GAHC010007062014

# THE GAUHATI HIGH COURT
## (HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

**Case No. : WP(C)/1362/2014**

UBC/102 DILIP GOGOI
S/O LT. LALIT GOGOI, PERMANENT R/O BHUMURAGURI, P.O. MATIKHULA, P.S. DHEMAJI, DIST-DHEMAJI, ASSAM

VERSUS

THE STATE OF ASSAM AND 4 ORS
REPRESENTED BY THE COMMISSIONER and SECRETARY GOVT. OF ASSAM, HOME, DEPARTMENT, DISPUR, GHY-6

2:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI
GUWAHATI

3:DY. INSPECTOR GENERAL OF POLICE NR
ASSAM
TEZPUR

4:SUPERINTENDENT OF POLICE DHEMAJI
DIST- DHEMAJI
ASSAM

5:B. TAMULI PHUKAN
CIRCLE INSPECTOR OF POLICE JONAI CIRCLE
DHEMAJI CUM ENQUIRY OFFICE

**Advocate for the Petitioner** : MR.N K BARUA

**Advocate for the Respondent** : GA, ASSAM

**:::BEFORE:::**

**HON'BLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

Date of hearing : 02.05.2024
Date of Judgment: 02.05.2024

**Judgment & order(Oral)**

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Heard Mr. P. J. Saikia, learned senior counsel, assisted by Mr. R. S. Mishra, learned counsel, appearing on behalf of the petitioner. Also heard Mr. J. K. Goswami, learned Addl. Senior Government Advocate, appearing on behalf of the State Respondents.

**2.** The petitioner by way of instituting the present writ petition, has presented a challenge to an order, dated 29.02.2012, passed by the Superintendent of Police, Dhemaji, imposing upon the petitioner the penalty of dismissal from service on conclusion of a departmental proceeding as instituted against him in the matter. The petitioner has also presented a challenge to an order, dated 05.11.2012, passed by the appellate authority rejecting the appeal as preferred by the petitioner in the matter.

**3.** The petitioner, herein, was initially recruited as an Unarmed Branch Constable in the Assam Police in the year 1991. Thereafter, while he was posted as a Constable(UB) at Dhemaji DEF; the petitioner came to be placed under suspension w.e.f. 15.11.2008. The said order of suspension was followed by initiation of a departmental proceeding by way of issuance of a Show Cause Notice, dated 05.01.2009, wherein, it was alleged that the petitioner although

being detailed for escort duty on the 2 dates, had not executed the duties so assigned and had remained unauthorizedly absent. The petitioner, in response to the said Show Cause Notice, dated 05.01.2009, submitted his written statement in the matter on 12.01.2009, and therein, by placing on record the clarifications with regard to the reasons of his absence, had undertaken that he shall abstain from making such mistakes in the future and accordingly, sought pardon in the matter. Thereafter, on not being satisfied with the explanation as brought on record by the petitioner in response to the said Show Cause Notice; an inquiry with regard to the allegations as levelled against him was so ordered by the disciplinary authority and accordingly, the petitioner appeared in the inquiry. On conclusion on the inquiry as drawn up against the petitioner, the Inquiry Officer submitted his report on 14.02.2012 and therein, held the allegations levelled against the petitioner and the charge so framed against him basing thereon, to be proved.

The Inquiry Officer, in his report, has held that the petitioner was a habitual absentee and that he was granted leave without pay on 33 occasions totaling around 451 days for his unauthorized absence from duty. It was also noted that 7 nos. of departmental proceedings were drawn against the petitioner for the misconduct as committed by him in his service tenure out of which 5 departmental proceedings were so disposed of with imposition of major penalties and 2 departmental proceedings were under consideration as on the date of submission of the said Inquiry Report by the Inquiry Officer.

