

(2006) 02 GAU CK 0060
In the Gauhati High Court
Case No : Writ Petition (C) No. 3873 of 2005

Jutismrita Dowarah

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 16-02-2006

Acts Referred:

Assam Services (Discipline and Appeal) Rules, 1964 — Rule 9, 9(4), 9(9)
Constitution of India, 1950 — Article 19(1), 226

Citation : (2009) 1 GLR 767

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : Manojit Bhuyan, for the Appellant; P. Pathak, G.K. Bhattacharjee and M. Gogoi, for the Respondent

Judgement

B.P. Katakey, J.—On the basis of the allegation of sexual harassment in work place leveled by the Petitioner Smt. Jutismrita Dowarah against the Respondent No. 6, Dr. (Sri) Siba Kanta Dutta, the Governing Body of the Dibrugarh Hanumanbux Surajmal Kanoi College (D.H.S.K College) initiated a disciplinary proceeding vide notification dated 15.9.2004, under the provisions of Assam Services Discipline and Appeal Rules, 1964 ("1964 Rules") asking him to show cause as to why disciplinary action shall not be taken against him on the charges of gross misconduct involving moral turpitude, outraging modesty of a woman, criminal intimidation, sexual harassment of a woman at work place and gross dereliction of duty. The Respondent No. 6, by the said charge memo was asked to submit his written statement in defence within ten days and was also asked to communicate if he desires to inspect documents which are relevant with the issue under inquiry. Apart from the said charge memo dated 15.9.2004 another notification of the even date was also issued by the Governing Body of the college intimating the Respondent No. 6 about the constitution of the inquiry committee in its meeting dated 25.8.2004 and also the direction issued to the said inquiry committee to submit the report within two months. The Respondent No. 6 pursuant to the said charge sheet submitted his reply denying the charges

leveled against him. The Governing Body in its meeting dated 31.7.2004 placed the Respondent No. 6 under suspension to facilitate the inquiry, which was communicated to him vide commutation dated 2.8.2004. Writ petition being W.P(C) No. 5577/2004 challenging the said resolution and the order of suspension was filed by the Respondent No. 6 where in an interim order was passed on 24.8.2004 staying the operation of the order of suspension. However, the said writ petition was dismissed vide judgment and order dated 24.1.2004 with the observation that he shall continue to remain under suspension till revocation of the order of suspension by the competent authority with further direction to conclude inquiry against him with utmost expedition. A Writ Appeal being No. 1 of 2005 was filed challenging the said judgment, which was admitted on 5.1.2005. After disposal of the said writ petition an application was filed by the Respondent No. 6 on 3.1.2005 addressed to the Chairperson of the inquiry committee intimating her about the willingness to participate in the inquiry and requesting to allow him to produce witness in his defence. The inquiry committee on 5.2.2005 submitted its report by holding that the first four charges against the Respondent No. 6 were proved but refrained from giving any finding in so far as the 5th charge is concerned. The Governing Body in its meeting dated 4.5.2005 considered the report of the inquiry committee and adopted the resolution withdrawing the resolution dated 31.7.2004 suspending the Respondent No. 6 from service and reinstating him in service by disagreeing with the finding recorded by the inquiry committee. The said resolution of the Governing Body was approved by the Director of Higher Education on 6.5.2005. Hence, the present writ petition by the Petitioner challenging the said resolution as well as the approval accorded by the Director, Higher Education.

2. I have heard Mr. Manojit Bhuyan, learned Counsel for the Petitioner, Mr. Pranabananda Pathak, learned senior Counsel for Respondent Nos. 4 and 5, Mr. G.K. Bhattacharjee, learned senior Counsel for the Respondent No. 6 as well as Ms. Maree Gogoi, learned Counsel for the Respondent Nos. 1, 2 and 3.

