



GAHC010147852022

Page No.# 1/10



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

Case No. : WP(C)/4950/2022

MADAN CHANDRA KAIBARTA
S/O RATNADHAR KAIBARTA, GRADUATE ASSISTANT TEACHER, BDS
GOVT. HIGHER SECONDARY SCHOOL FOR HEARING IMPAIRED,
KAHILIPARA, GUWAHATI, R/O STAFF QUARTER, OF BDS DEAF AND DUMB
SCHOOL COMPLEX, GUWAHATI, ASSAM, PIN-781019

VERSUS

THE STATE OF ASSAM AND 4 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, DEPARTMENT OF SOCIAL WELFARE, (NEWLY RENAMED AS
DEPARTMENT OF SOCIAL JUSTICE AND EMPOWERMENT), DISPUR,
GUWAHATI, ASSAM, PIN-781006

2:THE DIRECTOR OF SOCIAL WELFARE
ASSAM
(NEWLY RENAMED AS DIRECTOR OF SOCIAL JUSTICE AND
EMPOWERMENT)
UZAN BAZAR
GUWAHATI
ASSAM
PIN-781001

3:THE PRINCIPAL
GOVT. BDS DEAF AND DUMB SCHOOL
KAHILIPARA
GUWAHATI
ASSAM
PIN-781019



4:THE PRINCIPAL
SCHOOL FOR HEARING IMPAIRED
JORHAT
JORHAT URBAN-1
WARD NO. 16
JORHAT
ASSAM
PIN-785001

5:THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM
DEPARTMENT OF SOCIAL WELFARE
(NEWLY RENAMED AS DEPARTMENT OF SOCIAL JUSTICE AND
EMPOWERMENT) ASSAM CIVIL SECRETARIAT
DISPUR
GUWAHATI
ASSAM
PIN- 78100

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

JUDGMENT & ORDER

Advocate for the petitioner : Shri B. Purkayastha, Advocate

Advocates for respondents : Shri J.K. Goswami,
Addl. Senior Govt. Advocate.

Date of hearing : 14.09.2023

Date of judgment : 14.09.2023

1. The extraordinary jurisdiction conferred by Article 226 of the Constitution of India is being sought to be invoked by the petitioner who has put to challenge a Disciplinary Proceedings which has culminated in an order of dismissal from service. It is the case

of the petitioner that such dismissal order was initially passed on 12.01.2022, which was the subject matter of challenge in a Departmental Appeal, in which the Appellate Authority had passed an order dated 27.04.2022 by remanding the matter back and had also directed that till such reconsideration, the impugned dismissal would remain stayed. Subsequently, vide an order dated 30.06.2022, a fresh order of penalty was passed by the Disciplinary Authority, whereby the earlier order of dismissal was upheld.

2. Before going to the issue which has arisen for adjudication, it would be convenient if the facts of the case is narrated in brief.

3. The petitioner was appointed as an Assistant Teacher (Graduate Level) on 20.08.1986 and was posted at the BDS Government HS School, Kahilipara which is mainly for students having hearing impairment. The petitioner claims to have been promoted as a Graduate Teacher on 09.04.1990. While serving as such, an order was passed on 20.01.2004, whereby the petitioner was transferred, on attachment to the School of Hearing Impaired, Jorhat. The petitioner claims to have joined the said post and continued with it, however there was some break due to serious ailment of his wife who had subsequently passed away. It is the case of the petitioner that from the year 2006, his wife was unwell.

4. Since the petitioner was found absent from his duties, on 11.03.2013, an order was passed, directing an enquiry which had culminated in a Report dated 12.04.2013, whereby the Enquiry Officer found the allegation to be factually correct. Consequently, a Show Cause Notice was formally served on the allegation of unauthorised absence on 19.03.2014, to which the petitioner has claimed to have submitted a reply on 01.04.2014. However, the petitioner has also annexed a communication dated 07.04.2014 whereby the petitioner had informed his inability to submit any statement

of defence as he had asked for certain documents. In fact, there is a letter dated 31.03.2015, allowing the petitioner to inspect the document.

5. On 06.11.2019, the petitioner claims to have submitted a representation to consider his absence and documents were also sent by the Principal of Jorhat, School regarding his attendance. The petitioner also relied upon a communication dated 01.12.2020 by the Director of Social Welfare, Assam who had given a proposal with regard to the grant of extraordinary relief to the petitioner as he was suffering from tuberculosis.

