
(2012) 12 GAU CK 0047
In the Gauhati High Court
Case No : W.A. No. 51 of 2010

Bidyut Buragohain

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 14-12-2012

Acts Referred:

Citation : (2013) 1 GLT 943

Hon'ble Judges : Adarsh Kumar Goel, C.J;N. Kotiswar Singh, J

Bench : Division Bench

Advocate : R. Biswas, for the Appellant; B.S. Goyal, GA, for the Respondent

Final Decision : Allowed

Judgement

N. Kotiswar Singh, J.—The present appeal has been preferred against the Judgment and order dated 8.1.2010 passed by the learned Single Judge in W.P. (C) No. 4827 of 2008 by which the writ petition filed by the appellant-petitioner challenging the order dated 16.4.2008 imposing major penalty of compulsory retirement from service by the disciplinary authority and the order dated 28.8.2008 of the appellate authority rejecting the departmental appeal of the appellant-petitioner was dismissed. Brief facts of the case, as may be relevant for consideration by this Court, may be stated hereinbelow.

2. While the petitioner was serving as an Additional Superintendent of Police in Lakhimpur District, he was placed under suspension by an order dated 10.07.2001 in contemplation of a departmental enquiry. The petitioner was subsequently served with the memorandum of charges containing following charges:-

1. While Sri. Bidyut Buragohain, APS was posted as Additional Superintendent of Police(S), Lakhimpur on 05.07.2001, the Army apprehended one Sri. Gojen Bhuyan alias Sri. Joon Kalita an ULFA militant along with arms and ammunitions from the barrack attached to his official residence as he had given shelter to the ULFA militant without informing his superior officers. Reportedly, the said Gojen

Bhuyan had been staying with Sri. Bidyut Buragohain for last 7(seven) months during his tenure at North Lakhimpur and also during his previous tenure at Nalbari. He had failed to produce the militant either before his superior officer in time or to any other authority for appropriate action. His above amounts to harbouring of criminal and is also detrimental the security of the State.

2. While Sri. Gojen Bhuyan (ULFA militant) was staying in the premises of Sri. Bidyut Buragohain Govt. quarter at North Lakhimpur, the ULFA militant attempted to extort money from some businessman of North Lakhimpur by threatening them and the telephone of Sri. Bidyut Buragohain, APS, was used but he did not take any action against the militant and thereby he had completely failed to keep any check or watch on the activities of the ULFA militant being an important security officer in the district of Lakhimpur.

3. While Sri. Bidyut Buragohain, APS, was posted as Additional Superintendent of Police (HQ), Nalbari, one ULFA militant Sri. Gojen Bhuyan alias Joon Kalita, surrendered secretly on 12.12.2000 before him and the O.C. Borbori Police Station in Subonsiri village under Borbori Police Station alongwith arms and ammunitions. Shri. Bidyut Buragohain, APS, had taken over custody of the surrendered militant with arms and ammunitions and kept him under his personal custody with a reported intention to secure his surrender formally. But he had never secured his formal surrender and continued to keep him under his personal custody without any clear information to the Superintendent of Police, Nalbari. He didn't keep Sri. Gojen Bhuyan (ULFA) along with other surrendered militants in the barrack designated for them by Nalbari Police Station. Sri. Bidyut Buragohain, APS, was therefore charge with dereliction of duties and gross misconduct.

4. Again when Sri. Bidyut Buragohain, APS, was transferred to Lakhimpur from Nalbari as Additional Superintendent of Police (HQ) he took Sri. Gojen an ULFA militant with him along and lodged him in the security barrack at his official residence premises and failed to inform the Superintendent of Police, Lakhimpur, Sri. Bubhrajyoti Hazarika, APS, clearly that a militant had been staying with him in his security barrack, in the manner similar to when he was posted at Nalbari as addl. S.P(HQ), therefore, he was charged with serious misconduct and indiscipline.

