
(2017) 02 GAU CK 0034
In the Gauhati High Court
Case No : WP(C) No.2493 of 2016

Shri Hiramohan Doley

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 13-02-2017

Acts Referred:

Assam Municipal Act, 1956 — Section 50
Constitution of India, 1950 — Article 226

Citation : (2017) LIC 1175

Hon'ble Judges : Suman Shyam, J.

Bench : Single Bench

Advocate : Mr. B.K. Singh, Advocate, for the Petitioner; Ms. M. Bhattacharjee, Govt. Advocate, for the Respondents

Final Decision : Allowed

Judgement

Suman Shyam, J.(Oral)—Heard Mr. B. K. Singh, learned counsel for the petitioner. Also heard Smti. M. Bhattacharjee, learned Government Advocate, Assam, appearing for the respondent Nos.1 and 2. None appears for respondent Nos.3 and 4 though served.

2. The writ petitioner has approached this Court for the second time assailing the decision taken by the Dhemaji Town Committee releasing him from duty with retrospective effect without following the due procedure of law.

3. The petitioner's case, in brief, is that he was initially temporarily appointed as an electrician in the office of the respondent No.4 on 27.09.1985. Thereafter, his services were regularized in the said post in the year 1988. While serving as an electrician under the Demaji Town Committee, the petitioner suddenly fell ill as a result of which he could not attend his duties from 29.08.2012 till 10.10.2012 as he was under medical advice to be on rest during that period. After recovering from his ailments, when the petitioner reported back for duty on 11.10.2012, he was not allowed to join and instead was served with a show cause notice dated 03.10.2012 issued by the respondent No.3 asking the petitioner to show cause

within three days explaining his unauthorized absence. The petitioner had submitted his reply on 06.10.2012 stating the reasons for his absence but notwithstanding the same the respondent authorities refused to allow the petitioner to join his duties as a result of which the petitioner was compelled to approach this Court by filing WP(C) No.4439/2014.

4. The respondent nos. 3 and 4 had contested the said writ petition filed by the petitioner. While denying the receipt of the show cause reply dated 06.10.2012 submitted by the petitioner, the respondents had also disputed his claim of regularization in service. After hearing the learned counsel for the parties, this Court had disposed of the writ petition bearing No. WP(C) 4439/2014 by the order dated 30.11.2015 by issuing the following directions :-

"8. Having regard to the above, respondent Nos. 3 and 4 are directed to take a decision on the show cause reply submitted by the petitioner, which has been annexed to the writ petition, after giving due opportunity of hearing to the petitioner. The said respondents shall also take a decision regarding the service status of the petitioner from 29.08.2012 onwards. Let both the decisions be taken within a period of 4 (four) weeks from the date of receipt of a certified copy of this order keeping in mind the observations made above."

5. Enclosing a copy of the order dated 30.11.2015 passed by this Court the petitioner had submitted another representation dated 26.12.2015 giving further explanations for his absence from duty. However, notwithstanding the show cause reply as well as the representation dated 26.12.2015 filed by the petitioner, the respondent No.4 had passed the impugned order dated 20.01.2016 releasing the petitioner from the post of electrician with effect from 29.08.2012 i.e. from the date he had remained absent from duty. The operative part of the order dated 20.01.2016 is extracted herein below for ready reference :-

"That, till date the Govt. has not made any provision for regular post/service in the Town Committees.

Hence, the question of regularization of your post service does not arise. On the other hand, the Town Committee has proof that in earlier occasion too you remained absent from your duties neglecting your duties and consequently it has come to notice that the residents of the town criticized the Municipality electricity/ power was not supplied regularly.

Considering the above mentioned aspects, on the basis of the decision of Executive Meeting dated 12.01.16 of the Town Committee and as your service is temporary it is unanimously decided to release you from the post of temporary electrician with effect from 29.08.12 i.e. the date from which you remained absent.

Sd/- Illegible

President,

6. The order dated 20.01.2016 is under challenge in the present writ petition.

7. Mr. B.K. Singh, learned counsel for the petitioner, submits that there was neither any charge framed against the petitioner nor any disciplinary enquiry held against him as per the requirement of law. However, by the impugned order dated 20.01.2016 the respondents have dismissed the petitioner from service on charges of misconduct without holding any regular enquiry in the matter. Mr. Singh further submits that the observation that the service of the petitioner was not regularized is wholly incorrect since no employee can be believed to have continued in a temporary post for 27 (twenty seven) long years.