6. However, on 22.07.2021, a fresh Show Cause Notice was served upon the petitioner. The said Notice was however replied to by the petitioner on 04.08.2021. At that stage, the petitioner had filed WP(C)/5913/2021 in this Court in which notice of motion was issued on 10.11.2021. It is the case of the petitioner that only after such filing, he could know about the Show Cause Notice. In fact, even before the order was passed by this Court on 03.11.2021, the date of enquiry was fixed. The enquiry was accordingly held and the second Show Cause Notice was served upon the petitioner on 06.12.2021 by enclosing Report of the Enquiry Officer dated 03.12.2021. The same was replied to by the petitioner on 09.12.2021. However, vide order dated 12.01.2022, the petitioner was dismissed from service under the provisions of FR 18. As indicated above, the petitioner had preferred a departmental appeal and in this connection had filed another writ petition being WP(C)1135/2022 with the grievance that the appeal was not being considered. This Court had disposed of the said writ petition vide order dated 21.02.2022 with a direction to dispose of the said appeal. In compliance with the said order, the Appellate Authority had passed an order on 27.04.2022 whereby the appeal was disposed of by remanding the matter back to the Disciplinary Authority and had further granted stay on the penalty till such disposal. It is the case of the petitioner that soon thereafter on 30.04.2022, he had retired from service on attaining

the age of superannuation. On such remand, the Disciplinary Authority had passed a fresh order dated 30.06.2022, whereby the earlier order of dismissal has been upheld.

7. I have heard Shri B. Purkayastha, learned counsel for the petitioner. I have also heard Shri J.K. Goswami, learned Addl. Senior Government Advocate, Assam. The materials placed before this Court have been duly considered.

8. Shri Purkayastha, the learned counsel for the petitioner has urged that the impugned action of the respondents suffers from numerous defects. He submits that the defects are not only procedural in nature but also substantial whereby the petitioner has been deprived of an effective opportunity to defend his case. He submits that the charge against him, even on its face value is unauthorised absence, and even without going into the reasons assigned, the authorities have come to a conclusion of misconduct and had erroneously imposed the penalty of dismissal from service, which is extreme in nature and shocks the judicial conscience. It is submitted that the long period of past service of the petitioner from 1986 have been ignored while considering the aspect of imposition of penalty.

9. The learned counsel for the petitioner has submitted that when the authorities had initiated an enquiry by issuing a Show Cause Notice on 19.03.2014, another Show Cause Notice on the same charge could not have been issued on 22.07.2021. He further submits that the dismissal order dated 12.01.2022 has taken recourse to the provisions of FR 18 which is apparently not applicable as it presupposes unauthorised absence of five years, which in this case is not fulfilled. It is the case of the petitioner that till the year 2010, the petitioner was working and the Departmental Proceeding was initiated only on 2013 and keeping the Departmental Proceeding pending thereafter cannot be to the prejudice of the petitioner.

10. Shri Purkayastha, the learned counsel for the petitioner has further submitted that the period of his service is more than pensionable period, and therefore, by imposition of the extreme penalty of dismissal, he has been deprived of the pensionary benefits and further, his own share of the GPF has been withheld. He submits that even if full interference with the dismissal order is not made, the penalty of dismissal can be converted into any other lesser penalty whereby the petitioner would get some benefits as he has already retired from service on 30.04.2022.

11. In support of his submission, the learned counsel for the petitioner has relied upon the following decisions.

(i) ***Kishore Bhuyan vs. State of Assam reported in (2014) SCC online, Ghy 140.***

(ii) ***Order dated 17.05.2022 passed by a Division Bench of this Hon'ble Court in WA 203 2020. [Smti Samita Kami vs. The Union of India].***

12. In the case of ***Kishore Bhuyan*** (supra), this Court had held that in a case where the charge is of unauthorised absence, it is the duty of the authorities to explore and find out the reasons of such absence and as to whether the incumbent had wilfully and intentionally stayed away from service.

13. In the case of ***Smti Samita Kami*** (supra), the Hon'ble Division Bench had converted a penalty of dismissal to one of compulsory retirement.

14. *Per contra*, Sri Goswami, the learned State Counsel has submitted that the projection made by the petitioner is incorrect both on facts as well as in law. He submits that the foundation of the case itself is based on an erroneous statement that

there were two proceedings involved. He submits that though it is a fact that the Disciplinary Proceeding was initiated by issuing a Show Cause Notice on 19.03.2014 on the allegation of unauthorised absence, no reply was ever filed and the same would be clear from the communication dated 07.04.2014 issued by the petitioner himself whereby he had declined to submit any written statement. Under such circumstances, the learned State Counsel submits that issuing another Show Cause Notice on 21.07.2021 has not caused any prejudice to the petitioner and rather had facilitated him to put forward his defence. He submits that the authorities could have proceeded *ex-parte*, which was not done and another opportunity was granted and this point cannot be taken to challenge the proceeding as such.

15. With regard to the issue of FR 18, the learned State Counsel submits that it was a clear case wherein the period of unauthorised absence was more than five years and the projection made that the said absence was for a period of three years is factually incorrect. The learned State Counsel submits that the duties entrusted to the petitioner was for imparting education and his conduct in absenting himself from such duties continuously from years together is a major misconduct and therefore the penalty imposed of dismissal cannot be said to be considered as a disproportionate penalty. Shri Goswami, the learned counsel submits that none of the case laws relied upon by the petitioner are applicable in this case, as each case is decided on its own facts and circumstances.