5. Being a senior responsible police officer, Sri. Bidyut Buragohain, APS, could have easily secured his surrender as per laid down procedure, but although several opportunities were available during his posting at Nalbari as-well-as Lakhimpur, he did not take any positive and effective action and continued to harbor the ULFA militant on the pretext of securing his surrender. Nor he did not deposit the arms and ammunitions at malkhana for the reasons best known to him.

6. When the militant was lodged in the security barrack in his official residence premises, Sri. Gojen Bhuyan alias Joon Kalita had come to close association with

Sri. Khorgeswar Doley and Sri. Dhiren Sonowal, a student of Lakhimpur college. They had jointly planned for extortion of money from local businessman and written extortion letters purported to be issued by ULFA militant. They had used the official telephone of Sri. Bidyut Buragohain, APS, for threatening businessman and demanding money. Quite contrary to the claim of Sri. Bidyut Buragohain, APS, to have kept the militant under proper watch, the ULFA militant could indulge in the above mentioned criminal activities while staying with Sri. Bidyut Buragohain, APS, for which he was charged with gross misconduct and indiscipline.

7. The official residential premises of Sri. Bidyut Buragohain, APS, was raised by the Army, the fact that he had harboured a militant under his custody and the militant had been indulging in criminal activities was not known to his superiors. Therefore, Sri. Bidyut Buragohain, APS was charged with gross misconduct for hiding important information from seniors and for harbouring militant.

On not being satisfied with the reply submitted by the petitioner, the disciplinary authority conducted the departmental enquiry by appointing an Enquiry Officer. The Enquiry Officer submitted his report dated 29.1.2003. The disciplinary authority on consideration of the said enquiry report, having felt that the enquiry did not fully reflect all the articles of charges of the proceedings decided to hold a de novo enquiry which action was challenged by the petitioner in W.P. (C) No. 6097/2003 and this Court by an order dated 09.8.2005 passed in the said writ petition held the same to be without jurisdiction and set aside the order for holding a fresh enquiry. Situated thus, the disciplinary authority after considering the enquiry report dated 29.01.2003 and other materials on record passed a detailed speaking order on 16.4.2008 by which the petitioner was awarded the major penalty of compulsory retirement from service by invoking Rule 7(V) of the Assam Services (Discipline & Appeal) Rules, 1964 for gross misconduct and negligence of duties. In the said final order dated 16.4.2008, the disciplinary authority held that although charges No. 2, 4, 6 and 7 had not been proved, charge No. 1 had been partially proved and charges No. 3 and 5 which were serious in nature had been proved beyond doubt and accordingly, decided to award the major penalty of compulsory retirement. Being aggrieved by the aforesaid order of compulsory retirement passed by the disciplinary authority, the petitioner-appellant preferred an appeal before the appellate authority which was dismissed by the appellate authority vide order dated 28.8.2008.

3. Being aggrieved by the aforesaid order of penalty dated 16.4.2008 passed by the disciplinary authority as well as the order dated 28.8.2008 passed by the appellate authority dismissing the appeal filed by the petitioner, the petitioner approached this Court by filing the writ petition being W.P. (C) No. 6097/2003 challenging the said orders.

In the writ petition, the petitioner has assailed the actions of the authorities by contending, inter-alia, that the Enquiry Officer had given the finding in favour of the petitioner that all the charges have not been proved or established, and

accordingly, since charges were not proved, the disciplinary authority could not have come to a contrary conclusion without recording its disagreement with the enquiry report and also without affording an opportunity to the petitioner to represent against the said disagreement before proceeding to pass the final order.