It is seen that although a copy of the inquiry report was furnished to the petitioner, herein, he had not proceeded to refute the conclusions as reached by

the Inquiry Officer in the matter and poised thus; the disciplinary authority proceeded to consider the said inquiry report and thereafter, vide a communication, dated 18.02.2012, proceeded to issue a notice to the petitioner by highlighting therein, that the disciplinary authority had come to a provisional conclusion that the petitioner should be awarded a major punishment under Rule 66 of the Assam Police Manual Part-III and accordingly, he was directed to submit his representation in the matter.

It is seen that no further representations were submitted by the petitioner in the matter and accordingly, the disciplinary authority proceeded to consider the materials as brought on record in the inquiry for arriving at a conclusion with regard to the penalty that is to be imposed upon the petitioner, herein. Accordingly, vide an order, dated 29.02.2012, the disciplinary authority after considering the allegations so levelled against the petitioner vide the Show Cause Notice, dated 05.01.2009, as well as the materials coming on record, proceeded to agree with the conclusions as reached in the matter by the Inquiry Officer. Thereafter, by noticing the penalties as imposed upon the petitioner in the past; proceeded to draw a conclusion that the petitioner was not a person fit to be retained in a disciplined force like the Assam Police and therefore, in exercise of the powers as conferred on the disciplinary authority, proceeded to impose upon the petitioner the penalty of dismissal from his service. Further, the period of suspension as undergone by the petitioner in the matter, was held to be not counted towards his service. The petitioner being aggrieved by the imposition of the said penalty upon him; proceeded to prefer an appeal in the matter before the Director General of Police. The said appeal was given a final consideration by the appellate authority vide order, dated 05.11.2012, for the

reasons recorded therein, proceeded to reject the said appeal as preferred in the matter by the petitioner. Being aggrieved, the petitioner has instituted the present proceeding.

**4.** Mr. Saikia, learned senior counsel appearing for the petitioner; at the outset, has submitted that the allegations/ charge as levelled against the petitioner vide Show Cause Notice, dated 05.01.2009, being related to his purported unauthorized absence on 2 dates, the same could not have been taken to be a misconduct which would warrant the imposition of penalty of dismissal from service.

**5.** Mr. Saikia, learned senior counsel, by referring to the contentions as made by the petitioner both in the written statement as preferred by him against the said Show Cause Notice, dated 05.01.2009, and also the statements in his inquiry as well as the contentions made in the appeal memo; has contended that the petitioner could not, in the circumstances involved; be treated to have been unauthorizedly absent on the dates so mentioned. Accordingly, it has been contended that the penalty as imposed upon the petitioner is grossly disproportionate to the allegations as levelled against him in the matter vide the Show Cause Notice, dated 05.01.2009.

**6.** Mr. Saikia, by referring to the order, dated 29.02.2012, has submitted that the disciplinary authority, for the purpose of justifying the imposition of penalty of dismissal from service upon the petitioner, has relied and referred to the penalties as imposed upon him earlier and it was further contended that such

reliance was so placed on the earlier penalties as imposed upon the petitioner without putting the petitioner to notice in the matter. It was contended that the penalties as imposed upon the petitioner for misconducts committed by him earlier in his service tenure, having not been incorporated as a charge in the Show Cause Notice, dated 05.01.2009; the disciplinary authority could not have placed any reliance thereon for the purpose of determining the quantum of penalty to be imposed upon the petitioner, herein.

**7.** In this connection, with regard to the contention made by the petitioner that the penalty as imposed upon him is grossly disproportionate; Mr. Saikia, learned senior counsel, has referred and relied upon a decision of the Hon'ble Supreme Court rendered in the case of ***Chairman-cum-Managing Director, Coal India Ltd. & anr. V. Mukul Kumar Choudhuri & ors.***, reported in ***AIR 2010 SC 75***.

**8.** In the above premises; Mr. Saikia, has submitted that the penalty as imposed upon the petitioner requires to be interfered with by this Court along with the order passed in the matter by the appellate authority and a further direction is called upon to be issued to the respondent authorities to reinstate the petitioner in his service with all consequential benefits of pay, seniority, etc..

**9.** Mr. Goswami, learned Additional Senior Government Advocate, on the other hand, has submitted that the petitioner has not brought on record any material to demonstrate that he was in any manner disabled from defending his case in the manner required in the inquiry held in the matter.

