnesses and their names were given in the list of witnesses accompanying the show-cause notice dated 06.04.2019. However, none of the aforesaid informants had appeared in the enquiry and therefore the entire allegations against the petitioner stood not proved.

7. Shri Rafique, learned counsel for the petitioner further submits that in the second show-cause notice dated 08.11.2019, only the last page of the Enquiry Report containing the findings have been forwarded. On a specific query regarding pleadings in this regard, though the learned counsel has admitted that there is no pleadings in the writ petition, he has referred to his reply dated 25.11.2019 to the second show-cause notice in which it has been categorically stated that only the findings have been furnished to him and the entire Enquiry Report has not been furnished. It is submitted that by such procedure adopted, the petitioner was deprived of making an effective reply to the second show-cause notice by which he could have persuaded the disciplinary proceeding not to accept the findings of the enquiry and accordingly exonerate the petitioner. He submits that such denial amounts to violation of his fundamental right and therefore the present is a fit case for interference.

8. Coming to the second ground of challenge, it is submitted that the penalty imposed is discriminatory vis-à-vis a co-delinquent, namely, Shri Nipu Kalita, SI, who was also an accused in the criminal case against whom a similar disciplinary proceeding was initiated. Based on the same set of witness and allegation, the said Officer was imposed the penalty of stoppage of one increment only with cumulative effect.

9. In support of his submissions, Shri Rafique, learned counsel for the petitioner has relied upon the following case laws of the Hon'ble Supreme Court.

i. Hardwari Lal Vs. State of U.P. & Ors. Judgment dated 27.10.1999;

ii. Rajendra Yadav Vs. State of M.P. & Ors. Judgment dated 13.02.2013 [Civil Appeal No. 1334/2013].

10. In the case of ***Hardwari Lal*** (supra), the Hon'ble Supreme Court has held that non-examination of material witnesses in a departmental proceeding would be fatal and would be a ground for interference.

11. In the case of ***Rajendra Yadav*** (supra), the Hon'ble Supreme Court has dealt with the aspect of discriminatory punishment. For ready reference, paragraphs 12 and 13 are extracted hereinbelow-

> "*12. The Doctrine of Equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The Disciplinary Authority cannot impose 4 punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences.*
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> *13. The principle stated above is seen applied in few judgments of this Court. The earliest one is Director General of Police and Others v. G.*

Dasayan (1998) 2 SCC 407, wherein one Dasayan, a Police Constable, along with two other constables and one Head Constable were charged for the same acts of misconduct. The Disciplinary Authority exonerated two other constables, but imposed the punishment of dismissal from service on Dasayan and that of compulsory retirement on Head Constable. This Court, in order to meet the ends of justice, substituted the order of compulsory retirement in place of the order of dismissal from service on Dasayan, applying the principle of parity in punishment among co-delinquents. This Court held that it may, otherwise, violate Article 14 of the Constitution of India. In Shaileshkumar Harshadbhai Shah case (supra), the workman was dismissed from service for proved misconduct. However, few other workmen, against whom there were identical allegations, were allowed to avail of the benefit of voluntary retirement scheme. In such circumstances, this Court directed that the workman also be treated on the same footing and be given the benefit of voluntary retirement from service from the month on which the others were given the benefit."

12. *Per contra,* Ms. Bhattacharyya, learned Additional Senior Government Advocate, Assam has submitted that the allegations are very serious in nature and those are to be examined vis-à-vis the position of the petitioner, who was protector of law as he was posted as a Head Constable. She submits that the allegations constitutes and involves Section 392 of the IPC which is a very serious offence. She further submits that taking into account the seriousness of the offence involved, the punishment imposed may not be held to be disproportionate and accordingly no interference may be made. The learned State Counsel has also produced the original file of the disciplinary proceeding,

which has been placed on record.

13. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully examined.

14. The grounds taken in the writ petition and urged by the learned counsel for the petitioner was on the basis of the materials which were made known to the petitioner. However, a perusal of the file of disciplinary proceeding makes certain startling disclosures.

15. The show-cause notice dated 06.04.2019 had contained a list of 11 witnesses and list of 11 documents. The said list of witnesses also had the names of the three informants based on whose information, the police case was registered and on that basis the present disciplinary proceeding was initiated. However, from the report of the Enquiry Officer, it appears that none of the three informants had appeared before the Enquiry Officer. In fact, out of the 11 nos. of cited witnesses, only one witness had appeared being Havildar Bolin Phukan, who was the driver of the vehicle.

16. Ms. Bhattacharyye, learned State Counsel has also submitted that there is a finding that the petitioner had declined to make cross-examination of the witnesses.

