
(2014) 08 GAU CK 0027
In the Gauhati High Court
Case No : Writ Petition (C) No. 1864/2011

Apurba Deka

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 22-08-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 311
Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 244, 294, 506

Citation : (2014) 3 GLD 48 : (2015) 2 GLT 63

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : D.C. Kath Hazarika, Advocate for the Appellant; S.B. Sarma, Government Advocate and G. Baishya, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Arup Kumar Goswami, J.—By this application under Article 226 of the Constitution of India, the petitioner has prayed for a writ of mandamus directing the respondents to make necessary arrangements for payment of unpaid dues, pension, gratuity etc. to the petitioner as per provision of Rule 104 of Part-III of the Assam Police Manual (for short, "APM").

2. I have heard Mr. D.C. Kath Hazarika, learned Counsel for the petitioner. Also heard Mr. S.B. Sarma, learned counsel appearing for the Respondent Nos. 1 to 6 & 8 and Mr. G. Baishya, learned counsel appearing for Respondent No. 7.

3. Relevant facts may briefly be noticed.

4. The case projected in the writ petition, inter alia, is that the petitioner was recruited in a selection process as a Constable on 22.03.1999. While serving as Constable under 16th A.P. (I.R.) Bn., Bormonipur and attached to Battalion Headquarter Platoon, a departmental proceeding (for short, "D.P.") being D.P. No. 05/06 was initiated against him on the allegation of he being found

unauthorizedly absent from duty w.e.f. 10.03.2006. He was also suspended on 24.03.2006 and subsequently reinstated in service on 14.06.2006. In the D.P. No. 05/06, the Enquiry Officer had submitted his report on 25.07.2008 and subsequently, the Respondent No. 4 issued final order dated 31.01.2009, whereby the petitioner was discharged from service with immediate effect under Rule 366 of the A.P.M.

5. While the aforesaid D.P. was pending, an F.I.R. dated 21.05.2007 was lodged by a Havildar in the 16th A.P. (I.R.) Bn., Bormonipur against the petitioner in the Bormonipur Police Out Post, on the basis of which Mikirbheta Police Station Case No. 59/07 u/s 244/506 IPC was registered. On 22.05.2007, the petitioner was arrested and in G.R. Case No. 540/07 u/s 294/506 IPC corresponding to Mikirbheta Police Station Case No. 59/07, by a judgment and order dated 03.01.2008, passed by the learned Chief Judicial Magistrate, Morigaon, the petitioner was convicted and sentenced to suffer 3 (three) months simple imprisonment u/s 294 IPC and to serve simple imprisonment for four months and seventeen days u/s 506 IPC. The petitioner was under detention from 22.05.2007 and as such the petitioner had been under detention for 227 days. Accordingly, the period of sentence was set off u/s 428 Cr.P.C. and he was directed to be released from detention.

6. In connection with his arrest in Mikirbheta Police Station Case No. 59/07, another departmental proceeding being D.P. No. 10/07 was initiated, but as in the meantime the petitioner was discharged vide D.P. No. 05/06, D.P. No. 10/07 was disposed of by an order dated 03.06.2009 holding that no further punishment was warranted.

7. In the affidavit-in-opposition filed by the Respondent No. 4, it is stated that Rule 104 A.P.M. provides discharge of police personnel on retirement and the Rule does not relate to discharge from service as punishment in departmental proceeding. It was further pleaded that in view of Rule 24 of the Assam Services (Pension) Rules, 1969, (for short, "Pension Rules") the petitioner is not entitled to any pension. It is further pleaded that the petitioner having completed only 9 years 10 months and 9 days of service, which is less than 10 years, the petitioner was also not entitled to pensionary benefits including gratuity in terms of Rule 33(2) of the Assam Service (Revision of Pay) Rules, 2010 (for short, "ROP Rules"). It is also stated that the petitioner was earlier awarded punishment of L.W.P. for 97 days, Punishment Drill for 17 days, Quarter Guard for 13 days, 1 No. Severe Reprimand. 3 (three) numbers of departmental proceedings, namely, D.P. No. 3/2001, 1/2004 and 16/2006 were also initiated against the petitioner for various acts of misconduct, apart from the D.P. No. 05/06 and 10/07, in which he was also imposed penalty.