3. Mr. Bhuyan, learned Counsel for the Petitioner challenging the resolution adopted by the Governing Body in its meeting dated 4.5.2005 and order of the Director dated 6.5.2005 approving such resolution has submitted that as the preceding was initiated against the Respondent No. 6 under the provisions of 1964 Rules, the provision contained in Rule 9 of the said Rule has to be followed in so far as it relates to the requirements of recording finding, on each charge by the disciplinary authority, i.e., the Governing Body while disagreeing with the finding recorded by the inquiry committee. According to the learned Counsel as the inquiry committee submitted the report, finding the Respondent No. 6 guilty of four charges out of five, the Governing Body having disagreed with the finding recorded by the inquiry committee is required to record reasons after discussing the evidence on record but in the instant case as the Governing Body has recorded disagreement without discussing the evidence on record and without giving finding on each of the charges, the resolution adopted by it, is violative of the provision contained in Sub-rule 9 of the Rule 9 of the 1964 Rules,

consequently the order approving such resolution passed by the Director is also bad in law. Mr. Bhuyan, learned Counsel for the Petitioner has also submitted that the disciplinary authority has to give special importance while taking up the report of the inquiry committee for consideration as the allegation against the Respondent No. 6 was sexual harassment of a woman in work place and the finding recorded by the inquiry committee cannot be disagreed by the Governing Body in a mechanical manner as has been done in the instant case. It has further been contended by the learned Counsel for the Petitioner that the Director, Higher Education, has also exercised its power of approval in a most mechanical way, which is evident from the fact that the resolution was adopted on 4.5.2005, signed on 5.5.2005 and approved on 6.5.2005 at Guwahati. The learned Counsel therefore, submits that the impugned resolution of Governing Body dated 4.5.2005 as well as the order of approval dated 6.5.2005 by the Director required to be interfered with. Mr. Bhuyan, has further contended that though the Respondent No. 6 in his affidavit-in-opposition has taken up the plea of locus standi of the Petitioner, the present case being based on the allegation of the sexual harassment of a woman in a work place and the disciplinary proceeding having been initiated against him at the instance of the Petitioner, she cannot be termed as stranger to the proceeding and therefore, she has the locus standi to challenge the impugned resolution and order of approval.

4. Mr. Bhuyan, the learned Counsel for the Petitioner in support of his contention has placed reliance on *Hindustan Steels Ltd., Rourkela Vs. A.K. Roy and Others*, , *Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another*, , *Vishaka and others Vs. State of Rajasthan and Others*, , *Apparel Export Promotion Council Vs. A.K. Chopra*, , *Bank of India and Another Vs. Degala Suryanarayana*, as well as a decision of this Court in *Jalaluddin Laskar v. State of Assam and three Ors.* 1995 (2) GLR 383.

5. Mr. Pathak, learned senior Counsel appearing on behalf of the 1 Respondent No. 4 and 5 supporting the resolution of the Governing-Body as well as the order of approval passed by the Director has submitted that it is apparent from the proceeding of the Governing Body dated 4.5.2005 that as there were certain important defects and discrepancies in the process of inquiry conducted against the Respondents No. 6 and as the report of the inquiry committee based on hearsay evidence having no prima-facie evidence to establish the charges brought against the Respondent No. 6, the Governing Body has decided to disagree with the finding recorded by the inquiry committee in its report and decided to reinstate the Respondent in service. Mr. Pathak, learned Counsel for the Respondent Nos. 4 and 5, therefore, submits that it is not the case that no reason has been recorded by the Governing body while disagreeing with the finding recorded by the inquiry committee as contended by the Petitioner. The further submission of the learned senior Counsel is that the Director of Higher Education has therefore, rightly accorded the approval to the resolution adopted by the Governing Body in its meeting dated 4.5.2005, approving the resolution reinstating the Respondent No. 6 after rejecting inquiry report submitted by the

