(2019) 05 GAU CK 0054

In the Gauhati High Court

Case No : Writ Petition (C) No. 3272 Of 2015

Bimal Payeng — APPELLANT

Vs

State Of Assam And 6 Ors — RESPONDENT

Date of Decision : 15-05-2019

Acts Referred:

Constitution Of India, 1950 — Article 226, 311
Assam Services (Pension) Rules, 1964 — Rule 205, 206
Assam Services (Discipline & Appeal) Rules, 1964 — Rule 9

Citation : (2019) 05 GAU CK 0054

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : N. Dutta, K.N. Choudhury, T.C. Chutia, D.K. Roy, M. Chutia, U.K. Nair, A. Chetry, R. Borpujari

Final Decision : Partly Allowed

Judgement

1) Heard Mr. K.N. Choudhury, learned Senior counsel assisted by Mr. D.K. Roy, learned counsel for the petitioner. Also heard Mr. U.K. Nair, learned Senior counsel assisted by Mr. A. Chetry, learned Standing counsel for the Pension & Public Grievance P&PG for short) and Director of Pension, respondents No. 2 to 4 and 6. Also heard Mr. R. Borpujari, learned Standing counsel for the Finance Department, respondents No.1 and 5. None appears on call for the Deputy Inspector of Schools, Barpeta, respondent No.7.

2) By filing this writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged the validity and legality of order dated 19.02.2015, thereby dismissing him from service as Senior Assistant in the Office of the Directorate of Pension, Assam. The petitioner has also challenged the show cause notice and charge sheet issued against him as well as the order dated 23.02.2015, which was passed consequent to the herein before referred order dated 19.02.2015. The said orders were challenged by filing W.P. (C) 817/2014. However, during the pendency of the said proceeding, his appeal was dismissed.

Hence, by filing this present writ petition, apart from the herein before referred orders, the petitioner has also challenged the appellate order dated 16.05.2015, by which the Addl. Chief Secretary to the Govt. of Assam, P&PG Department had dismissed his appeal preferred against the order of his dismissal from service.

3) In this writ petition, it is projected that the petitioner had joined his service as Lower Division Assistant ('LDA' for short) on 01.11.1991 and posted at the Directorate of Pension, Assam. He was promoted to the post of Senior Assistant on 05.04.1995. The Deputy Inspector of Schools, Barpeta ('DIS' for short), namely, Md. Rafijuddin Ahmed had submitted a pension case (i.e. Family Pension proposal) vide Memo dated 3518 dated 20.09.2011 to the Director of Pension, Assam in respect of Late Talebar Rahman, expired teacher of 133 No. Chengelia L.P. School along with all supporting documents including Service Book accompanied by an application dated 27.06.2001 by Mrs. Sahera Begum. The said proposal was received through the Data Entry Operator ('DEO' for short) at the Office of the Directorate of Pension on 13.10.2011. It is projected that this particular pension case was allotted to the petitioner in normal procedure. It is projected that on scrutiny, the petitioner did not find Pay Fixation as on 01.01.1989 under Revision of Pay, 1990 and the matter was sent to the Finance & Accounts Officer ('F&AO' for short), his higher authority. The objection of the petitioner was approved by the Director of Pension and the proposal was returned to the DIS by the F&AO vide letter dated 11.05.2012. Thereafter, the pension proposal was re-submitted by the DIS after meeting the objection by his letter dated 19.07.2012. On receipt of the said pension proposal, the same was re-allotted to the petitioner for processing. The proposal was found in order and, as such, the proposal was submitted before the F&AO for verification. After verification, the proposal was put up before the Director of Pension for approval. Accordingly, the family pension proposal was approved the Director of Pension. However, as per procedure, after the approval of the proposal, the order was required to be typed and the file was required to be returned back to the petitioner through Director of Pension Information System ('DPIS' for short) for comparing the order and to put his signature below the signature of the Director of Pension and to thereafter send the file to the F&AO for final signature and only thereafter, the pension order ought to have been released to the Treasury Office concerned. However, in this particular case the said process was not followed and the Final Pension Order dated 10.09.2012 was directly released to the Treasury, Nalbari directly from the table of the Director of Pension, Assam without the signature by the petitioner.