**10.** It was also contended by the learned Additional Senior Government Advocate, that the Inquiry Officer had arrived at his conclusion in the matter after having considered the evidence coming on record in the inquiry and accordingly, the said findings of the Inquiry Officer requires no interference by this Court. It was further contended that in the absence of any allegation being brought on record that the petitioner was prevented from defending his case in the manner required; this Court would not re-evaluate the evidence and findings as coming on record in the inquiry as an appellate authority.

**11.** Mr. Goswami, learned Additional Senior Government Advocate, has further contended that the disciplinary authority after providing due opportunity to the petitioner to have his say in the matter, had proceeded to issue the order, dated 29.02.2012, imposing upon the petitioner the penalty of dismissal from service. It was also contended that the order, dated 29.02.2012, is a well-reasoned one and was so passed after taking into consideration all relevant materials requisite for the purpose.

**12.** Mr. Goswami, learned Additional Senior Government Advocate, by referring to the order of the appellate authority in the matter, has submitted that the same is a detailed order being so passed after taking into consideration all the contentions raised by the petitioner in his appeal and accordingly, the same being not perverse; this Court would not like to interfere with the orders of the disciplinary authority as well as that of the appellate authority.

**13.** I have heard the learned counsels appearing for the parties and also

considered the materials placed on record.

**14.** At the outset; it is to be noted that Mr. Saikia, learned senior counsel for the petitioner, has not disputed the contention of the respondents that the petitioner had been granted all requisite opportunities to defend his case in the inquiry held in the matter and the petitioner was not prejudiced in any manner in this connection. As such, in the absence of any procedural irregularity being alleged by the petitioner; the charges as levelled against him ought to be held to have been established. However, given the arguments advanced by the learned senior counsel for the petitioner in the matter; this Court would now proceed to examine the same.

**15.** One of the submissions advanced by Mr. Saikia, learned senior counsel for the petitioner, while presenting a challenge to the order, dated 29.02.2012, passed by the disciplinary authority in the matter is that the disciplinary authority while deciding the quantum of penalty to be imposed upon the petitioner, has placed reliance upon the earlier penalties as imposed upon him and such a reliance having been placed without any notice being issued to the petitioner in the matter, it was contended that the same vitiates the said order, dated 29.02.2012, issued by the disciplinary authority.

**16.** The allegation/charge as levelled against the petitioner vide the Show Cause Notice, dated 05.01.2009, at the first glance, would seem to be innocuous and that the same would seem to not mandate the imposition of a severe penalty like that of dismissal from service. However, the allegation as

levelled against the petitioner has to be understood in the context that the petitioner is a Constable with the Assam Police which undoubtedly is a disciplined force and the discipline of a personnel of such a force is something which is higher than that expected of persons appointed in other civil posts.

**17.** Coming to the submissions as raised by Mr. Saikia, learned senior counsel, that the penalty as imposed upon the petitioner being so imposed by placing reliance on the earlier penalties so imposed upon him, to have vitiated the order, dated 29.02.2012; it is to be noted at the outset that from a reading of the order, dated 29.02.2012, it is seen that the said penalties were not considered independently by the disciplinary authority for imposition of the penalty of dismissal from service in respect of the petitioner for the allegations as levelled against him vide the Show Cause Notice, dated 05.01.2009, but, the same was so taken into consideration after the disciplinary authority had come to a conclusion that the materials as coming on record in the inquiry, the findings of the Inquiry Officer was not contrary thereto and after having agreed with such findings reached in the matter by the Inquiry Officer, it is seen that the earlier penalties as imposed upon the petitioner was only taken note of to justify the imposition of the penalty of dismissal from service upon the petitioner, herein. The Inquiry Officer, in his report, having taken note of the earlier penalties as imposed upon the petitioner and a copy thereof furnished to the petitioner, it cannot be held that the petitioner had no knowledge of the authorities taking into consideration the same while evaluating the materials coming on record with regard to the allegations of similar nature now levelled against him vide the Show Cause Notice, dated 05.01.2009.

