
(2019) 05 GAU CK 0035
In the Gauhati High Court
Case No : Writ Petition (C) No. 6579 Of 2013

Jagadish Chandra Nath

APPELLANT

Vs

State Of Assam And 3 Ors

RESPONDENT

Date of Decision : 10-05-2019

Acts Referred:

Constitution Of India, 1950 — Article 226
Assam Services (Discipline And Appeal) Rules, 1964 — Rule 9, 9(2), 9(5)
Assam Police Service Rules, 1966 — Rule 4, 4(b)(iii), 13(2)
Assam Civil Service (Conduct) Rules, 1965 — Rule 24, 351

Citation : (2019) 05 GAU CK 0035

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : Wise Imran, N Goswami

Final Decision : Allowed

Judgement

1) Heard Mr. M.K. Sharma, learned counsel for the petitioner. Also heard Mr. N. Goswami, learned Govt. advocate appearing for the State respondents.

2) By this writ petition under Article 226 of the Constitution of India, the case projected by the petitioner is that at the relevant time he was serving as Armed Branch Constable and posted at Goalpara. The Superintendent of Police, Goalpara (respondent No.4), drew up a departmental proceeding against the petitioner on the ground of marrying for the second time while his first wife is still alive and without obtaining divorce from the first wife. It is further projected that as directed by the respondent No.4, the Enquiry Officer started the departmental proceeding and recorded the statements of the departmental witnesses and of the petitioner. In this connection it is projected the learned counsel for the petitioner has submitted that the departmental proceeding was vitiated for the following reasons, viz., (i) the Enquiry Officer had not furnished a list of documents or copies thereof on which the department had relied upon, (ii) the department had examined 6 witnesses whereas in the list of witnesses, only

4 names were cited, (iii) the petitioner was not made aware that the petitioner was entitled to assistance of a defence assistant, (iv) the Enquiry Officer allowed another unconnected enquiry, for which the petitioner was never charged to be merged with the departmental proceeding been conducted, and (v) the Enquiry Officer had relied upon the alleged past conduct of the petitioner for which no material was served on the petitioner, and (vi) the petitioner was not given adequate opportunity to cross examine the departmental witnesses. Accordingly, it is submitted that the petitioner was held guilty of the charged brought against him and thereafter vide order dated 09.10.2009, the respondent No.4 had dismissed the petitioner from service w.e.f. 08.10.2009 and directed that the petitioner shall not be considered for any appointment from Government of Assam in future. The departmental appeal filed by the petitioner was dismissed by the appellate authority i.e. the Deputy Inspector General of Police (W.R.) (respondent No.3) by order dated 17.08.2010 on the ground that the period of limitation of appeal expired by 9 months 16 days. The aggrieved petitioner approached this Court and accordingly, by order dated 08.01.2013 passed in WP(C) 134/2012, this Court had directed the Respondent No.3 to consider the appeal filed by the petitioner against his termination from service on merit and to pass necessary orders in accordance with law. Thereupon, the appellate authority had directed the petitioner to appear before him for hearing. It is projected that in the appellate proceeding, the petitioner was not given a fair chance of hearing and his appeal was dismissed by order dated 20.05.2013. It is further submitted that although second marriage is disputed, but nonetheless, second marriage is not prohibited under Part-III of the Police Manual. Hence, it is submitted that this present writ petition was preferred.

3) In support of his submissions that the departmental proceeding was vitiated and not sustainable, the learned counsel for the petitioner has relied upon the following case citations, viz., (1) Indu Bhushan Dwivedi Vs. State Bank of India, (2010) 11 SCC 278; (2) Chand Mohammad Ali Vs. State of Assam & Ors., (2016) 5 NEJ 62; (3) Durgeswar Ray Vs. State of Assam & Ors., 2012 (4) GLT 269; (4) P. Zokha Vs. State of Mizoram & Ors., 2002 (1) GLT 476; (5) Dinesh Ch. Ray Vs. State of Assam & Ors., 2000 (2) GLT 413; (6) Abujamamuba Singh Vs. State of Manipur & Ors., 2000 (1) GLT 227.

