

(2012) 11 GAU CK 0060
In the Gauhati High Court
Case No : WA No. 187108 WA

Government of Assam

APPELLANT

Vs

Bhupati Ranjan Mudoi

RESPONDENT

Date of Decision : 08-11-2012

Acts Referred:

Citation : (2013) 2 GLT 700

Hon'ble Judges : Adarsh Kumar Goel, C.J;Ujjal Bhuyan, J

Bench : Division Bench

Advocate : B. Chetri, GA and Mr. N. Upadhyay, Jr. GA, for the Appellant;

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J.—Delay condoned. Office to register this appeal.

2. This writ appeal is directed against the judgment and order dated 21.5.2012 passed by the learned Single Judge allowing the writ petition WP(C)No. 3255 of 2011 filed by the respondent as writ petitioner.

3. The background facts may be briefly noted.

4. Respondent is serving as Block Development Officer (BDO) and posted at Paschim Nalbari Development Block, Nalbari. A show cause notice dated 31.12.2009 issued by the Principal Secretary to the Govt. of Assam, Panchayat and Rural Development Department (who is the Disciplinary Authority) was served on the respondent. By the said show cause notice, it was alleged that the respondent while working as BDO, Silchar Development Block had withdrawn an amount of Rs. 12,00,000/- (Rupees twelve lakhs) from NREGA account and another sum of Rs. 4,00,00/- (Rupees four lakhs) from Indira Awas Yojana (IAY) account without any requisition from the concerned Junior Engineers and Gaon Panchayat Secretaries. Further allegation is that the respondent had withdrawn fund under NREGA by issuing self cheque on 5.3.2008 and hurriedly re-deposited the withdrawn amount on the next day. Similar charge was made in respect of

withdrawal of IAY fund. Respondent was also charged with issuing two outstation cheques for Rs. 11.15 lakhs and Rs. 11 lakhs and Rs. 4 lakhs in favour of Smt. Parul Nath, who is wife of the respondent and working as Gram Sevika in Chakchaka under District Rural Development Agency (DRDA), Barpeta.

5. Respondent submitted his written statement dated 22.2.2010. He denied the charges levelled against him. Regarding withdrawal of money without requisition from the concerned authorities, he stated that a prior meeting of Gaon Panchayat Secretaries was held wherein requisition was made for release of funds under NREGA & IAY schemes expeditiously. Regarding withdrawal of funds from the Bank on 5.3.2008 and re-deposit of the same on 6.3.2008, respondent stated that the relevant Govt. instructions regarding joint operation of the Bank accounts of the block was not brought to his notice. Prior to joining at Silchar, he was on leave and the office records were also not available. However, before disbursement, he confirmed the matter and when it came to his notice that the account of the block had to be jointly operated, he immediately deposited the withdrawn amount. Regarding drawal of funds under IAY for selected beneficiaries, respondent stated that when he found that no record was available regarding selection of such beneficiaries and that an enquiry was going on against the earlier BDO regarding anomalies in IAY, he deposited the amount withdrawn in the Bank on 6.3.2008. As regards allegation of issuing two outstation cheques in favour of his wife, respondent admitted that it was a bonafide mistake. He stated that it was his wife who had brought it to his notice about issuance of cheques to her. Thereafter, the respondent went to the concerned Bank and instructed the Bank Manager not to encash the cheques.

6. The Disciplinary Authority issued notification dated 22.3.2010 appointing the State Enquiry Officer, Assam as Enquiry Officer to enquire into the charges brought against the respondent. By the said notification, Shri Ratneswar Kalita, Superintendent of the Department was nominated as the Presenting Officer to present the case of the Department before the Enquiry Officer.

7. While the enquiry was going on, notification dated 4.5.2010 (Annexure-8 to the writ petition) was issued by the Deputy Secretary to the Govt. of Assam, Panchayat & Rural Development Department ordering that respondent would continue to hold the office of BDO in the same capacity without financial powers until further orders.