inquiry committee and also approving the resolution of withdrawal of order of suspension. The fact that the resolution was adopted on 4.5.2005, sent to the Director on 5.5.2005 and approved by the said authority on 6.5.2005 cannot by itself show that the Director has mechanically exercised the power of approval. Mr. Pathak has¹ further contended that the Petitioner has no locus standi to challenge the resolution of the Governing Body as well as the approval of the Director passed in a disciplinary proceeding as in such a proceeding the matter is essentially between the employer and the employee and the third party has no locus standi to challenge the decision of the disciplinary authority taken in a disciplinary proceeding. Mr. Pathak, alternatively submits that in case this Court finds that the Governing Body, i.e., disciplinary authority has to record detailed reason while disagreeing with the finding recorded by the inquiry committee in its report, the Governing Body will definitely reconsider the entire matter, however, the resolution adopted by the Governing Body regarding withdrawal of suspension order may not be interfered with by this Court as the object of placing an employee under suspension being to safeguard from manipulation of records, intimidation of witness and in the instant case the report having been submitted by the inquiry committee, the continued suspension of the Respondent No. 6 is not necessary at all more so when the Petitioner has willingly left the service of the college by submitting resignation.

6. Mr. G.K. Bhattacharjee, learned senior Counsel appearing on behalf of the Respondent No. 6 while supporting the argument put forward by the Mr. Pathak, learned senior Counsel for the Governing Body, has further contended that the allegation against the Respondent No. 6 is completely false and baseless and were leveled by the Petitioner with ulterior motive. It has further been contended by the learned senior Counsel that the proceeding initiated against the Respondent No. 6 was conducted in complete violation of principle of natural justice and in violation of provision contained in Rule 9 of the 1964 Rules. Referring to Sub-rule 4 of Rule 9 of 1964 Rules, Mr. Bhattacharjee has submitted that the inquiry officer or board of inquiry to inquire into the charges leveled against the delinquent officer is to be constituted only if the disciplinary authority is not satisfied with the written statement of defence submitted by such officer against the charge memo issued to him. But in the instant case it is evident from the charge memo dated 15.9.2004 that the Governing Body even before issuance of such charge memo constituted the board of inquiry and even without waiting for filing of the written statement in defence. Mr. Bhattacharjee has further submitted that after disposal of the writ petition challenging the order of suspension by the High Court, he submitted an application before the Chairperson of the inquiry committee on 3.1.2005 expressing his willingness to participate in the inquiry and to adduce evidence in defence but in spite of such request made, the inquiry committee did not offer any opportunity to him to participate in the inquiry proceeding and also to adduce evidence in defence. Therefore, according to the learned senior Counsel the entire proceeding was conducted in violation of principle of natural justice as well as 1964 Rules and

hence the Governing Body has rightly disagreed with the finding recorded by the inquiry committee. Referring to the inquiry report submitted by the inquiry committee, Mr. Bhattacharjee, learned senior Counsel has submitted that the inquiry committee in its report has recorded the finding that no finding can be recorded on the basis of untested evidence. The learned senior Counsel therefore, submits that the resolution was rightly adopted by the Governing Body and was duly approved by the Director. It has further been submitted by the learned senior Counsel that nothing much can be read into the fact that the resolution of the Governing Body was approved by the Director within two days of taking it, more so when the Petitioner has not alleged mala fide against any of the Respondents.

7. Ms. Gogoi, learned State counsel appearing on behalf of the Respondent Nos. 1, 2 and 3 has submitted that the Director has approved the action of the Governing Body taken in its resolution adopted in the meeting dated 4.5.2005 and while approving such resolution no illegality has been committed by the Director.

8. I have considered the submissions of the learned Counsel for the parties and also perused the pleadings as well as the proceeding book of the Governing Body produced by the learned Counsel for the Respondent Nos. 4 and 5 and also the records of approval produced by the learned State counsel.

9. As discussed above, on the basis of the allegation of the sexual harassment of the Petitioner in work place, the charges were framed against the Respondent No. 6 by initiating a disciplinary proceeding against him. The inquiry report was submitted by the inquiry committee on the basis of such allegations and charges. The Apex Court in Vishaka's case has held that incident of sexual harassment of a woman at work place results in violation of the "Gender Equality" and the "Right to Life and Liberty" and also the right under Article 19(1)(g) of the Constitution of India. It has further been held that a writ of mandamus for the direction for prevention of violation of such fundamental right can be issued. The Apex Court because of absence of enacted law for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work place has laid down the guidelines and norms for due observance in all workplaces or other institutions until a legislation is enacted for that purpose, which includes initiation of disciplinary action. Such disciplinary action can only be initiated at the instance of the person who alleges sexual, harassment in workplace and in the instant case it is the Petitioner at whose instance said disciplinary action was initiated against the Respondent No. 6. Though in a disciplinary proceeding the matter is essentially between the employer and the delinquent employee and the third party has no right to challenge any action taken on the disciplinary proceeding by the disciplinary authority, in a disciplinary proceeding initiated on the allegation of sexual harassment in work place, the same stands at a different footing. A stranger or a person who does not have any