4) Per contra, the learned Govt. Advocate has referred to the statements made in the affidavit- in- opposition (hereinafter referred to as A/o for brevity) filed on 08.01.2014 by the respondent No.4 through the Additional Superintendent of Police Goalpara. He has submitted that the disciplinary proceeding was initiated against the petitioner for marrying one Nilima Nath for the second time during the subsistence of the first marriage with one Punu Rani Rabha. It is further submitted that in paragraph 5 and 7 of the A/o, it was the specific stand of the respondent No.4 that every opportunity was given to the petitioner to defend himself. It is further submitted that the Punu Rani Rabha had given her statement that she was living with petitioner as husband and wife and that they were married at Bapuji Nagar Kali Mandir. It is submitted that in view of the

categorical finding by the impugned order dated 09.10.2009 passed by the respondent No.4 that while the departmental proceeding was continuing the petitioner had entered the room of one Rabin Kalita and misbehaved with his daughter and sister-in-law and on the next day the petitioner had abused the wife of Rabin Kalita and made indecent exposure before the lady and that the enquiry report of Keshabanandan Bora, APC, Dy.S.P.(B) had been amalgamated with the instant departmental proceeding. It is submitted that the disciplinary authority i.e. the respondent No.4 had held that the service record of the petitioner had revealed that he was awarded with minor punishments for his misconducts as many as 28 times and, as such, the learned Government had justified the order of dismissal of the petitioner and that the petitioner was not fit for being a member of a Disciplined Force or for any Government job. It is submitted that unless the departmental punishment is illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, the Courts should not go into the correctness of the choice made by the competent authority while inflicting punishment or while holding the delinquent employee guilty of misconduct and substitute its decision on the wisdom of the disciplinary authority and in support of his submissions, the learned Govt. Advocate has placed reliance on the case of Union of India & Anr. Vs. K.G. Soni, (2006) 6 SCC 794.

5) The materials available on record reveal that in the show cause notice on the basis of statement of allegations, charge against the petitioner was framed by the respondent No.4 as under:- Charge

Thus you are charged for gross misconduct and violence of conduct rule on your part being a member of disciplined force which tantamount to initiate disciplinary action against you and not fit to remain in discipline force.

Therefore you are asked to submit your written statement within 10(ten) days from the date of receipt of this communication.

Your written statement whether you intend to be heard in person should be submitted to the undersigned within the period specified above.

List of Witnesses

- (1) S.I. (UB) Achyut Talukdar
- (2) ASI (UB) Pinak Pani Nath
- (3) W/C (UB) Helen Daimary
- (4) W/C (A.B.) Hira Ray.

6) Thereafter, by order dated 27.03.2009, the Reserve Officer, Police Reserve, Office of the Superintendent of Police, Goalpara had appointed Shri J.H. Bhuyan, APS, Dy.S.P. (B), Goalpara as Enquiry Officer of Departmental Proceeding No.4/2009 drawn up against the petitioner for enquiry. The petitioner has annexed the typed copy of findings of Departmental Proceeding No.4/2009 drawn

up against the petitioner as Annexure-5. On a perusal of the same, it appears that the Enquiry Officer had examined the PWs, which suggests that there was no presenting officer. There is no mention in the departmental proceeding that any opportunity was given to the petitioner to cross examine any of the six witnesses examined as DWs. There is also no record that in terms of Rule 9(2) of the Assam Services (Discipline & Appeal) Rules, 1964 (hereinafter referred to as the "1964 Rules"), the petitioner was asked whether he desires to be heard in person, or that the petitioner was informed of his right under Sub- Rule (5) of Rule 9 of 1964 Rules to avail assistance of any other Government Servant approved by the Disciplinary Authority. Moreover, no material has been produced by the respondents to show that apart from 4 (four) witnesses named in the show cause notice the petitioner was provided with a list of two additional witnesses, namely, Punu Rani Rabha and Nilima Nath or that any of the documents exhibited by the department was provided to the petitioner. It also appears from the Departmental Proceeding (Ext.5) that the Enquiry Officer had recorded the statement of the petitioner of his own and not as introduced by the presenting officer. In fact in the said departmental proceeding (Ext.5), there is no mention anywhere that any Presenting Officer had presented the case of the prosecution. Thus, it appears that the Enquiry Officer had acted both as the 'prosecutor' and also as the 'judge'.