8. It appears that the Enquiry Officer completed the enquiry and submitted his report on 6.10.2010. The Disciplinary Authority, however, issued notification dated 20.11.2010 (Annexure-18 to the writ petition) stating that there are inconsistencies in the report of the Enquiry Officer submitted on 6.10.2010. State Enquiry Officer had not done a full enquiry and the enquiry was therefore incomplete having not heard witnesses. Smt. Aparna Dey, Jt. Secretary of the Panchayat and Rural Development Department, Assam was appointed as Enquiry Officer under Para-6.18.1 (2) of the Manual of Departmental Proceedings to enquire into, the charges brought against the respondent and thereafter to

submit her enquiry report. The earlier notification dated 22.3.2010 appointing the State Enquiry Officer as the Enquiry Officer was cancelled.

9. Respondent submitted representation for early disposal of the departmental proceeding. It was also contended that fresh enquiry is not contemplated under the relevant rules.

10. Ultimately, respondent filed the related writ petition, that is, W.P(C) No. 3255 of 2011 before this Court seeking the following reliefs:-

1) to quash Annexure-8 notification dated 4.5.2010 and Annexure-18 notification dated 20.11.2010,

2) to release arrear salaries from 9.4.2008 to 4.5.2010,

3) to pay monthly salary at the revised scale,

4) to give full charge of the post of BDO by allotting proper office.

11. The appellant was arrayed as respondent in the writ petition. Three counter affidavits were filed. In the first affidavit dated 6.8.2011, the stand of the appellant was that writ petitioner was not allowed to handle financial transactions as a departmental proceeding was pending. The further stand taken was that since the report of enquiry submitted by the State Enquiry Officer did not carry full facts and had inconsistency, further enquiry was ordered. Fixation of pay of writ petitioner could not be done as departmental proceeding was on. In the second affidavit filed on 12.3.2012, the appellant stated that Panchayat and Rural Development Department did not maintain the service record of BDO's, which are dealt with by the office of the Accountant General, Assam. From the report of the Accountant General, it could be found out that respondent was placed under suspension on 7.4.1994 and reinstated on 28.7.1994. He was again placed under suspension on 27.7.1998 and reinstated on 18.6.1999. The departmental proceedings in respect of the above two cases are still pending, because of which the Accountant General could not fix his pay as due. In the counter affidavit dated 9.5.2012, appellant stated that a well furnished chamber with comfortable sitting arrangement was made available to the respondent. Respondent's pay could not be revised as he could not cross the efficiency bar due to non-regularization of his period of suspension. Therefore, regular increments could not be granted to the respondent and consequently, he is drawing pre-revised scale of pay. Decision to hold further enquiry was justified on the ground that enquiry report of the State Enquiry Officer was found incomplete and having inconsistency. Further enquiry was ordered in accordance with the provisions contained in Chapter VI, Para- 6.18.1 (2) of the Manual of Departmental Proceedings.

12. Learned Single Judge after hearing the matter held that the direction to hold fresh enquiry against the respondent is not sustainable in law, Accordingly, notification dated 20.11.2010 was set aside and quashed. The authority was directed to pass appropriate order in respect of regularization of the period of

suspension of the respondent and for payment of salary for the said period as well as for payment of revised pay. The authorities were further directed to consider, in view of the aforesaid development, entitlement of respondent to get full charge of the post of BDO.

13. Aggrieved, the State is in appeal.

14. Mr. B. Chetri, learned Sr. Govt. Advocate, Assam submits that learned Single Judge was not justified in interfering with the decision of the Disciplinary Authority in directing fresh enquiry. He submits that Disciplinary Authority is not bound by the report of the Enquiry Officer and in an appropriate case, like the present one, he can order a fresh enquiry.

15. The submissions made have been considered.

16. The contents of the notification dated 20.11.2010 (Annexure-18 to the writ petition) have already been noticed. On the ground that the Enquiry Officer had not done a full enquiry by not hearing witnesses and there being inconsistency in his report, the Disciplinary Authority appointed a new Enquiry Officer to hold a fresh enquiry against the respondent.

17. Question for consideration is whether the Disciplinary Authority was justified in discarding the enquiry report and directing fresh enquiry by appointing a new Enquiry Officer.

18. It is a settled legal proposition that the findings of Enquiry Officer or his recommendations are not binding on the Disciplinary Authority. The Disciplinary Authority may agree with the report or may differ with the same. If the Disciplinary Authority disagrees with the findings of the Enquiry Officer and holds that the charges framed against the delinquent have been prima facie proved, it may impose punishment as it may deem fit on the delinquent in accordance with law.