17. On a perusal of the statement made by the sole witness, Bolin Phukan, though it appears that the said submission is correct as no cross-examination was made of the said witness, there was no allegation at all having any element of offence or misconduct and therefore simply by the fact that the witness was not cross-examined cannot be a ground to draw any adverse inference against the petitioner. The Enquiry Report also suggests that certain documentary

evidence were taken into consideration which includes the statement made by witnesses, Wahajuddin Shah and Md. Wahidur Rahman made under Section 164 of the CrPC. It may be mentioned that the aforesaid two witnesses were also the informants in the criminal case. However, what intrigues this Court is that while the statement of those witnesses made under Section 164 of the CrPC was taken into consideration, the said witnesses were not produced in the departmental proceeding so as to give the petitioner an opportunity to cross-examine them based on the pre-recorded statement. Though it may be permissible to produce a pre-recorded statement which may be in the nature of a statement made under Section 164 of the CrPC in a disciplinary proceeding, the requirement of law would be to afford the delinquent an opportunity to cross-examine the said witnesses by securing their presence in the disciplinary proceeding which in the instant case was not done. Therefore, the pre-recorded statement could not have been used in any manner against the delinquent.

18. On the aforesaid issue, the law is well settled and one may gainfully refer to the case of ***Union of India* v. *T.R. Verma*** reported in ***(1958) SCR 499***, the relevant paragraph being extracted hereinbelow-

> "*Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not*

strictly followed. Vide the recent decision of this Court in New Prakash Transport Co. v. New Suwarna Transport Co. where this question is discussed."

19. Further, in the case of ***State of Mysore v. Shivabasappa Shivappa*** reported in ***AIR 1963 SC 375***, it has been held as follows:

"*It is on the observation that "the evidence of the opponent should be taken in his presence" that the decision of the learned Judges that the evidence of witnesses should be recorded in the presence of the person against whom it is to be used is based. …*

… When the evidence is oral, normally the examination of the witness will in its entirety, take place before the party charged, who will have full opportunity of cross-examining him. The position is the same when a witness is called, the statement given previously by him behind the back of the party is put to him, and admitted in evidence, a copy thereof is given to the party, and he is given an opportunity to cross-examine him. To require in that case that the contents of the previous statement should be repeated by the witness word by word, and sentence by sentence, is to insist on bare technicalities, and rules of natural justice are matters not of form but of substance. In our opinion they are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged, and he is given an opportunity to-cross-examine them.

20. In the case of ***State of U.P. v. Om Prakash Gupta*** reported in ***(1969) 3 SCC 775***, the Hon'ble Supreme Court has reiterated the aforesaid principle in the following manner:

> "*12. This Court has repeatedly laid down that the fact that the statements of the witnesses taken at the preliminary stage of the enquiry were used at the time of the formal enquiry does not vitiate the enquiry if those statements were made available to the delinquent officer and he was given opportunity to cross-examine the witnesses in respect of those statements.*"

21. With regard to the second show-cause notice, the entire objective of such second show-cause is to give the delinquent an opportunity to persuade the disciplinary authority not to accept the views of the Enquiry Officer which are against the delinquent. The requirement of such notice is one of the essential safeguards which a delinquent is entitled to. However, in the instant case, it appears that the said requirement of law was made into a mere formality by forwarding only the last page of the enquiry report containing the findings. Though there are no specific pleadings to that effect in the writ petition, this Court has noticed that in the reply of the petitioner dated 25.11.2019 to the second show-cause notice, the said point was specifically taken and in the impugned order of penalty dated 27.02.2020, there is no such denial.

22. Though, Shri Rafique, learned counsel for the petitioner has also highlighted on the aspect of parity in imposition of penalty, since this Court has come to the conclusion of there being serious error, both procedural and substantial in the enquiry, this Court is not required to go to that aspect of the matter.

23. In view of the aforesaid facts and circumstances, this Court is of the unhesitant opinion that the impugned disciplinary proceeding based on the enquiry which had culminated in the order of dismissal dated 27.02.2020 is unsustainable in law and accordingly set aside. Consequently, the petitioner is

directed to be reinstated in service.

24. At this stage, the learned State Counsel has submitted that liberty may be granted to hold the enquiry afresh by taking into consideration the seriousness of the charges and also the connection with the criminal case involving Section 392 of the IPC.

25. The aforesaid submission has been duly considered and it appears that the allegation is indeed a serious one where public trust is also immensely involved. Therefore, this Cout directs that while the impugned order of dismissal dated 27.02.2020 is set aside, the authorities would be at liberty to hold a fresh enquiry on the allegations which were labeled vide show-cause notice dated 06.04.2019.

26. To facilitate holding of such enquiry, the authorities would also be at liberty to post the petitioner in any non-sensitive post. Further, since the interference is on grounds which may be termed as technical, the petitioner is not entitled to any back wages.

27. The writ petition accordingly stands disposed of.

28. No order as to cost.

29. Records, in original be returned to the learned State Counsel.

JUDGE

Comparing Assistant