Thus, the main plea of the petitioner in the writ petition was that as the Enquiry Officer had exonerated the petitioner of all the charges, if the disciplinary authority decided to act contrary to the findings of the Enquiry Officer, it ought to have recorded its disagreement with reasons thereof and ought to have given an opportunity to the petitioner to be heard before passing any adverse order or imposing any penalty. The learned Single Judge, after considering the various charges and also the findings given in the enquiry report, proceeded to hold that as per enquiry report, the petitioner had not been exonerated fully from all charges and also held that it cannot be said to be a case of total exoneration of the petitioner from all the charges, rather it was a case of establishing at least 3(three) charges out of 7(seven) and observed as follows:-

19. As noted above, on perusal of the entire enquiry report, it cannot be said to be a case of total exoneration of the petitioner from all the charges rather it is a case of establishing at least 3 (three) charges not of 7 (seven)

20. If all the charges are taken together, the basic charge against the petitioner is that although the particular ULFA militant was taken into custody at Nalabari but the petitioner did not arrange his formal surrender nor he kept him under custody as is required to be done in case of a suspected criminal. The petitioner instead of behaving as a responsible disciplined Police Officer rather kept the militant alongwith him even to the extent of taking him to North Lakhimpur on his transfer from Nalbari and while doing so, the ULFA militant was allowed to take his arms and ammunitions alongwith him. It was only 5.7.2001, the army personnel carried out the raid in the premises of the petitioner and could apprehend the ULFA militant alongwith arms and ammunitions. The enquiry revealed that the said ULFA militant not only was allowed to remain free by the petitioner but acting advantage of his freedom, he also indulged in sending extortion notes by writing letters and making use of the telephone belonging to the petitioner. If this is not misconduct, I am afraid, nothing could be termed as misconduct.

4. Thus, the learned Single Judge was of the view that as per the enquiry report, the petitioner had not been exonerated fully from all charges and some of the charges were indeed established. The learned Single Judge also did not find any infirmity with the appellate order dated 28.8.2008 in which the appellate authority agreed with the finding recorded by the disciplinary authority and held that there were enough indication of consideration of the entire materials on record. Accordingly, the learned Single Judge, considering the seriousness of the charges levelled against the petitioner and the findings recorded by the Enquiry Officer, declined to interfere with the imposition of major penalty of compulsory retirement, which the Court considered to be a lesser penalty, though accordingly

to the learned Single Judge, the petitioner was deserving of a harsher penalty of dismissal/removal from service.

Therefore, it is clearly evident that the learned Single Judge upheld the decision of the disciplinary authority as well as the appellate authority primarily on the ground that some of the charges against the petitioner were said to have been proved by repelling the contention of the petitioner that the charges levelled against the petitioner were found not proved by the Enquiry Officer. In view of the above, learned Single Judge did not consider it necessary to deal with the contention of the petitioner that in case of any disagreement with the finding recorded by the Enquiry Officer, the disciplinary authority ought to have recorded its own finding and thereafter, afforded an opportunity to the petitioner to make a representation against such disagreement, which contention was based on the decisions of the Apex Court in Punjab National Bank and Others Vs. Sh. Kunj Behari Misra, , Lav Nigam Vs. Chairman and MD, ITI Ltd., reported in (2006) 9 SCC 440 and Ram Kishan Vs. Union of India and others, . The learned Single Judge held that the principle enunciated in the aforesaid decisions will not be applicable in the present case as it is not a case where the disciplinary authority had disagreed with the finding recorded by the Enquiry Officer. The learned Single Judge held that on the contrary, some of the charges can be held to have been proved as the Enquiry Officer did not exonerate the petitioner fully from the charges.

5. We have heard the learned counsel appearing for the appellant as well as the respondents.

6. Learned counsel appearing for the petitioner-appellant has strenuously argued that such finding of the learned Single Judge that the petitioner had not been exonerated fully from all the charges and the present case is not one involving disagreement by the-disciplinary authority from the findings recorded by the Enquiry Officer, is not borne by record and has drawn attention to the enquiry report dated 29.01.2003. Therefore, we have considered it expedient to reproduce the findings of the Enquiry Officer as the findings recorded by the Enquiry Officer are pivotal to the decision of the learned Single Judge as well as of this Court.