8. By referring to a decision of this Court rendered in the case of Khandan Kumar Das v. State of Assam and others, reported in (2016) 1 GLR 459, Mr. Singh submits that in the aforesaid decision this Court has held that framing of proper charges followed by holding of a proper disciplinary enquiry would be mandatory before an order of termination of service can be issued. Contending that the impugned order is in clear violation of the law laid down by this Court, Mr. Singh has prayed for setting aside the impugned order with a direction for reinstatement of the petitioner back in service with full back wages.

9. Ms. M. Bhattacharjee, learned Govt. Advocate, Assam, submits that the matters complained of in the writ petition falls within the exclusive domain of the respondent Nos.3 and 4 and the State Government has no role to play in the matter.

10. I have considered the submissions made by the learned counsel for the parties and have also gone through the materials on record. From the record, it is apparent that the petitioner was temporarily appointed as an electrician way back on 27.09.1985 and since then he has been working in such capacity for 27 long years before the respondents took a decision not to allow him to join back his duties. From a bare reading of the impugned order dated 20-01-2016 it is also evident that the same had been issued on the grounds of alleged negligence of duty / misconduct on the part of the petitioner. Since, the petitioner has been released from the post held by him with retrospective effect from 29-08-2012 on the ground of alleged misconduct, therefore, it is evident on the face of the record that the order dated 20-01-2016 is a disguised order of termination from service.

11. An order of termination from service amounts to imposition of a major penalty. Since, the services of the petitioner had been terminated on the ground of alleged misconduct therefore, it was incumbent upon the respondents to frame specific charges of misconduct against him asking the petitioner to show cause and if the disciplinary authority was not satisfied with such show cause reply, an

enquiry ought to have been held and a report be prepared recording specific findings of misconduct establishing the charges framed against the delinquent before an order of major penalty could have been imposed upon him. But the record reveals that in the present case no such exercise was conducted by the respondents before issuing the impugned order dated 20-01-2016.

12. In the above context, it would be pertinent to mention here-in that in the show cause notice dated 03-10-2012 the only thing that was mentioned was that the petitioner was willingly absent from duty from 29-08-2012 and therefore, he was asked to show cause as to why disciplinary action should not be taken against him as per Assam Municipal Act, 1956. The contents of the notice dated 03-10-2012 is quoted here-in-below for ready reference:-

" Office of The President Of Dhemaji Town Committee, Dhemaji

No.DTC/A-1/2012/528

Dated ? 03.10.2012

To

Sri Hiramohan Doley

Electrician

Dhemaji Town Committee.

Sub - Seeking explanation for absent in duty.

You are willingly absent to your duties from 29.08.2012.

As per the decision of the executive committee meeting of Dhemaji Town Committee held on 29.09.2012 you are hereby asked to state satisfactory reason why disciplinary action will not be taken against you within three days from today i.e. 03.10.2012. Otherwise appropriate action will be taken as per the Assam Municipality Act, 1960.

Sd/- Illegible

President

Dhemaji Town Committee

Dhemaji "

13. From a plain reading of the notice dated 03-10-2012, it appears that even before hearing the version of the petitioner, the respondents were of the opinion that he had remained willingly absent from duty. It appears that the show cause notice was issued with a pre-determined mind set and the notice was a mere formality adopted by the respondents only to terminate the services of the petitioner.

14. In his show cause reply dated 06-10-2012 as well as the subsequent

representation dated 26-12-2015, the petitioner had not only mentioned that he was suffering from several ailments during the period from 29-08-2012 till 10-12-2012 and was unable to attend his duties as he was under medical treatment, but the petitioner had also produced medical testimony in support of his claim. However, such explanation of the petitioner did not receive any consideration from the respondents while issuing the impugned order. Not only that, the petitioner was never given any opportunity to show cause in respect of the allegation of previous absence from duty since no such allegation was included in the show cause notice dated 03-10-2012. Notwithstanding the same, a major penalty in the form of termination from service has been imposed upon the petitioner taking note of his previous conduct. The above action of the respondents, on the face of it, was, therefore, in flagrant violation of the principles of natural justice and is liable to be declared so.