interest in the disciplinary proceeding cannot, however, challenge the action taken in the disciplinary proceeding or reinstatement of the delinquent officer in service by the disciplinary authority. But in a disciplinary proceeding initiated at the instance of a person alleging, sexual harassment in work place, like the Petitioner, it cannot be said that she is a stranger or a person having no interest on the said proceeding. Hence, the contention of the learned senior Counsel for the Governing Body as well as the Respondent No. 6 that the Petitioner has no locus standi to challenge the decision of the Governing Body to reinstate the Respondent No. 6 in service and the order of approval thereof, cannot be accepted, therefore rejected.

10. Though the learned Counsel for the contesting parties have argued at length on the question of Sufficiency or otherwise of materials on record to constitute the misconduct alleged against the Respondent No. 6 because of the alleged sexual harassment of the Petitioner by the Respondent No. 6, by referring to the discussion made by the inquiry committee in its report as well as finding recorded by it, this Court is not inclined to go into the sufficiency or otherwise of material to constitute the such misconduct as in the instant case the question arose for decision is whether the disciplinary authority is required to discuss evidences on record and give reasons on each charges found to be proved by the inquiry committee in its report, before disagreeing with the finding recorded by the said inquiry committee and if so whether the Governing Body has discussed the evidences and gave reasons and record finding on each charge in its resolution dated 4.5.2005. It is a settled position of law that the writ court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot go into the sufficiency or otherwise of evidences to constitute misconduct and cannot sit on appeal over the finding recorded by the inquiry officer, on the decision of the disciplinary authority taken of such finding and also cannot re-appreciate the evidences on record and substitute its own conclusion. The disciplinary authority is the sole judge of facts and in case an appeal is filed, the appellate authority has also the power to re-appreciate the evidence and come to its own conclusion. However, if it is a case of no evidence at all or the proceeding has been challenged on the ground of violation of principle of natural justice or rules framed for the purpose of holding such disciplinary proceeding or there is procedural irregularities or mala fide exercise of power, the court can definitely interfere with such decision. The court is not concerned with the correctness of the finding of fact recorded in a disciplinary proceeding on the basis of which the orders are made but concern with the decision making process.

11. It is also a settled position of law that the strict rules of evidence are not applicable to the departmental inquiry proceeding and the only requirement of law is that the allegation against the delinquent officer must be established by such evidences, acting upon which a reasonable person acting reasonably and with objectivity may arrived at the finding upholding the gravamen of the charges against the delinquent officer. Mere conjecture or surmises cannot sustain the finding of guilt even in departmental inquiry proceeding. The court

exercising the jurisdiction of judicial review cannot interfere with the finding of the fact arrived at in a disciplinary proceeding except in case of mala fide or perversity, i.e., where there is no evidence to support a finding or where a finding is such that no man acting reasonably and objectivity could have arrived at that finding.

12. Sub-rule 9 of Rule 9 of 1964 Rules provides that the disciplinary authority shall, if it is not the inquiring authority, consider the record of inquiry and record the finding on each charge. Recording of reason on each charge by the disciplinary authority, may not be necessary in case the disciplinary authority agrees with the finding recorded by the inquiry committee into the charges leveled against the delinquent officer, but such requirement of recording the reason on each charge has to be complied with by the disciplinary authority in case of disagreement with the finding of the inquiry committee. The Apex Court in *Bank of India and Another* (supra) has held that the disciplinary authority on receipt of the inquiry report submitted by the inquiry officer may or may not agree with the finding recorded by the inquiry officer but in case of disagreement, the disciplinary authority has to record reasons for disagreement and then to record its finding, if the evidence available on record be sufficient for such exercise or else to remit the case to the inquiry officer for further inquiry.