Findings:

1. In respect of first charge

From the evidence recorded as mentioned above and after scrutinizing the written statements it is revealed that Shri B. Buragohain brought the matter of formal and official surrender of Shri Gojen Bhuyan to the notice of immediate superior officers and junior officers as revealed from the Statements of Shri S.J. Hazarika, APS the then S.P of Lakhimpur, Shri S.N. Singh, IPS the then S.P of Lakhimpur Shri Tularam Das, APS/Asstt. Commandant with A.P. Bn. The then D.S.P DSB North Lakhimpur and Shri Ranjan Bhuyan, D.S.P Headquarter Nalbari. Shri Deepak Kumar, IPS, the then S.P Nalabari could not remember whether Shri

B. Buragohain had reported the matter for his formal surrender. Shri Ranjan Bhuyan D.S.P Headquarter, Nalbari further stated that Shri B. Buragohain has kept Shri Gojen Bhuyan as a "Source". "Source" is not informed to other officers. Shri Kamal Ch. Bora, Retd. D.S.P DSB further stated that list for surrender on 26.1.01 was preferred by DSP Headquarter As per procedure the list is to be prepared by DSP DSB. Shri B. Buragohain was away from the Headquarter from 24.1.01 to 26.1.01 for Law and Order duty and as such the name of Shri Gojen Bhuyan could not be entered for surrender. Further as there was no formal reporting of picking up from Subansiri village under Borburi P/S for surrender, his name could not be enlisted for surrender on 26.1.01 at Guwahati.

From the Statement of Shri Kamal Ch. Bora, SI of Police and the then Sheastader of Nalbari P/S Malkhana it is revealed that Shri B. Buragohain had kept the arms and ammunitions in the P/S Malkhana on 13.12.2000 and taken to North Lakhimpur after 2/3 months of his transfer to North Lakhimpur by sending police escort. At the time of Cross-examination by Shri P.P. Barua P.O. Shri B. Buragohain D.O stated that on 15.6.01 two arms taken from Nalbari were kept in North Lakhimpur P.S Malkhana. He farther stated that as per discussion with the then S.P. Lakhimpur Shri S.N. Singh for surrender the arms and ammunition were taken back to his (Shri Buragohain) custody on 2.7.01 and Shri Buragohain had kept this arms till taken by army on 5.7.01. From the Statement of Shri S.N. Singh; IPS who had agreed for surrender with arms was revealed. As such the charge of gross misconduct for not bringing to the notice of the superior officers or to the authority concerned could be proved. Shri Buragohain wanted that Shri Gojen Bhuyan be surrendered formally and ceremonially and he could not avail the opportunity on 26.1.01 as he was away from the Headquarter for law and order duty. At Lakhimpur he was preparing for surrender of Shri Gojen Bhuyan with arms and ammunitions in consultation with S.P Shri S.N Singh, IPS which was revealed from the Statement of Shri S.N. Singh and as such his negligence of duty could be proved, it is also revealed that he was not taken prompt action in respect of surrender.

(Emphasis added)

2. In respect of 2nd charge.

From the statement (oral) as well as from the written statement of Shri K.K. Nath, DIG, the using of Shri B. Buragoghain's phone by Shri Gojen Bhuyan, @ Joon Kalita, Ulfa militant, for attempting the extortion of money from the businessman of North Lakhimpur Town could not be ascertained No proof was found in this respct. The same thing revealed from the Statements of the House Guards e.g. Shri Dandiram Saikia, Havildar, Shri Tulan Dutta, Constable, Shri Jitan Bora, Constable, Shri Muhiram Panging, Constable and Shri Dev Kr. Chetri, Constable. They further stated that nothing adverse of Shri Gojen Bhuyan was kwon to them as well as to Shri B. Guragohain, except Shri Khageswar Doley no body came to meet him (Gojen Bhuyan). Further he was not going out

frequently. From the statement of Shri Tulum Das, the then D.S.P DSB North Lakhimpur it revealed that Shri Gojen Bhuyan and other two accused issued only one extortion notice to one Punjabi Singh and this was the first case. As this was the first case of issuing extortion notice, this matter was not known to Shri B. Buragohain. And as such, the 2nd charge of gross misconduct and negligence of duty brought against Shri B. Buragohain for his failure to check and watch the activities of Shri Gojen Bhuvan could not be proved.