4) It is projected that on receipt of the pension order and pension papers, the Treasury Officer by his letter dated 08.10.2012, requested the DIS to verify the genuineness of the Family Pension Case as because the Treasury Officer did not find name of School where the deceased had last worked had not been mentioned in the descriptive roll. In his reply dated 10.10.2012, the DIS informed the Treasury Officer that he was working as In-Charge DIS since 01.02.2012 and that the proposal was sent by Rafijuddin Ahmed, the then DIS,

who was now working as DIS, North Salmara, Abhayapuri and that through the name of School where the deceased teacher had last worked was mentioned as 133 No. Chengelia L.P. School, but official records are not available to locate its existence and hence the genuineness of the pension proposal seemed to be suspected and doubted. The fake family pension case in the name of Mrs. Sahera Begum, wife of Late Talebar Rahman was reported by the Treasury Officer, Nalbari to the Director of Pension, Assam and the payment was stopped. The Director of Pension, Assam by letter dated 18.10.2012, asked the Treasury Officer for returning both halves of the PPO No. PPO/E/FP/67952 in respect of Mrs. Sahera Begum, wife of Late Talebar Rahman, ex LP School teacher without payment.

5) It is further projected that in the meanwhile, the Secretary to the Govt. of Assam and Director of Financial Inspection, Assam had initiated an enquiry and found that the Gaonburah's certificate, next of kin certificate and death certificate were all forged and that racketeers were operating in Barpeta District in connivance with some dishonest government officials. Accordingly, vide his Enquiry Report dated 26.12.2012, the persons found responsible for the fake Family Pension proposal of Mrs. Sahera Begum, wife of Late Talebar Rahman were - (a) Rafijuddin Ahmed, DIS, North Salmara, Abhayapuri, (b) Elimuddin Ali Ahmed, Senior Assistant of the office of the DIS, Barpeta, and (c) Sakayat Hussain, Dealing Assistant of the office of Director of Pension, Assam. There was no finding against the petitioner in the said report.

6) It is further projected that the matter was also investigated by the Central Bureau of Investigation, who had arrested Sakayat Hussain, Dealing Assistant of the office of Director of Pension, Assam who was also put under suspension, but the petitioner was never implicated of any charges. However, the Commissioner & Secretary to the Govt. of Assam, Pension and Public Grievance Department ('P&PG Deptt.' for short) issued a show cause notice dated 11.03.2013 along with Statement of Allegations without any list of documents and list of witnesses, inter-alia, on the ground that during processing the pension papers, the petitioner had not examined the same properly and violated the norms of Rule 205 and 206 of the Assam Services (Pension) Rules, 1964. The petitioner had submitted his detailed show cause reply on 15.03.2013, wherein, amongst others, it was submitted that though the pension case was processed by him, but the Pension Payment Order was directly issued by the concerned Officer without routing through the petitioner, as such he had no scope of re-verifying the papers. The petitioner was placed under suspension by order dated 15.05.2013. It is projected that the aggrieved petitioner had moved this Court by filing W.P. (C) No. 3198/13, which was disposed of by this Court by giving him liberty to prefer an appeal. However, when the petitioner preferred an appeal and prayed for reinstatement, the same was rejected by order dated 13.09.2013. Later on, the disciplinary authority started the Departmental Proceeding against the petitioner by framed charges and requiring him to show cause under Rule 9 of the Assam Services (Discipline & Appeal) Rules, 1964 read with Article 311 of the

Constitution of India. In the meanwhile, against the order dated 15.05.2013, for drawing up departmental proceeding, appellate order dated 13.09.2013, and claiming reinstatement, the petitioner had preferred W.P.(C) No. 817/2014, which was disposed of by order dated 23.02.2015 by giving the petitioner liberty to challenge the order of dismissal from service dated 19.02.2015 as indicated above. Hence, the present writ petition has been preferred.

7) The learned senior counsel for the petitioner has submitted that in the enquiry report dated 26.12.2012 submitted by the Secretary to the Govt. of Assam, & Director, Financial Inspection, he had implicated three persons and not the petitioner and out of the said three implicated persons, Sakayat Hussain was reinstated by his parent Department i.e. Secretariat Administration Department and reverted back to his original post in the said department. Moreover, it is submitted that the State respondents have not produced any material on record to deny the statement made by the petitioner that no departmental or criminal investigation were initiated against the remaining two Govt. employees named in the said report. By referring to reply dated 05.02.2013, submitted by the Director of Pension before the Commissioner & Secretary to the Govt. of Assam, P&PG Deptt., it was stated that the Pension case in question was received by the DIS on 13.10.2011 and finalized on 03.09.2012 and that the case was not finalized immediately. It was also stated that the family pension proposal was supported with all requisite documents and there was no doubt about genuineness of the pension case. The learned senior counsel for the petitioner heavily relies on the Enquiry Report on allegation of charges against the petitioner, wherein it was mentioned that the objection raised by the petitioner on pay entry of RoP 1990 was corroborated by the note-sheet of file marked as Ext.1 and accordingly, the finding was to the effect that "Charge No.1 and 2 are only partly established i.e. only his lack of responsibility, ignorance of Govt. Rules & Procedures is indicated while processing the alleged fake family pension cases." It is also recorded that 2 more objections were raised by F&AO, but as supporting documents were available, the pension was settled in the Directorate of Pension. The finding No.2 (sic. 2 ought to have been Charge No.3) is to the effect that "... As seen from the statement and other relevant documents submitted as Ext.2, 3, 4 & 5, the Director of Pension finalized old pension cases without raising any objection since the Directorate also had to clear all arrear pension and family pension cases as long back as 1975 i.e. since the Assam Elementary Education Provincialisation Act, came into force. So, the processing of the fake family pension case of 22 years long appears to have been done without thorough examination of the case. Charge No.4 was held not established. As against Charge No.5, it was held that the charge was partly established by holding that the petitioner should have pointed out the delay in submission of fake family pension cases and that the said action on his part indicates lack of responsibility and lack of probity. But, it was also held that Ext.2, 3, 4 and 5 indicates that such cases were actually processed and it was further held that the underlying fact was that there was no established procedure while disposing old