13. A Single Bench of this Court in *Jalaluddin Laskar* (supra) has held that Rule 9 of the 1964 Rules in its entirety is mandatory and non compliance thereof shall make a inquiry invalid in the eye of law. In the instant case, inquiry proceeding is not under challenge. What is challenged is the resolution adopted by the Governing Body reinstating the Respondent No. 6 as well as disagreeing with the finding of the inquiry committee and also the revocation of order of suspension including the order passed by the Director approving such resolution, on the ground of not assigning reasons for such disagreement. Therefore, there is no necessity of going into the question of procedural irregularities in conducting the inquiry, as contended by the Respondent No. 6.

14. It is now to be seen whether the Governing Body has recorded any finding on the charges leveled against the Respondent No. 6 and whether sufficient reasons have been recorded while disagreeing with the finding of the inquiry committee.

15. It appears from the resolution adopted by the Governing Body in its meeting dated 4.5.2005 that the Governing Body has found that there were "certain important defects and discrepancies in the process of inquiry" and "the entire report of the inquiry committee based on hearsay evidence". The said proceeding also reflects that one of the grounds on which the Governing Body disagreed with the finding of the inquiry committee is that there is no eyewitness to establish charges levelled against the Respondent No. 6 by the Petitioner. The Governing Body, therefore, due to lack of prima facie evidence to establish the charges brought against the Respondent No. 6 disagreed with the finding recorded by the inquiry committee and resolved to reinstate Respondent No. 6 in service. Apart from recording that there were certain important defects and discrepancies in the

process of inquiry, report of inquiry committee based on hearsay evidence, there is no eyewitness and lack of prima facie evidence to establish the charges, the Governing Body has not discussed at all what are the important defects and discrepancies in the process of inquiry. There is also absolutely no discussion of the evidences adduced before the inquiry committee in support of the charges. Without such discussion, the Governing Body has recorded the finding that there is lack of prima facie evidence to establish the charges levelled against the Respondent No. 6. As held above, the disciplinary authority i.e., Governing Body before disagreeing with the finding recorded by the inquiry committee has to record reasons after discussing the evidences on record on each charges which the inquiry committee has found to have established against the Respondent No. 6. But in the instant case as evident from the proceeding of the Governing Body dated 4.5.2005, no such discussions have been made. Therefore, the resolution adopted by the Governing Body disagreeing with the finding of the inquiry committee cannot legally be sustained. Consequently the approval accorded by the Director to the resolution adopted by the Governing Body dropping the charges also cannot stand in the eye of law. Hence, the resolution of the Governing body disagreeing with the finding recorded by the inquiry committee and dropping the charges as well as the approval to that effect by the Director, are set aside.

16. This leads to the question whether the resolution regarding revocation of the order of suspension is also required to be interfered with, including the approval of such resolution regarding revocation of the order of suspension. The idea behind placing an officer under the suspension is not to inflict the punishment but to safeguard against further loss, manipulation of records and intimidation of witnesses. In the instant case the Respondent No. 6 was put under suspension vide order dated 2.8.2004, which was though initially stayed by the High Court vide order dated 28.4.2004 passed in W.P(c) No. 5577 of 2004, the said writ petition was eventually dismissed vide order dated 24.11.2004 by observing that the Petitioner shall remain under suspension till revocation of such order by the competent authority. The Governing Body being the competent authority by taking into account entire facts and circumstances of the case decided to revoke the order of suspension vide resolution dated 4.5.2005. The inquiry proceeding against the Respondent No. 6 having already been completed by submission of the inquiry report, the stage for interference with the proceeding is also over. Moreover, the Petitioner has resigned from service of the college on 3.10.2005 and, therefore, there is also no scope either to pressurize the Petitioner or giving further scope to the Respondent No. 6 to conduct himself against the Petitioner again as alleged earlier. It is also not the case of the parties that there is any other such allegation against the Respondent No. 6 by any one else. The Governing Body having decided to revoke the order of suspension in its meeting dated 4.5.2005 and the same having been approved by the Director, I do not see any reason to interfere with such order of revocation of suspension of the Respondent No. 6 in exercise of the power of judicial review under Article 226 of