(Emphasis added).

3. In respect of 3rd charge.

As per statement of Shri Bhuben Gohain, the men O.C Barbari P.S it is revealed that before proceeding to Subansiri village under Borbori P/S for picking up Shri Gojen Bhuyan for surrender General Diary entry was there at Barburi P/S. After return also as stated, the details are being recorded on the General Diary. As per statement of Shri Kamal Ch. Bora, the then Sherastadar of Nalbari P/S it is revealed that the packet of arms and ammunitions was kept in Nalbari P/S on 13.12.200. In formal and ceremonial surrender function held at Guahati on 26.1.01 Shri Gojen Bhuyan could not be produced as Shri B. Guragohain was away from the Headquarters from 24.1.01 to 26.1.01 for law and order duty and his name was not listed by D.S.P. Headquarter for surrender. And as such the charge of gross misconduct and negligence of duty for secretly surrender of Shri Gojen Bhuyan before Shri B. Buragohain and O.C Borabori and failure of securing formal surrender could not be established. But not keeping Shri Gojen Bhuyan in the barrack meant for surrendered militant was a fact.

(Emphasis added).

4. In respect of 4th charge.

The charge of serious misconduct and indiscipline brought against Shri B. Buragohain, APS the then Addl. S.P could not be established as mentioned against the charge No. 1 above. (emphasis added).

5. In respect of 5th charge.

The charge for not securing formal surrender of Shri Gojen Bhuvan. ULFA militant, and for not deporting the arms and ammunitions could (sic. not) be established as mentioned in charge No. 1 and charge No. 2 above.

(Emphasis added)

6. In respect of 6th charge.

The charge of gross misconduct and indiscipline brought against Shri Buragohain for keeping him in the security barrack and use of Shri B. Guragohain's telephone and failure of proper watching Shri Gojen Bhuyan the Ulfa militant could not be established as mentioned in the charges No. 1, Charge No. 2 and Charge No. 3 above.

(Emphasis added)

7. In respect of 6th charge.

The charge of Gross misconduct for hiding important information from the superior against Shri B. Buragohain, APS in harbouring the militant under his custody indulging criminal activities could not be established as mentioned in Charge No. 1, Charge No. 2 and in charge No. 3 above.

(Emphasis added)

It may be mentioned that the word "not" was not found in the finding relating to 5th charge in the enquiry report annexed to the petition, which the learned counsel for the petitioner-appellant stated to be missing due to typographical mistake, which was not contested by the learned counsel for the respondents.

7. As regards the first charge, the Enquiry Officer gave the finding that the charge of gross-misconduct for not bringing to the notice of the superior officer or to the authority concerned of the surrender of an ULFA member could not be proved. Similarly, in respect of 2nd charge of gross-misconduct and negligence of duty against the petitioner for failure to check the activities of the surrendered ULFA member, the Enquiry Officer held that the same could not be proved. In respect of 3rd charge of gross-misconduct and negligence of duty regarding the secret surrender of ULFA member and failure to secure formal surrender, it was held that it could not be established. In respect of 4th and 5th charges, the Enquiry Officer also held that the same could not be proved. Similarly, in respect of 6th charge, the Enquiry Officer held that the same could not be established as mentioned in Charges Nos. 1, 2 and 3. Similar finding was given in respect of charge No. 7 of not being established. Thus, the findings given by the Enquiry Officer as recorded in the enquiry report dated 29.01.2003 as quoted above would clearly reveal that Enquiry Officer had held that all the charges against the petitioner could not be proved or could not be established. That being the position, we find it difficult to agree with the finding of the learned Single Judge as recorded in Para Nos. 19 of the impugned judgment and order dated 08.01.2010 that it was not a case of total exoneration of the petitioner from all charges, rather, it was a case of establishing at least three charges out of seven.