pension/ family pension cases and there appears to be no adherence to the existing Rules and Procedures as laid down in the Assam Service (Pension) Rules 1969. The learned senior counsel has laid stress in respect of the finding recorded to the effect that being the final pension paying authority, it was also the duty of the Director of Pension, as well as the F&AO to examine the instant case and there are several instances where old pension cases (Ext.2, 3, 4 & 5) were disposed without adhering to government procedures with further finding to the effect that although the petitioner had gained sufficient experience, but the practice of disposing old pension cases (which require thorough examination) without following any procedures/ Rules laid down which appears to be systematically followed without the superior officials raising any question or doubts, which again amounts to lack of knowledge of the established Procedures & Rules and lack of probity. He further refers to the conclusion wherein it was expressed that "... there is very little doubt that there has been a clear violation of established Rules & Procedures, not only on part of the concerned official, but also on part of the then Director of Pension and then F&AO of the Directorate who should have also examined the pension proposal thoroughly. Detection of fake family pension proposal could have been done at any level in the Directorate of Pension starting from the Dealing Assistant right up to the Director of Pension." Accordingly, it is submitted that when there was a collective failure, the petitioner could not have been singled out for harsh punishment of dismissal from service, while the three alleged perpetrators of fake pension papers against whom indictment was made in the enquiry, were honourably exonerated and reinstated in service without drawing any departmental proceeding. He has prayed for granting the petitioners all the reliefs as made in the writ petition. In support of his submissions, the learned senior counsel for the petitioner has referred to the cases of (i) Chairman- Cum- Managing Director, Coal India Limited & Anr. Vs. Mukul Kumar Choudhuri & Ors., (2009) 15 SCC 620; and (ii) M. Raghavelu Vs. Govt. of A.P. & Anr., (1997) 10 SCC 779.

8) Per contra, the learned senior counsel appearing for the respondents No.2 to 4 and 6 has justified the dismissal of the petitioner from service and in that regard, it is submitted that submitted that there was a clear finding that there were infraction of Rules and Procedures of the Government in dealing with the particular family pension proposal and, as such, this was a clear case of dereliction of duty and moreover, there was also a categorical finding that the petitioner was ignorant of the Rule and Procedures and, as such, there was no infirmity in the order of dismissal of the petitioner from service. It is also submitted that there was no procedural irregularities in the conduct of the departmental enquiry and after giving adequate opportunity to the petitioner to defend himself, the proceedings had culminated in ordering dismissal of service of the petitioner. It is also submitted that the punishment was justified under the facts and circumstances of the case. It is also submitted as the punishment was proper and moreover as the petitioner had unsuccessfully exhausted the appellate remedy available, this Court ought not to re-appreciate the evidence

and decide the matter as if sitting in appeal. In this regard, he has placed reliance on the case of (i) R.R. Parekh Vs. High Court of Gujarat & Anr., (2016) 14 SCC 1; and (ii) Nirmala J. Jhala Vs. State of Gujarat & Ors., (2013) 4 SCC 301. The learned senior counsel for the respondents No.2 to 4 and 6 has extensively relied on the departmental proceeding and to the stand taken in their affidavit- in- opposition.

9) The learned Standing Counsel for the Finance Department has submitted that no affidavit- in- opposition has been filed. However, he adopts the submissions made by the learned senior counsel for the respondents No.2 to 4 and 6.