15. Section 50 of the Assam Municipal Act, 1956 confers ample power upon the Chairman of the Municipal Board to remove any employee for inefficiency, negligence of duty or for misconduct. Therefore, there can hardly be any doubt on the power of the respondent No 3 to initiate any disciplinary action against the petitioner on any of the ground mentioned in section 50 of the Act of 1956. However, what must be borne in mind is that such power has to be exercised in a fair and reasonable manner, in adherence to the law embodied in Article 14 of the Constitution of India as well as the principles of natural justice.

16. In the case of Khandan Kumar Das (supra), which was also a case of termination of an employee working under a Municipal Board, this Court, while acknowledging the power of the Chairman of the Board to take disciplinary action against delinquent employee had held as follows : -

"15. Section 50 of the Assam Municipal Act, 1956 deals with appointment and pay of establishment. As per the first proviso to Section 50, the Chairman is both the appointing authority as well as the disciplinary authority. He is vested with the power to remove an employee in the service of the establishment for inefficiency, negligence of duty or misconduct. No doubt, the Chairman being the disciplinary authority is vested with the power and authority to remove an employee of a Municipal Board on account of inefficiency, negligence of duty or misconduct. It goes without saying that vesting of power in an authority is one thing and exercise of such power is another thing. The power so vested has to be exercised in a manner which is consistent with the mandate of Article 14 of the Constitution of India. In other words, such power has to be exercised in a reasonable manner and cannot be exercised in an arbitrary or whimsical manner, howsoever the provocation may be. Since removal from service is a major penalty, the same has to be preceded by a fair procedure which would include compliance to the principles of natural justice. The principles of audi alteram partem is too well settled to require any re-instatement. No person can be punished without affording him a reasonable opportunity of hearing. This is the fundamental principle of law which is required to be followed while imposing any

penalty, not to speak of a major penalty like removal from service.

16. A delinquent employee is required to know what is the charge framed against him. The charge therefore will have to be specific, clear and unambiguous. If the disciplinary authority decides to hold disciplinary proceeding against a delinquent employee, the first and foremost requirement would be to frame definite charges against him capable of being understood and replied by the delinquent employee. Reply submitted by the delinquent to the charge framed would have to be considered by the disciplinary authority. If the reply is found to be satisfactory the matter can be dropped at that stage itself. If it is found to be not satisfactory the disciplinary authority either by himself or through another authority is required to conduct an enquiry to enquire into charges framed against the delinquent since the penalty is removal from service, a major penalty, wherein due and adequate opportunity is required to be given to the delinquent employee to defend himself, including by adducing of evidence.

17. Enquiry report has to be prepared based on the enquiry proceedings and specific findings are required to be recorded as regards the charges framed. Copy of the enquiry report is required to be given to the delinquent employee prior to the decision of the disciplinary authority either to accept the enquiry report or not to accept the report i.e., before deciding on the guilt or otherwise of the delinquent employee. If the delinquent employee submits his representation on the enquiry report, the same is required to be considered by the disciplinary authority together with the record of enquiry and thereafter to take a decision either to hold the delinquent employee guilty or not guilty. If the report is thereafter accepted i.e. if the delinquent employee is held guilty, commensurate penalty may be imposed on him by the disciplinary authority."

17. In the present case also, neither any proper show cause notice containing specific charges of misconduct was ever served upon the petitioner nor any enquiry proceeding was held before terminating his services by issuing the impugned order dated 20-01-2016. Having regard to the facts and circumstances of the present case, I am of the view that the law laid down in the case of Khandan Kumar Das (supra) would be squarely applicable in the facts of this case as well. The respondents appear to have proceeded with the decision to terminate the services of the petitioner in pre-determined manner, and without holding any disciplinary enquiry on the ground that his services were not regularized. Assuming that the services of the petitioner was not regularized, even in that case the requirement of adopting a fair procedure in compliance with the principles of natural justice cannot be dispensed with even in case of a temporary employee.

18. For the reasons stated above, I am of the considered opinion that the impugned order dated 20-01-2016 is not sustainable in the eye of law and the same is hereby set aside. Consequently, the petitioner shall be forthwith reinstated in service with full back wages.

19. Subject to reinstatement of the petitioner, the respondents would be at liberty to initiate fresh disciplinary proceedings against the petitioner in accordance with law.

20. The writ petition stands allowed.

21. No order as to cost.