the Constitution of India, More over, the Petitioner is not alleging that in case the order of suspension of Respondent No. 6 is revoked and he is allowed to function till a fresh decision is taken by the Governing Body on the report of the inquiry committee, he will interfere with the disciplinary proceeding and try to influence the Members of the Governing Body. There is also no allegation of mala fide in the writ petition. In any case the Petitioner cannot challenge the action of the Governing Body in revoking the order of suspension, as it is the Governing Body, being the appointing authority, to decide whether an employee is to be put under suspension and also whether such suspension order to be revoked or not. Therefore, while setting aside the resolution of the Governing Body as well as the approval accorded by the Director in so far as it relates to dropping of the charges leveled against the Respondent No. 6 by disagreeing with the finding recorded by the inquiry committee and directing the Governing Body to take a fresh decision on the matter by recording reasons and discussing the evidence adduced before the inquiry, I refused to interfere with the resolution of the Governing Body revoking the order of suspension of the Respondent No. 6 as well as the approval of the Director in that respect.

17. The learned Counsel for the Petitioner has also relied on the decision of the Apex Court in The Comptroller and Auditor General of India (supra) which relates to the power of High Court to issue a writ of mandamus. The decision of the Apex Court in Hindustan Steels Ltd. (supra) relied upon by the Petitioner, being on the point of exercise of discretion by the industrial tribunal without weighing the circumstances of the case, has not been discussed in this judgment, the same having no relevance in the case in hand. The learned Counsel for the Petitioner has also referred to the decision of the Apex Court in Apparel Export Promotion Council (supra) wherein the Apex Court has observed that the court-while dealing with the case of sexual harassment at the work place of a female employee has to bear in mind that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and either verbal or physical with sexual overtones, whether directly or by implication. In the said case it has further been held that any action or gesture whether directly or by implication, aims at or has the tendency to outrage the modesty of the female employee must fall under the general concept of the definition of the sexual harassment and the entire materials on record has to be examined to determine the genuineness of the complaint.-In the present case, as observed above, the question before me is whether the Governing body has committed illegality in not recording the reasons and discussing the evidence on record on each charges while disagreeing with the finding of the inquiry committee and dropping the charges and not the question of sufficiency or otherwise of the materials to constitute sexual harassment.

18. Regarding the submission of the learned Counsel for the Petitioner that non application of mind by the Director in approving the resolution writ large on the fact that resolution was approved within two days of taking it, I am of the view that there being no allegation of mala fide leveled by the Petitioner, the approval

of the resolution within two days, ipso facto, will not make the same invalid in the eye of law.

19. In view of the aforesaid discussions, while upholding the resolution of the Governing Body revoking the order of suspension and also the approval of the Director in that respect, I set aside the other part of the resolution of the Governing Body taken in its meeting dated 4.5.2005 and also the approval accorded by the Director in that respect on (6.5.2005, in so far as it relates to the dropping of charges against the Respondent No. 6 by disagreeing with the finding recorded by the inquiry committee. Accordingly, I direct the Governing Body to re consider and to take a fresh decision on the report submitted by the inquiry committee and to give reasons by discussing the evidence on record on each charge, in case the Governing Body decides to disagree with the finding recorded by the said committee. It is also open to the Governing Body to direct a fresh inquiry if such course is required to be adopted keeping in view the allegation of the Petitioner that there were procedural irregularities in conducting the inquiry preceding and also the entire facts and circumstances of the case. The Governing Body after taking a final decision on the disciplinary proceeding shall forward the same to the Director for his approval as required under the law, who shall decide the question of approval in accordance with law.

20. The writ petition is accordingly partly allowed. However, keeping in view the facts and circumstances, I do not make any order as to cost.