10) Having heard the learned senior counsel for both sides and standing counsel for the respondents No.1 and 5, the materials available on record show that as the fake pension case was timely detected by the Treasury Officer, Nalbari, no payment was made from the Government exchequer. In para-4 of the affidavit- in- opposition, although the respondent No.3 had stated that the particular pension case was allotted to other Dealing Assistant and not to the petitioner, but as per the Report of Enquiry dated 26.12.2012, the then Director of Pension, Assam, namely, Sri Janaki Ram Das did not state that the petitioner had unauthorisedly processed the particular pension case allotted to another Dealing Assistant and he had categorically stated that he did not think that any officer of his office was involved in the said fake pension case. Paragraph 4 of the show cause notice dated 11.03.2013 indicates that the Commissioner & Secretary, P&PG Deptt. (respondent No.3) had mentioned that the petitioner was the Dealing Assistant and supervisor and moreover there was no accusation in the said show cause notice as well as in the Articles of Charge issued on 21.09.2013 by the respondent No.3 that the particular pension case was allotted to other Dealing Assistant and not to the petitioner. Hence, the allegation made in the affidavit- in-opposition by the respondent No.3 that the particular pension case was allotted to other Dealing Assistant and not to the petitioner does not appear to be borne out from the records and moreover, the statement made in para-4 of the said affidavit- in- opposition is verified to be true to his knowledge without disclosing how he acquired such knowledge when the then Director of Pension, Assam is not on record to have made such accusation as revealed from the herein before referred Enquiry Report dated 26.12.2012.

11) It is further seen that in the enquiry conducted by the Secretary to the Govt. of Assam and Director of Financial Inspection, the persons found responsible for the fake Family Pension proposal of Mrs. Sahera Begum, wife of Late Talebar Rahman were - (a) Rafijuddin Ahmed, DIS, North Salmara, Abhayapuri, (b) Elimuddin Ali Ahmed, Senior Assistant of the office of the DIS, Barpeta, and (c) Sakayat Hussain, Dealing Assistant of the office of Director of Pension, Assam. Subsequently, Sakayat Hussain, was arrested by CBI and was put in jail but subsequently was reinstated in service on 18.01.2014 by his parent department i.e. Secretariat Administration Department. However, the petitioner was not found guilty in the aforesaid enquiry. However, in the Departmental Proceeding,

the respondent No.3 after discussing the evidence, arrived at a conclusion that there was a clear violation of the established Rules and Procedures, not only on part of the concerned official but also on part of the then Director of Pension and the then F&AO of the Directorate of Pension, who should have examined the pension proposal thoroughly. While deciding Charge No.5, it was held that the charge was partly established by holding that the petitioner should have pointed out the delay in submission of fake pension cases and that the said action on his part indicates lack of responsibility and lack of probity. It was also held that Ext.2, 3, 4 and 5 indicated that such cases were actually processed and it was further held that the underlying fact was that there was no established procedure while disposing old pension/ family pension cases and there appears to be no adherence to the existing Rules and Procedures as laid down in the Assam Service (Pension) Rules 1969. Thus, not only in the enquiry report dated 26.12.2012, but also in the Departmental Proceeding, the authorities including the respondent No.3 had imputed collective failure on part of the petitioner, F&AO and the Director of Pension to adhere to the Rules and Procedures of the Assam Service (Pension) Rues, 1969.

12) Thus, on the basis of the enquiry report dated 15.05.2014, wherein collective failure of the petitioner, F&AO and the Director of Pension was found, the petitioner was singled out and dismissed from service. It is seen that the Disciplinary Authority has not given any finding that the omission on part of the petitioner was with criminal intent of defrauding the public exchequer or that the petitioner had participated in the conspiracy to cause financial gain to himself or to the beneficiary, rather, the materials available on record shows that right from the petitioner to F&AO and the Director of Pension never doubted the genuineness of the Pension case forwarded by DIS, Barpeta. The petitioner has not been found to have committed any financial irregularity or impropriety. The Enquiry Report dated 26.12.2012 indicates that even the then Director of Pension did not find any reason to doubt the fake pension case. The disciplinary authority merely found the petitioner guilty of lack of knowledge of Rules and Procedures, he had acted negligently and there was no established procedure and the Rules and Procedures were not adhered to and that such practice had been systematically followed. Yet, the disciplinary authority has singled out the petitioner for inflicting punishment of dismissal from service, whereas others, who were an integral part of the same transaction have been left out unscathed and not proceeded against.