19. In the case of Punjab National Bank and Others Vs. Sh. Kunj Behari Misra, , the Hon'ble Supreme Court held that in a case where the disciplinary authority disagrees with the findings of the enquiring authority, then before it records its own findings on the charges levelled against the delinquent, 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 would have to be conveyed and the delinquent officer should have an opportunity to persuade the Disciplinary Authority to accept the favourable conclusion of the Enquiry Officer. The above view expressed in Punjab National Bank was followed by the Apex Court in the subsequent decision in S.B.I. and Others Vs. Arvind K. Shukla, .

20. A Single Bench of this Court in the case of Bidyut Buragohain Vs. State of Assam, examined the provisions of Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964. As per the said Rule, after the enquiry report is received by the Disciplinary Authority, the record of the enquiry is required to be considered

and thereafter a finding on each charge has to be recorded. This Court held that there is no specific power vested in the Disciplinary Authority by the provisions of the said Rules so as to enable the said authority to hold a fresh/de-novo enquiry in case the Disciplinary Authority is in disagreement with the findings of the Enquiry Officer. In the facts of that case, this Court held that no specific power to hold second enquiry into the same set of allegations which were earlier enquired into having been vested in the Disciplinary Authority and the provisions of Rule 9 being mandatory, the decision to hold a fresh enquiry was held to be without jurisdiction and was interfered with.

21. Learned Single Judge held that there is no indication in the impugned notification that the Disciplinary Authority had considered the enquiry report in reference to the charges and came to any conclusion. Learned Single Judge held that Rule 9 does not provide for remanding the matter back to the enquiry authority. Examining the provisions contained in Para 6.18.1 (2) of the Manual of Departmental Proceedings, learned Single Judge held that the aforesaid provision for fresh/further enquiry has been made to remove any prejudice caused to the officer against whom the departmental proceeding is initiated. On due consideration, learned Single Judge held as under:-

8. I have considered the submissions made by the learned counsel for the parties and have also gone through the entire records. In the counter affidavit filed by the Govt. in the Panchayat and Rural Development Department through the Deputy Secretary on 08.08.2011, it was contended in paragraph-7 of the said affidavit that the petitioner was not allowed to handle the financial transactions since a departmental proceeding was pending against him. As regards the enquiry conducted against the petitioner, it has been stated that since the enquiry report of State Enquiry Officer was found incomplete and having inconsistency, further; enquiry was ordered through another enquiry officer. In paragraph-14 of the said affidavit, it has been contended that since a departmental proceeding is pending against the petitioner, fixation of pay cannot be allowed to him.

9. The same very authority has filed another affidavit on 15.05.2012 reiterating the same stand. As regards the plea of the petitioner that he has not been provided with sitting arrangement in the office, it has been stated that a well furnished chamber with comfortable sitting arrangement have been provided to the petitioner. In paragraph-4 of the said affidavit, it has been stated that the petitioner was suspended in 1994 and reinstated in service on 28.07.1994. The said period having not been regularized, he could not be allowed to cross EB. Referring to second suspension on 27.07.1998 and reinstatement in service on 18.06.1999, it has been stated that since a departmental proceeding is still pending, the period cannot be regularized and consequently he cannot be paid his salary in the revised scale of pay. As regards the power to initiate fresh proceeding on conclusion of the earlier enquiry, it is stated that since the earlier enquiry report was found incomplete and inconsistent, further enquiry was

ordered under the provision of Chapter VI, para 6.18.1(2) of the Manual of Departmental Proceeding.

10. For a ready reference, the aforesaid provision on the subject of fresh/further enquiry is reproduced below:

6.18.1. Where the Disciplinary Authority, on a contention raised by the person proceeded against or otherwise finds that any material irregularities have been committed and they have caused or they may cause prejudice to the person charged or such irregularities are likely to vitiate the proceedings, it will consider.

(1) whether the whole enquiry should be set aside and a fresh enquiry started *denovo*; or

(2) whether the enquiry be set aside from the stage of occurrence of the irregularity and it be ordered to be started afresh from that particular stage.

8.18.2. As far as possible, where ends of justice can be served and so long as the person proceeded against is given reasonable opportunity of being heard, efforts should be made to resume the enquiry from the stage at which the irregularity occurred.