7) The statement of Punu Rani Rabha is to the effect that she had stated that her father was Durjyadhan Basumatary and she had further admitted that she was the married wife of one Sri Haladhar Rava for 13/14 years. She further stated that the petitioner offered to marry her but she refused because she was already married, but the petitioner raped her and thereafter, the petitioner brought her with him and they started to live as husband and wife and that their marriage was performed at the Kali Mandir, Bapujinagar and Paglartek Shiv Mandir. Thereafter, the petitioner had married the second wife. This Court is conscious that it is not sitting in appeal. However, a glaring aspect is not found to be addressed by the Enquiry Officer or by the Appellate authority, which is, whether in light of admission by the alleged first wife that she was already married to one Haladhar Rava, is her alleged marriage with the petitioner in two temples can constitute a valid marriage and then a corollary aspect was required to be examined that whether there was any impediment for the petitioner to have married Nilima Nath, alleged to be his second wife. Moreover, a categorical finding has been given by the Enquiry Officer that marriage of the petitioner and Punu Rani Rabha was not performed in accordance with any social ritual or Court marriage process, nonetheless, even in light of the said finding, the Enquiry Officer has not addressed that how the marriage of the petitioner and the alleged first wife would have constituted a valid marriage. Therefore, it appears that the Enquiry Officer was pre-determined that the first marriage of the petitioner was a valid and subsisting marriage and, as such, the said authority failed to appreciate the admission by the alleged first wife that she was already married.

8) Moreover, the categorical finding recorded by the Enquiry Officer in the

Departmental Proceeding is that on 23.03.2005, the delinquent constable married with one Smt. Nilima Nath as second wife without getting divorced of his first wife Smt. Punu Rani Rabha in violation of the provision of Rule 13(2) of the Assam Police Service Rules, 1966 wherein it is clearly stated that "no person who has more than one wife living shall be eligible for appointment to the service". However, the Enquiry Officer miserably failed to appreciate that an Armed Branch Constable cannot be said to be in the 'Cadre' of Assam Police Service, whose posts are prescribed under Rule 4 thereof, which includes Deputy Superintendent of Police and upwards. No material is available on record to show that the post of AB Constable has been declared by the Governor of Assam to fall within the cadre of Assam Police Service in terms of Rule 4(b)(iii) of the 1966 Rules. Thus, the recorded by the Enquiry Officer finding is found to be vitiated by total non-application of mind. It may be relevant to mention that ordinarily Rule 24 of the Assam Civil Service (Conduct) Rules, 1965 bars second marriage without consent from the Government. However, no opinion is given by this Court as to whether Rule 351 of Part-III of Assam Police Manual refers to the herein before mentioned 1965 Rules or any other Conduct Rule would apply to member of AB Constable.