8. In the affidavit filed by the Respondent No. 7, it is indicated that the Office of the Principal Accountant General (A & E) cannot authorize any pensionary benefit unless pensionary benefits are sanctioned and papers are duly forwarded by the Government of Assam.

9. Mr. D.C. Kath Hazarika, learned counsel for the petitioner, submits that while "Discharge" order is not under challenge, it is also evident that there is no provision such as Rule 366, in terms of which the petitioner was discharged and that Rule 104 of A.P.M. alone provides for discharge. He relies on Rule 104 of A.P.M. to contend that said Rule visualizes preparation of pension and gratuity rolls and if that was not possible, all necessary information for their preparation would have to be obtained and until that is completed, discharge cannot take place. He also refers to Rule 53, 68, 69, 123, 126 and 131 of the Pension Rules.

10. Mr. S. Sarma, learned State Counsel, with reference to the affidavit, submits that Rule 104 of A.P.M. does not relate to discharge from service as punishment, but then, the petitioner has not challenged the order of "Discharge" and therefore, the order has attained finality. It is further submitted that the petitioner, from the date of his discharge on 31.01.2009, is not in service and in the facts and circumstances of the case, the petitioner is not entitled to pensionary benefits, gratuity, etc. in view of Rule 24 of the Pension Rules and Rule 33(2) of ROP Rules as punishment was imposed upon the petitioner, coupled with the fact that he had put in less than 10 years of service.

11. I have considered the submission of the learned counsel for the parties and have perused the materials on record.

12. It appears that D.P. No. 05/06 was drawn up against the petitioner under Assam Services (Discipline & Appeal) Rules, 1964 (for short, "Service Rules") read with Article 311 of the Constitution of India and show cause notice was issued on the allegation that he was found unauthorizedly absent from 10.03.2006. The Charge Memo was issued on 28.03.2006, but the petitioner did not submit his show cause reply. Prior to issuance of the Charge Memo, a W.T. Message dated 18.03.2006 was sent asking him to join his service. One more W.T. Message dated 03.05.2006 and a notice dated 27.04.2006 were issued asking him to join. There was no response. However, after 3 months, he returned to join his service and made a prayer for allowing him to join his duty. Accordingly, he was allowed to resume his duties on 06.06.2006 and the suspension order was also revoked. Side by side, the D.P. continued and on 25.07.2008, the Enquiry Officer submitted his report.

13. Order dated 31.01.2009, by which the petitioner was "Discharged", shows that second show cause notice was issued to the petitioner. However, he did not submit any representation.

14. The order dated 31.01.2009 is quoted hereinbelow:-

"Perused the findings submitted by the Enquiry Officer. I do agree with the findings as the charge leveled against him is proved beyond all reasonable doubt. Still then, he was given opportunity and issued 2nd show cause notice so that he can submit his representation if any in his favour. In spite of several reminders, the delinquent cons. 661 Apurba Deka failed to submit his representation. Hence, I do take a decision that such type of arrogant constable is not desirable in a

discipline force. His such misconduct and indiscipline act will demoralize the force if legal action is not taken. Considering all pros and cons the constable is discharged under rule 366 AMP Part-III with immediate effect. The period of absence and suspension w.e.f. 10.03.2006 pm. to 14.06.06 pm. Total 96 days is treated as dies-non. The Govt. properties issued to him, be collected. The D.P. is disposed of."

15. Sum and substance of the argument of Mr. Kath Hazarika is that as the petitioner had been discharged in terms of Rule 104 of A.P.M., he is entitled to pension and gratuity. He is right in his submission that there is no provision under Rule 366 A.P.M. for "Discharge" and that only provision containing "Discharge" is to be found in Rule 104. Rule 104 is quoted hereinbelow:-

"104. Discharges. - All men who are to be discharged will be brought into headquarters; their uniform will be taken from them and dealt with in accordance with Rule 330; their appointment certificates will be withdrawn; their accounts will be settled and their dues paid to them; their pension and gratuity rolls will be prepared, or when this is not possible, all necessary information for their preparation will be obtained and then, and not till then are they to be discharged. Should any man fail to obey the order to join the reserve prior to discharge, he should be treated as absent without leave. The date on which an Inspector, Sergeant Major or Sergeant vacates his appointment on retirement" or discharge should be promptly reported to the Inspector General."