8. Therefore, even though the Enquiry Officer had given a finding that the charges against the petitioner were not proved or could not be established, the same was not binding upon the disciplinary authority and it could have come to a different conclusion based on the materials already existing in the enquiry report. However, law requires that the disciplinary authority gives an opportunity to the charged officer of being heard before proceeding to impose any penalty on the basis of his own findings not consistent or contrary to the findings given by the Enquiry Officer with reasons thereof. In the present case, what we have noted is that the disciplinary authority, after re-appreciation of the evidence which had emerged in course of the inquiry and other materials came to the conclusion that even if charges Nos. 2, 4, 6 and 7 could not have been proved, charge No. 1 has

been partially proved and charges Nos. 3 and 5, which are serious in nature have been proved beyond doubt. Though the disciplinary authority may be entitled to come to such a conclusion, the fact remains that the said conclusion is contrary to the findings recorded by the Enquiry Officer as discussed above. Therefore, if the disciplinary authority comes to a different or contrary conclusion to that of the Enquiry Officer and draws its own conclusion, law requires that the charged officer be given an opportunity of being heard against the contrary or different decision reached by the disciplinary authority with the reasons thereof before proceeding to impose any penalty as has been held by the Supreme Court in a number of cases, viz., in Punjab National Bank & Ors. Vs. Shri Kunj Behari Misra (supra), Yoginath D. Bagde Vs. State of Maharashtra and Another, .

9. If the findings of the Enquiry Officer are favourable to the charged employee and if the disciplinary authority takes a view different from the one taken by the Enquiry Officer, the disciplinary authority is bound to give notice setting out its tentative conclusion to the charged officer and only after hearing the charged officer, the disciplinary authority can arrive at a final finding of guilt.

10. In Punjab National Bank & ors. Vs. Shri Kunj Behari Misra (supra), the Supreme Court had held,

19. The result of the aforesaid discussion would be that the principles of natural Justice have to be read into Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer.

In Yoginath D. Bagde (supra), the Supreme Court also held that,

29... But the requirement of "hearing" in consonance with the principles of natural justice even at that stage has to be read into Rule 9(2) and it has to be held that before the disciplinary authority finally disagrees with the findings of the enquiring authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the enquiring authority do not suffer from any error and that there was no occasion to take a different view. The disciplinary authority, at the same time, has to communicate to the delinquent officer the "TENTATIVE" reasons for disagreeing with the findings of the enquiring authority so that the delinquent officer may further indicate that the reasons on the basis of which the

disciplinary authority proposes to disagree with the findings recorded by the enquiring authority are not germane and the finding of "not guilty" already recorded by the enquiring authority was not liable to be interfered with.

The above decisions have been consistently followed by the Apex Court in subsequent cases.

In the present case, admittedly, the impugned order dated 16.04.2008 was passed by the disciplinary authority imposing major penalty of compulsory retirement without giving any notice to the petitioner after the disciplinary authority recorded its conclusions differing with the findings of the Inquiry Officer. The above course of action is plainly contrary to the well established principle of law as discussed above. In view of the above, the appeal is allowed by setting aside the judgment and order dated 8.1.2010 passed by the learned Single Judge in W.P. (C) No. 4827 of 2008. Resultantly, the impugned order dated 16.4.2008 passed by the disciplinary authority imposing penalty of compulsory retirement and order dated 28.8.2008 passed by the appellate authority affirming the penalty are set aside. As a consequence, the petitioner would be entitled to be reinstated to service. However, the State respondents would be at liberty to proceed with the enquiry by furnishing a copy of the findings/conclusions reached by the disciplinary authority which are different from the findings recorded by the Enquiry Officer with reasons thereof to the petitioner to enable the petitioner to submit his representation against such conclusions and finding arrived at by disciplinary authority before passing any final order in this regard. Till such final order is passed by the competent authority as stated above, the petitioner-appellant, who would be reinstated in service, shall be deemed to be under suspension. However, he will not be entitled to any back wages upto today.

With the above observation and direction, the appeal stands allowed.