16. The rival contentions made by the learned counsel for the parties have been duly considered.

17. The contention raised by the petitioner that based on the same charges there were two proceedings does not appear to be factually correct. Though it appears that there were two Show Cause Notices, the materials on record makes it clear that the

first Show Cause Notice issued on 19.03.2014 was not even replied to by the petitioner. Under those circumstances, the act on the part of the authorities to issue another Show Cause Notice on 22.07.2021 cannot be said to be prejudicial to the interest of the petitioner. This Court on the other hand rather finds force in the contention made on behalf of the State that by such action, a further opportunity was granted to the petitioner to defend himself which he had done by submitting a reply on 04.08.2021. This Court has also noticed that there are no allegations of any procedural irregularities in conducting the enquiry and the subsequent action of forwarding the Report of the Enquiry Officer to submit the response of the delinquent appears to be in order. The dismissal order which was initially passed on 12.01.2022 was considered by the Appellate Authority which had passed an order on 27.04.2022, remanding the matter to the Disciplinary Authority. However, the Disciplinary Authority had passed the subsequent order on 30.06.2022 whereby the earlier order of dismissal has been upheld. This Court on perusal of the materials on record does not find any glaring illegalities and irregularities in the proceeding. In any case, the role of a writ court in examining the findings in a Disciplinary Proceeding is a circumscribed one wherein only the decision making process may be matters of scrutiny and interference is made only in cases of glaring illegalities in procedure or gross violation of the principles of natural justice. A mere error committed by the Disciplinary Authority may not be a subject matter of scrutiny or interference by this court.

18. The Hon'ble Supreme Court in the landmark case of ***Tata Cellular Vs. Union of India*** reported in ***(1994) 6 SCC 651*** has laid down as follows:

"74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision making process itself."

19. The matter ultimately boils down to the aspect of proportionality of the penalty

which in this case is Dismissal from Service. Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964 lays down the procedure for imposing penalties which appears to have been substantially followed in the instant case. Rule 7 of the said Rules lays down the various penalties and Dismissal from service is found to be the most stringent of the penalties. The charge against the petitioner is of unauthorised absence. There is however, no allegation on any materials on record that in his past period from 1986 till the order of attachment at Jorhat in 2004, there were any blemish in the services of the petitioner. Consideration of unblemished past service is also a relevant consideration in determining penalty against an incumbent facing a Disciplinary Proceeding. This Court, as observed above has been informed that the petitioner has retired from service on 30.04.2022 and therefore, the question of his re-instatement will not arise at all, and in any case, this Court has not come to a conclusion that the penalty imposed is grossly erroneous. The only consideration of this Court is on the aspect as to whether the penalty can be converted to any other penalty whereby the petitioner would get certain post-retirement benefits, including the GPF.

20. In the celebrated case of ***B.C. Chaturvedi vs. Union of India*** reported in ***(1995) 6 SCC 749***, Hon'ble Justice B.L. Hansari in his concurring part has elaborately discussed the plenary powers of this Court under Article 226 of the Constitution of India. The provisions of Section 11 A of the Industrial Disputes Act has also been taken into consideration which empowers the Labour Court/ Industrial Tribunal to substitute penalties in case of a penalty of dismissal from the charge.

21. Following the aforesaid decision, this Court is of the opinion that there can be no impediment in exercise of powers under Article 226 of the Constitution of India and the only restriction is a self-imposed one. Under the facts and circumstances of the instant case, this Court is of the view that the order of dismissal vis-à-vis, the nature

of the allegations may not be held to be proportionate, more so when such dismissal disentitles the petitioner from the provision of all post-retirement benefits. This Court has also noticed that the initial order of dismissal was passed on 12.01.2022 and immediately thereafter on 30.04.2022, the petitioner had surpassed the age of superannuation. The appellate authority in its order dated 27.02.2022 had also stayed the order of dismissal which was ultimately upheld by the Disciplinary Authority in the impugned order dated 30.06.2022, when the matter was reconsidered on remand. Therefore, when the fresh consideration was being made, the petitioner had already surpassed the age of superannuation. Under the peculiar facts and circumstances, this Court while not finding any fault with the Disciplinary Proceeding, is of the opinion that interest of justice would be served and the equity would be balanced if the relief is moulded. Accordingly, it is directed that the order of Dismissal be converted to one of Compulsory Retirement. Consequently, the authorities are directed to consider the post retirement entitlements of the petitioner which would be entitled after his retirement on 30.04.2022.

22. The present order has been passed on the peculiar facts and circumstances of the case and is not to be treated as a precedent for any other case.

23. Writ Petition accordingly stands disposed of. No order as to cost.

JUDGE

Comparing Assistant