9) After the finding was delivered by the Enquiry Officer on 08.07.2009, the respondent No.4 had issued a second show cause notice dated 31.08.2009, and thereby put the petitioner to notice in respect of the finding by the Enquiry Officer. The petitioner was also asked to show cause as to why the said finding should not be accepted for inflicting major punishment to him. The petitioner had submitted his reply and the respondent No.4 had held that the charge of marrying another girl in the lifetime of the first living wife was proved beyond reasonable doubt which is gross misconduct. However, while deciding quantum, the respondent No.4 had relied on his past conduct, 28 minor punishments inflicted on him and conduct during pendency of departmental proceeding. The respondent No.4 had recorded in the impugned order dated 09.10.2009 that on 28.09.2009, the petitioner had misbehaved with daughter and sister-in-law of one Rabin Kalita and on next day he abused the wife of said Rabin Kalita and made indecent exposure before the lady and the report of the enquiry was amalgamated with the instant Departmental Proceeding and accordingly, the petitioner was dismissed from service, rendering him not to be considered for any appointment under Government of Assam in future. Thus, while inflicting major punishment, the respondent No.4 is found to have relied on extraneous materials on which the petitioner was never put to notice. This appears to be in violation of the decision of the Supreme Court of India in the case of State of Mysore Vs. K. Mancha Gowda, AIR 1964 SC 506, and followed by this Court in the case of Abujamamuba Singh (supra), where it was, inter-alia, held that if the authority wants to take into account the previous record of the employee, the delinquent employee must have notice of such proposal. In the case of Indu Bhushan Dwivedi (supra) (para-26), the Supreme Court of India had held that if the employer uses some material adverse to the employee about which the latter

is not given notice, the final decision gets vitiated on the ground of the violation of the rule of audi alteram partem.

10) This Court in the case of Chand Mohammad Ali (supra), by relying on the case of State of Uttar Pradesh Vs. Saroj Kumar Sinha, (2010) 2 SCC 772, had held that the provisions of Rule 9 of the 1964 Rules have mandatory character and conformation to the laid down procedure would vitiate the departmental proceeding and the consequential order passed. As indicated herein before, in this case, the petitioner was provided with the list of 4 witnesses, but 6 witnesses were examined. Moreover, as many as 12 exhibits were marked but without giving the petitioner any list of documents on which the department would be relying upon. Moreover, the petitioner was not provided information that he was entitled to avail assistance by a defence assistant and that the petitioner was also not made aware that he had a right to cross-examine the departmental witnesses. Thus, on these three counts, this Court finds that there has been a procedural violation of Rule 9 of the 1964 Rules. The holding of proceeding without affording opportunity to engage defence assistant was held to be denial of right to fair procedure by this Court in the case of Durgeswar Ray (supra). The non furnishing of the list of documents and witnesses at the time of delivery of charges was held to have caused prejudice to the delinquent employee by this Court in the case of Dinesh Chandra Ray (supra).

11) No doubt that the petitioner was a member of a disciplined force and as a member of a disciplined force, the petitioner was expected to maintain highest standard of discipline, but at the same time, he is also entitled to a right to a fair procedure. It is seen that the Enquiry Officer had acted as prosecutor and the judge and the enquiry was conducted without affording a reasonable opportunity to the petitioner to defend himself, this Court is constrained to hold that for gross procedural impropriety in the disciplinary proceeding, the same has vitiated the penalty of dismissal from service as imposed on the petitioner. Considering the above, this Court is of the unhesitant opinion that the respondents were not justified in removing the petitioner from service in the manner in which it was done. Therefore, as the impugned order dated 09.10.2009, thereby dismissing the petitioner from service is vitiated by procedural impropriety, the case of K.G. Soni (supra), relied upon by the learned State Counsel would not help the respondents in any manner. Hence, the order under P.O. No. 2151 dated 09.10.2009 passed by the Superintendent of Police, Goalpara, thereby dismissing the petitioner from 08.10.2009 is set aside and quashed. Resultantly, the petitioner is entitled to be reinstated in service.

12) Therefore, it is provided that the period from 08.10.2009, the date from which the petitioner was dismissed from service by order under P.O. No. 2151 dated 09.10.2009 passed by the Superintendent of Police, Goalpara till the petitioner is reinstated in service would be treated as period under which the petitioner is under suspension. Although the petitioner shall be entitled to notional benefits of continuity in service all throughout, he shall not be entitled to

any pay or any other financial benefit during the said period. The Superintendent of Police, Goalpara shall pass consequential orders to give effect to this order.

13) allowed.

The Rule is made absolute in the terms of this order. The writ petition stands

14) No cost.