**18.** In the above context; a reference is made to a decision rendered by the Hon'ble Supreme Court in the case of ***Govt. of A.P. v. Mohd. Taher Ali***, reported in ***(2007) 8 SCC 656***, wherein, in a similar issue; the Hon'ble Supreme Court had drawn the following conclusion:

> "***5. Learned counsel appearing on behalf of the respondent submitted that in fact, the disciplinary authority while passing the order has taken into consideration the earlier absence of the respondent from duty. He submitted that this could not have been taken into consideration as the respondent was not aware about these incidents and those were not part of the charges levelled against him. In support of his submission learned counsel for the respondent has invited our attention to the judgment of this Court titled State of Mysore v. K. Manche Gowda but in the present case we are satisfied that in fact the respondent deliberately absented himself from duty and did not offer any explanation for his absence from election duty. It is not the respondent's first absence. He also absented himself from duty on earlier occasions also. In our opinion there can be no hard-and-fast rule that merely because the earlier misconduct has not been mentioned in the charge-sheet it cannot be taken into consideration by punishing authority. Consideration of the earlier misconduct is often only to reinforce the opinion of the said authority. The police force is a disciplined force and if the respondent is a habitual absentee then there is no reason to ignore this fact at the time of imposing penalty. Moreover, even ignoring the earlier absence, in our opinion, the absence of 21 days by a member of a disciplined force is sufficient to justify his compulsory retirement."***

**19.** In view of the decision of the Hon'ble Supreme Court in the case of ***Mohd. Taher Ali***(supra); the contention as to whether the past record should form a part in the charge memo or in the notice calling for further representation on the Inquiry Report is no longer *res integra*. This Court is satisfied that, in the facts as involved in the present matter; the petitioner, herein, absented himself from duty and did not offer any cogent explanation for his such absence from the duty he was required to undertake as a Constable(UAB). It is also noted that this is not the first instance when the petitioner had remained absent from his duties and he had also absented himself on many occasions earlier. This Court is of the considered view that there can be no hard-and-fast rule that

merely because the earlier misconduct has not been mentioned in the charge-sheet; it cannot be taken into consideration by the disciplinary authority to reinforce the opinion of the said authority with regard to the penalty proposed to be imposed upon a delinquent. It is reiterated that the police force is a disciplined force and the petitioner is admittedly a habitual absentee then there can be no reason as to why the earlier penalties as imposed upon the petitioner for the same misconduct, cannot be taken into consideration by the disciplinary authority while considering the quantum of penalty to be imposed upon the petitioner. It is to be noted that that Inquiry Officer in his report, had taken note of the earlier penalties as imposed upon the petitioner, which also indicates that inspite of major penalties being imposed upon the petitioner, he had not rectified his conduct.

**20.** Habitual absenteeism is a gross violation of discipline as has been held by the Hon'ble Supreme Court in the case of ***Burn & Co. Ltd. & ors. v. Their employees***, reported in ***AIR 1959 SC 529***. In the said case, an employee, who absented without leave or permission, was dismissed from service following a domestic inquiry. The Industrial Tribunal had directed reinstatement of the employee and the matter thereafter reached before the Hon'ble Supreme Court and the Hon'ble Supreme Court held that absence of a workman without permission and without any leave application for the same, amounts to gross violation of discipline entailing dismissal from service. The Hon'ble Supreme Court further held that if such workman is dismissed by the employer, the Industrial Tribunal should not order for reinstatement. The Hon'ble Supreme Court held that where a workman is almost in the habit of loitering outside his place of work without the permission of his departmental head and does not

desist from doing so even though warned, his service can be dispensed with. In such a case, it cannot be said that the employer was actuated by any improper motive to victimize him for his Union activity.

**21.** In the case of ***L & T Komatsu Ltd. v. N. Udayakumar***, reported in ***(2008) 1 SCC 224***; the Hon'ble Supreme Court reiterating the views expressed in the ***Burn & Co. Ltd.***(supra) and having regard to the past record of the respondent therein, who was found guilty for unauthorized absence on several occasions, held that the Industrial Tribunal/High Court ought not to have interfered with the order of dismissal from service, treating it to be harsh.

