
(2015) 01 GAU CK 0046
In the Gauhati High Court
Case No : WP(C) No. 6234 of 2013

Rajib Borah

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 20-01-2015

Acts Referred:

Citation : (2015) 2 GLD 426

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : P.K. Das and N.K. Kalita, for the Appellant; K.K. Choudhury, G.A.,
Advocates for the Respondent

Final Decision : Disposed off

Judgement

Biplab Kumar Sharma, J—The petitioner is aggrieved by the Annexure-5, Order dated 30.06.2009 of the Commandant, 9th AP Battalion, Barhampur, Nagaon, by which, pursuant to a disciplinary proceeding, he was discharged from service with immediate effect. The order refers to departmental proceeding bearing D/P No. 7/06, along with the additional charge. The petitioner is also aggrieved by the order dated 16.01.2010 (Annexure-8), by which the appeal preferred by him against the order of discharge was rejected on the ground of delay in filing the appeal. Thus, the appeal has not been disposed of on merit.

2. The petitioner while was serving as a constable was issued with the show cause notice dated 19.05.2006 with the statement of allegation that he was unauthorizedly absent from duty for the period from 31.10.2005 to 22.03.2006 (totalling 141 days). It was alleged that such conduct on the part of the petitioner amounted to gross indiscipline, misconduct and negligence of duty rendering him unfit to continue in police force. Along with the charge sheet, apart from the statement of allegation, the list of documents and witnesses was also furnished. The show cause notice was in reference to the aforesaid D/P No. 7/06. The petitioner vide his reply dated Nil of June 2006 (Annexure-2) contended that he had left the duty place verbally intimating the Platoon

Commandant and thereafter because of sudden deterioration of his health condition he had to remain absent from duty without intimation from 31.10.2005 to 22.03.2006. According to the said written statement of defence, his such absence from duty was not unauthorized. He admitted that he could not contact with the Battalion Headquarter. However, he attributed the same as "in spite of trying his level best". He also pleaded that his wife also could not intimate about the absence from duty because of her ill health.

3. Along with the writ petition, the petitioner has enclosed a copy of the enquiry report dated 31.05.2009, recording the finding therein that the charge that was brought against the petitioner was not proved. However, on perusal of the second show cause notice dated 05.06.2009, that was issue to the petitioner proposing removal from service, it appears that apart from D/P No. 7/06 (original charge sheet), the additional charge No. 1 was also referred to. In the writ petition, the petitioner has contended that in the enquiry report dated 31.05.2009 no mention was made regarding the additional charge. According to the petitioner, the charge against him having not been established in the enquiry the disciplinary authority could not have passed the impugned order discharging him from service.

4. On perusal of the Annexure-5, impugned order dated 30.06.2009, it is found that the order was passed taking into account the original charge sheet as well as the additional charge sheet. As regards the additional charge sheet, the petitioner has stated in Para-15 of the writ petition that he was never served with the copy of the memorandum of charges containing the additional charge. However, in Para-9 of the writ petition, in reference to Annexure-4, second show cause notice dated 05.06.2009, the petitioner has stated thus:-

"9. That the petitioner respectfully states that after receipt of the 2nd show cause notice, when the petitioner came to know that he will be removed from service, the petitioner got nervous and could not decide anything. Therefore, the petitioner could not even think regarding submission of his reply to the said show cause. Hence, the petitioner did not submit any reply to the said 2nd show cause notice."

5. If we go by the aforesaid statement nothing is discernible regarding the stand taken in Para-15 of the writ petition that the petitioner was not served with the additional charge sheet. When the Annexure-4, second show cause notice clearly mentioned about the additional charge sheet, it was incumbent on the part of the petitioner to deal with the said aspect of the matter, more particularly, when it is his plea that the additional charge sheet was not served on him.

6. As regards the delay in filing the appeal against the impugned order of discharge from service, the petitioner has taken the plea that on the receipt of the said order he became nervous as his service was dispensed with. According to him, he had to undergo treatment for hypertension and other related ailments like depression etc. It was his wife, who had first submitted the application on

08.01.2010 before the DIG of Police, praying for revocation of the termination order. Thereafter, the petitioner also preferred the departmental appeal on 22.01.2010, which was subsequently rejected by the impugned order dated 16.11.2010, on the ground of delay.