11. The aforesaid provision is applicable only when the disciplinary authority finds that any material irregularity has been committed and the same might cause "prejudice to, the" persons charged or such irregularity are likely to vitiate the proceeding. It is only in such circumstances, it is to be considered as to whether the whole enquiry shall be set aside or fresh enquiry should be initiated *de novo*.

12. From the above, what is seen is that the aforesaid provision for fresh/further enquiry has been made to remove any prejudice caused to the officer against whom the proceeding is initiated. Even otherwise also, the said provision cannot override the provision of Assam Services (Discipline & Appeal) Rules, 1964. Rule 9 of the said Rules laying down the detailed procedure for imposing penalties, provides that on the conclusion of the enquiry, the enquiring authority shall prepare the enquiry report and the disciplinary authority would consider the same towards recording its own findings on each charge. There is no provision for remanding the matter back to the enquiring authority, more particularly on the ground of there being inconsistencies in the report, as indicated in the impugned notification dated 20.22.2010 (sic) (Annexure-18).

13. There is also no indication in the impugned notification that the disciplinary authority considered the report in reference to the charges and came to any conclusion. Only finding recorded in the notification is that the report is incomplete and inconsistent. If the course of action adopted by the respondent/disciplinary authority by issuing the impugned notification is allowed to stand, same will cause serious prejudice to the delinquent officer. On each and every occasion it will be the tendency of the disciplinary authority to remand the matter back to another enquiry officer; if it finds that the enquiry report is not

favourable to it.

14. In the instant case, the disciplinary authority after recording that there are inconsistencies in the report submitted by the enquiring authority on 06.10.2010, took recourse to the provision of the aforesaid Manual by appointing another enquiry officer to enquire into the charges, as if it is determined to get favourable report.

15. As regards the Annexure-8 notification dated 04.05.2010 by which the petitioner was directed to hold the post of BDO in the same capacity without financial power, as per the affidavit in opposition filed by the respondents, same was taken recourse to in view of the pendency of the departmental proceeding against the petitioner. In view of my opinion that the impugned Annexure-18 notification, dated 20.11.20.10 directing fresh enquiry against the petitioner is not sustainable in law, the authority will have to consider as to whether divesting the petitioner from the financial power and to be precise with the duties and functions attached to the post of BDO is still to continue or not.

16. As regards the payment of salary for the period from 09.04.2008 to 04.05.2008, if the petitioner worked for the said period, the respondents cannot deny him salary for the said period.

17. If the petitioner was placed under suspension and thereafter reinstated in service, duty was cast on the disciplinary authority to regularize the said period of suspension. Since the subsequent enquiry ordered by the notification dated 20.11.2010 has been interfered with, direct on is issued to the disciplinary authority to pass appropriate order towards regularisation of the period of suspension. As regards the earlier period of suspension mentioned in the affidavit filed on 15.05.2012, there being no appropriate proceeding pertaining to the same, the authority shall now pass appropriate order regularising the period of suspension.

18. The writ petition is allowed by setting aside and quashing the impugned notification dated 20.11.2010 (Annexure-18). The respondents shall now pass appropriate orders in respect of regularization of the periods of suspension of the petitioner and payment of salary for the said period, payment of revised pay and shall also consider as to whether in view of these developments the petitioner is entitled to get full charge of the post of BDO presently being held by him. The respondents shall pass appropriate orders consistently with the above directions and observations as expeditiously as possible/preferably on or before 30.06.2012.

19. Writ petitioner is allowed. There shall be no order as to costs.

22. We are in agreement with the views expressed by the learned Single Judge. While it is true that the findings and recommendations of the Enquiry Officer are not final and binding on the Disciplinary Authority, in the event of disagreeing with such findings and recommendations, the Disciplinary Authority may record a finding and, thereafter, may impose punishment on the delinquent in accordance

with law. But the Disciplinary Authority has to apply its mind vis-a-vis the enquiry report and must indicate the areas and reasons for disagreement. The notification dated 20.11.2010, as rightly held by the learned Single Judge, does not indicate any application of mind to the report of inquiry and the areas and reasons for disagreement. In such circumstances, we do not find any error or infirmity in the view taken by the learned Single Judge. Therefore, in view of the discussions made above, we see no merit in this appeal, which is accordingly dismissed. However, there will be no order as to costs.