**22.** Accordingly, in view of the decisions of the Hon'ble Supreme Court in the decisions as noticed hereinabove; this Court is of the considered view that the disciplinary authority for the purpose of justifying the penalty as decided to be imposed upon the petitioner; had not committed any error in taking note of the earlier penalties as imposed upon the petitioner.

**23.** At this stage, this Court would consider the submissions made by Mr. Saikia, learned senior counsel, that the penalty as imposed upon the petitioner is grossly disproportionate to the allegations as levelled against him in the Show Cause Notice, dated 05.01.2009. In support of the said submission, Mr. Saikia, has relied upon the decision of the Hon'ble Supreme Court in the case of ***Mukul Kumar Choudhuri***(supra). The Hon'ble Supreme Court in the above-cited case, in paragraph No. 26, had concluded as under:

> "***26. The doctrine of proportionality is, thus, well-recognised concept of judicial review in our jurisprudence. What is otherwise within the***

***discretionary domain and sole power of the decision-maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a***

***manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review. One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment. In a case like the present one where the misconduct of the delinquent was unauthorised absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's rules and regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations. Ordinarily, we would have sent the matter back to the appropriate authority for reconsideration on the question of punishment but in the facts and circumstances of the present case, this exercise may not be proper. In our view, the demand of justice would be met if Respondent 1 is denied back wages for the entire period by way of punishment for the proved misconduct of unauthorised absence for six months."***

**24.** On an application of the said decision to the facts of the present case; it is to be noted that the penalty as imposed upon the petitioner, herein, who is otherwise a habitual absentee, cannot be held to be disproportionate to the allegations so levelled against him and the penalty so imposed, cannot be held to be out of proportion to the misconduct as alleged against the petitioner, herein. It is found that the penalty so imposed upon the petitioner by the disciplinary authority was so done taking into consideration the measure, magnitude and degree of misconduct and all other relevant circumstances which include the past records of the petitioner, herein. Accordingly, it is held that the facts of the present case do not present any special feature warranting any interference by this Court in the limited exercise permissible in the matter in

exercise of its power of judicial review.

**25.** In the light of the decisions as rendered by the Hon'ble Supreme Court and noticed hereinabove; it is now well-settled that habitual absenteeism is a serious lapse moreso when the same is committed by a member of a disciplined force, the same cannot be permitted to be treated lightly. It is an admitted position that the previous punishment as imposed upon the petitioner for similar misconduct had not resulted in the desired effect of correction on his part and he has repeated the act of remaining unauthorizedly absent for which the penalty of dismissal from service as imposed upon him, cannot be held to be an excessive penalty. In the present case, the petitioner being a member of the disciplined force; the allegation as levelled against him in the Show Cause Notice, dated 05.01.2009, itself; mandates imposition of a major penalty even without reference to his past records.

**26.** Accordingly, the disciplinary authority having taken into consideration the past record of the services of the petitioner, herein, and the same being for the purpose of adding weightage to the decision as arrived at in the matter; this Court is of the considered view that the said course of action as adopted by the disciplinary authority does not vitiate the departmental proceedings and/or the penalty as imposed upon the petitioner by the disciplinary authority and there is no violation of the principles of natural justice in the matter.

**27.** In view of the above; the penalty as imposed upon the petitioner by the disciplinary authority vide the order, dated 29.02.2012, does not call for any

interference from this Court in-as-much as the same is a result of gross habitual absenteeism by the petitioner who is a member of a disciplined force. Accordingly, the order, dated 29.02.2012, passed by the disciplinary authority along with the order, dated 05.11.2012, passed by the appellate authority; does not call for any interference from this Court.

**28.** In the above view of the matter; the writ petition is held to be bereft of merit and the same accordingly stands dismissed. However, there shall be no order as to costs.

**JUDGE**

**Comparing Assistant**