16. Rule 105 of A.P.M. provides for a Discharge Certificate to be given to every police officer, discharged in Form No. 74 of Schedule XL(A) (Part I) and the same will have to be signed by the Superintendent of Police. The certificate is to contain the actual cause of each man's leaving the police force, whether discharge at his own request, dismissed for misconduct, discharged as unfit for further service or discharged on reduction, or whatever the cause may be, must be stated in the certificate fully and correctly but concisely. Thus, it is apparent that "Discharge" is only a consequence in the happening of certain eventualities. None of the parties, it is to be noted, has brought on record the Discharge Certificate.

17. Before proceeding further, it will be also necessary to briefly deal with the provisions of the Pension Rules and the R.O.P. Rules cited at the bar. Rule 24 of the Pension Rules provides that no pension can be granted to a person dismissed or removed for misconduct, insolvency or inefficiency. However, it is also provided that the compassionate allowances or/and land compassionate gratuity may be granted to the officers so dismissed or removed when they are deserving of special consideration. Rule 53 is relatable to superannuation pension which is not relevant for the purpose of this case. Rule 68 provides for 4 categories of pension, namely, compensation pensions, invalid pensions, superannuation pensions and retiring pensions. Rule 69 provides for compensation pension in case of an officer selected for discharge owing to abolition of a permanent post. The "Discharge" of the petitioner is not on account of abolition of permanent

post. Rules 123, 126 and 131 fall in Chapter 7 and are special Rules for the police. Rule 123 provides that Rules in the said Chapter applies to members of the police forces constituted under the Police Act, 1861. Rule 126 provides that qualifying service relates to service in the police force as mentioned in Rule 123. Rule 131 provides the mechanism as to how pension admissible to the police constables shall be determined.

18. Rule 33(2) of ROP Rules lays down that qualifying service for receiving full pension will be 25 years and that proportionate pension shall be given to those employees who have completed more than 10 years but less than 25 years of qualifying service.

19. Penalties are prescribed under Rule 7 of the Service Rules. Under Rule 7, "Discharge" is not a penalty. Rule 66 of A.P.M. also prescribes penalties that may, for good and sufficient reason, be imposed upon the members of the police service. No penalty such as "Discharge" is prescribed under the said Rule. In the affidavit of the State Respondents also it has been categorically stated that Rule 104 of A.P.M. does not relate to discharge from service as punishment in departmental proceeding.

20. In the order dated 31.01.2009, it has been noted that the petitioner's service is not desirable in a Disciplined Force. Apparently, the petitioner has not been exonerated. The effect of "Discharge" is that the petitioner is not in service from 31.01.2009. This would be possible only if penalty in the nature of compulsory retirement, removal or dismissal was passed. From the prayers made in the writ petition, it becomes clear that the petitioner does not want to come back to the service. In the circumstances, although the D.P. was not closed by imposition of a penalty which would have led to the petitioner's eventual "Discharge" under Rule 104 of A.P.M., in absence of any challenge to the order of "Discharge" as well as the effect thereof, the Court will have to understand that "Discharge" order is relatable to any of the three possible penalties - compulsory retirement, removal or dismissal from service.

21. Submission of Mr. Kath Hazarika that Rule 104 of A.P.M. automatically entitles a person "Discharged" to pension and gratuity is misconceived. The provision has to be interpreted to mean that Pension and Gratuity Rolls have to be prepared in cases where one is entitled to pension and gratuity. Rule 24 of the Pension Rules provides that no pension can be granted to a person dismissed or removed from service. The petitioner has also not completed 10 years of qualifying service to entitle him to receive proportionate pension even if it is taken that he is compulsorily retired.

22. In view of the above discussions, I am of the considered opinion that there is no merit in the writ application and accordingly, the same is dismissed. No cost.