7. When the matter was last taken up on 16.12.2014, noticing the factum of issue of the additional charge sheet, Ms. K.K. Choudhury, learned State Counsel was requested to produce the relevant records and she has produced the same. Mr. N.K. Kalita, learned counsel representing the petitioner has strenuously argued that since the charge that was levelled against the petitioner was not established in the enquiry, the disciplinary authority could not have passed the extreme penalty of discharge from service. However, Ms. Choudhury, learned State Counsel, learned State Counsel submits that although the original charge was held not established in the enquiry but the additional charge was established, which also pertained to unauthorized absence from duty and accordingly, the disciplinary authority imposed the penalty of discharge from service.

8. I have given my anxious consideration to the submissions made by the learned counsel for the parties and have perused the records, including the records produced by Ms. Choudhury, learned State Counsel. On perusal of the said records, it appears that the additional charge sheet was received by the mother of the petitioner under her clear signature. As per the provisions of Order 5 Rule XV of the Code of Civil Procedure, 1908, service of notice can be made on any adult member of the family whether male or female. The records have revealed that one Smt. Sonti Bora, who is the mother of the petitioner received the additional charge sheet dated 18.07.2008 on 16.08.2008. It is not the case of the petitioner that the additional charge sheet was not served on his mother or that the mother did not inform him about the additional charge sheet. The enquiry proceeding file has further revealed that the enquiry was conducted in respect of the additional charge sheet also and witnesses were examined. On perusal of the said file, it appears that the additional enquiry report was prepared referring to the evidence on record and also the notices served on the petitioner on various occasions. It was held that the petitioner did not respond to the notices of enquiry and that the charge against the petitioner for his unauthorized absence for the subsequent period and to be specific was 10.03.2008 to 02.04.2008 (24 days) and 09.04.2008 to 19.06.2008 (72 days) stood established in the enquiry. However, it is not known as to whether the report dated 31.05.2010 pertaining to the additional charge was furnished to the petitioner or not.

9. Needless to say that unauthorized absence from duty by a member of a disciplined force is to be viewed seriously. Needless also to say that in absence of any specific pleas raised during the course of the enquiry proceeding, such pleas cannot be allowed to be raised for the first time in the writ petition. The departmental appeal that was preferred by the petitioner was dismissed vide

Annexure-8 dated 16.11.2010, on the ground of delay. Thus, the appeal was not dealt with on merit. Mr. Kalita, learned counsel for the petitioner referring to the specific plea taken in the writ petition as to the cause of delay in filing of appeal submits that the departmental appeal requires disposal on merit.

10. Considering the matter in its entirety, I am of the considered view that the departmental appeal requires disposal on merit. Accordingly, the impugned appellate authority order dated 16.11.2010, Annexure-8, stands set aside and quashed. The appellate authority, while disposing of the appeal dated 22.01.2010, that was forwarded to the appellate authority vide memo dated 21.01.2010, shall consider the following:-

1) Whether the enquiry report pertaining to the additional charge was furnished to the petitioner or not?

2) Whether in view of the findings recorded by the Enquiry Officer in respect of the original charge sheet and without any disagreement note thereof providing opportunity of being heard to the petitioner on such disagreement, the impugned order of discharge could have been passed on the basis of the additional charge, which stood established in the enquiry.

3) Whether on the basis of the additional charge established during the enquiry, the petitioner deserves extreme penalty of discharge from service.

4) If it is found that the enquiry report pertaining to the additional charge was not furnished to the petitioner, he could be provided with a copy of the same thereof entitling him to make representation against the same and thereafter, appropriate order(s) may be passed.

5) It is hereby provided that in the event of any decision to impose any lesser penalty on the petitioner for his unauthorized absence is taken, the petitioner shall not be entitled to any back wages from the date of his discharge from service to the date of imposing of any lesser penalty, inasmuch as, the petitioner did not render any service for the said period and there was also delay on his part in preferring the appeal and also approaching the Court.

11. Let the appeal be disposed of taking note of the above as expeditiously as possible, preferably within 3(three) months.

12. With the above observations and directions, this writ petition stands disposed of.