13) The appellate authority has also failed to appreciate that while the Disciplinary Proceeding Report had attributed collective failure on part of the petitioner, F&AO and the Director of Pension, Assam to adhere to Rules and procedures, only the petitioner was singled out for punishment. Neither the disciplinary authority nor the appellate authority took any exception to the serious lapse in the procedure projected by the petitioner that after PPO is issued, the file ought to have been routed through the petitioner for his counter-sign, but instead the PPO was directly dispatched by the Director of Pension to

the Treasury Officer, Nalbari and if that be so, there is no explanation why only the petitioner could be said to have been held to be responsible for dereliction of duty.

14) Under such circumstances, having seen that out of so many persons attributed for the fake pension case to be processed, the petitioner, who was initially not accused of any charges whatsoever, is the only person got punishment. The petitioner has relied on an order under Memo No. S(E)61/2013/46 dated 18.01.2014 showing that Sakayat Hussain, who was indicted by the Enquiry Report dated 26.12.2012 and had been arrested by CBI and put in jail, had been reinstated in service, this Court finds that the decision making process to award punishment of dismissal of the petitioner from service vide order dated 19.02.2015 is not sustainable as the authorities have awarded disproportionate punishment to the petitioner even when the fake pension papers was timely detected and disbursement of pension was stopped, as such, no financial loss whatsoever was caused to the State. The punishment of dismissal from service merely for lack of knowledge of Rules and Procedures, for lack of probity, as well as for non- adherence of Rules and Procedures while disposing of pension cases, in the considered opinion of this Court, is disproportionate, when the authorities have categorically held that non adherence to the Rules and Procedures while disposing of pension cases was "systematically followed" in the Directorate of Pension. Moreover, the petitioner could not have been only singled out for being punished without proceeding against the others who have been found to be equally responsible in the enquiry report dated 26.12.2012 as well as in the departmental enquiry instituted against the petitioner.

15) In this regard, this Court finds support from paragraph 19 and 20 of the case of Chairman - Cum- Managing Director, Coal India Limited (supra), which is quoted below:-

"19. The doctrine of proportionality is, thus, well recognized concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in access to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.

20. One of the tests to be applied while dealing with the question of quantum of punishment would be would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment."

16) In the case of M. Raghavelu (supra), relied upon by the learned senior

counsel for the petitioner, the Supreme Court of India had seen no reason to pick out the appellant therein alone for finding him guilty of the charge. Paragraph 5 thereof is quoted below:-

"5. The argument of the learned counsel for the appellant is that if the persons directly in charge of the construction work were found not guilty of the charge framed, the appellant, who was indirectly in charge of the work, cannot be punished for similar charge levelled against him. We find force in the argument of the learned counsel for the appellant and we do not think that the argument of the learned counsel for the respondent that the enquiry officer in this particular case has gone into the merits and has given different finding should be accepted. As pointed out earlier, on the basis of the same set of evidence the officers who were directly in charge of the construction work were exonerated of the charge and we see no reason to pick out the appellant alone for finding him guilty of the charge."

17) In the present case in hand, the others who have been indicted in the Report dated 26.12.2012 and those indicted in the Disciplinary Proceeding have not been charged, the ratio culled out from the above referred case is found to squarely apply under the facts of this case.

18) The two cases of (i) R.R. Parekh (supra), and (ii) Nirmala J. Jhala (supra) cited by the learned senior counsel for the respondents No.2 to 4 and 6 would not be applicable because this Court has not made any attempt to interfere with the findings, but this Court has examined the decision making process leading to award of disproportionate punishment of dismissal of the petitioner from service.

19) Accordingly, this Court is inclined to set aside the (i) Order No. PPG(P) 129/2013/164 dated 19.02.2015 issued by the Commissioner & Secretary to the Govt. of Assam, Pension & Public Grievances Deptt., (ii) Office Order under Memo NO./DP/81/92/84 dated 23.02.2015 issued by the Director of Pension, Assam, and (iii) Order No. PPG(P) 129/2013/229 dated 16.05.2015 passed by the Addl. Chief Secretary to the Govt. of Assam, Pension & Public Grievances Deptt., without affecting the Enquiry Report in connection with the Disciplinary Proceeding. The matter is remanded back to the Disciplinary Authority to re-examine the punishment inflicted upon the petitioner afresh and to pass appropriate orders in the case of the petitioner without being influenced by the 3 (here) orders that have been set aside. In order to facilitate the same, the petitioner shall be deemed to be in service only for the limited purpose of the Departmental Proceeding from the date of his dismissal from service till the date the fresh order is passed by the disciplinary authority. It is further provided that the petitioner shall not be entitled to back wages, but he shall be entitled to notional benefits for pension and other retirement benefits.

20) This writ petition shall stand partly allowed and the Rule is made absolute in terms of this order. Ordered accordingly. No cost.