GAHC010106332011

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

Case No. : WP(C)/893/2011

JOGEN DAS
SON OF LATE KHATARAM DAS, RESIDENT OF VILLAGE- RUKMANIGAON, BAHINI PATH, HOUSE NO. 38, P.O. KHANAPARA, P.S. DISPUR, GUWAHATI IN THE DISTRICT OF KAMRUP.

VERSUS

ASSAM POWER DISTRIBUTION CO. LTD. and ORS
APDCL, REPRESENTED BY THE CHIEF GENERAL MANAGER D, APDCL LOWER ASSAM ZONE, BIJULEE BHAWAN, PALTANBAZAR, GUWAHATI-1.

2:THE MANAGING DIRECTOR

ASSAM POWER DISTRIBUTION CO. LTD
BIJULEE BHAWAN
PALTANBAZAR
GUWAHATI-1.

3:THE CHIEF GENERAL MANAGER DISTRIBUTION
ASSAM POWER DISTRIBUTION CO. LTD.
BIJULEE BHAWAN
PALTANBAZAR
GUWAHATI-1.

4:THE SR. MANAGER

DEDG
APDCL BIJULEE BHAWAN
PALTANBAZAR
GUWAHATI-1.

5:THE SUB-DIVISIONAL ENGINEER

GOLOKGANJ ELECTRICAL SUB-DIVISION
APDCL
LOWER ASSAM ZONE
GOLOKGANJ.

6:MR. A.K. CHOUDHURY
ENQUIRY OFFICER
NOTICE THROUGH THE MANAGING DIRECTOR
ASSAM POWER DISTRIBUTION CO. LTD. BIJULEE BHAWAN
PALTANBAZAR
GUWAHATI-1

Advocate for the Petitioner : MR. P P DAS

Advocate for the Respondent :

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Mr. BK Das, Advocate
For the Respondents : Mr. B Choudhury, Advocate
Date of Hearing : 18.03.2024
Date of Judgment : 19.06.2024

JUDGMENT AND ORDER(CAV)

1. Heard Mr. BK Das learned counsel for the petitioner. Also heard Mr. B Choudhury, learned standing counsel, APDCL.

2. The present writ petition is filed praying for a writ the nature of certiorari for setting aside and quashing findings of the departmental enquiry report and order of punishment dated 18.06.2010, whereby penalty of reduction in pay by one stage with cumulative effect and recovery of an amount of Rs. 37,194/- in 9 (nine)

instalments were directed. A further prayer is made for payment of salary for the petitioner with effect from and from 01.02.2008 to 13.02.2008 and from 25.02.2008 to 29.02.2008, during which period according to the petitioner, he was on leave.

3. The brief fact of the case can be summarised as follows:

I. While the petitioner working as junior engineer, a disciplinary proceeding was initiated against him by filing a charge sheet dated 05.09.2008.

II. Three charges were levelled against the petitioner. The first charge was habitual negligence of duty/ unauthorised absence from duty for three periods i.e. from 15.02.2008 to 24.02.2008, from 05.03.2008 to 31.03.2008 and from 03.03.2008 to 11.05.2008.

III. The second charge was misappropriation of Board's revenue to the tune of Rs. 91,158.55/-.

IV. The third charge was breach of ASEB Officers Conduct Regulation, 1982 more particularly Regulation 10.

V. The petitioner denied the charge No. 1 and contended that the petitioner had submitted application for leave on 14.02.2008 and earned leave application on 26.02.2008. An explanation was given that he was suffering from chronic sinusitis and also undergone an operation during the said period.

VI. As regards the second charge of theft, fraud and dishonesty in connection with business of the Board, he denied the same. Regarding the charge of misappropriation of Board's revenue, the petitioner had given certain explanation like no availability of consumer ledger etc.

VII. After completion of the departmental proceeding, the enquiry officer concluded that as the petitioner himself has admitted as regard his absence and from his stand it is clear that the petitioner remained absent without even bothering to obtain permission to leave head quarter or without awaiting the sanction of the leave. Accordingly, it was held that the charge No. 1 was proved.

VIII. As regards the charge No. 2(a), the enquiry officer concluded that the charge was not proved. Regarding the misappropriation of Rs. 91,138.55/- under charge No. 2(b), the enquiry officer concluded that the explanation furnished by the charged officer is not supported by any documentary evidence and are somewhat vague. It was also concluded that the charge officer has failed to show as to how an amount of Rs. 28,000/- shown to have been realised in the ledger is correct. Accordingly, it was held that said charge was proved except entry Nos. 5 and 7.

IX. A second show cause notice was issued on 22.08.2009 and the petitioner had filed reply to such show cause notice on 14.10.2009. A specific stand was taken that the consumer ledger on the basis of which the allegation

was made, was not produced before the enquiry officer and therefore, the petitioner was deprived of his right to cross-examine on such ledger. The petitioner also disputed the determination of the enquiry officer that there was a shortage of amount of Rs. 78,138.55/-.

X. On receipt of such explanation, the respondents re-calculated the amount and found out that another amount of Rs. 40,945/- cannot be recovered from the petitioner out of Rs. 78,158.55/- (amount found recoverable by the enquiry officer). Therefore, amount of misappropriation of revenue was reduced to Rs. 37,194/-.

XI. Thereafter, by an order dated 18.06.2010 the employer passed the order of penalty and held that the petitioner is liable for recovery of amount of Rs. 37,194/-. Being aggrieved, the petitioner preferred a departmental appeal. Said appeal was also dismissed by the appellate authority. Aggrieved by the said two decisions, petitioner has preferred the present writ petition.

4. Mr. BK Das, learned counsel for the petitioner assailing the impugned action of the respondent authorities argues the followings:

I. The petitioner requested the respondent No.3 vide letter dated 30.10.2008 for allowing him to inspect the documents relating to realisation of energy bill in the consumer ledger and the Subsidiary Cash Book as well as money receipt.

II. Although the respondent No. 4 vide letter dated 08.11.2008, asked the petitioner to inspect the documents on 23.10.2008 and to contact the Senior Manager, Dhubri Electrical Division, but the said authority failed to provide him the consumer ledger.

III. The consumer ledger is the vital document so far, the charges No. 2 is concerned since the inspection report Ext. 7 was prepared by the Sub-Divisional Engineer, Golokganj Sub-Division on the basis of such common ledger.

IV. The petitioner stated in his representation dated 14.10.2009 that in spite of direction of the Presenting Officer to produce the Consumer Ledger, the same was not presented in the enquiry not to speak of allowing the petitioner to inspect the Ledger Book.

V. The consumer ledger book is the whole basis of making the entries in the inspection report. As such it is consumer ledger which is the prime document to be exhibited in the enquiry. Neither the respondents have allowed the petitioner to inspect the consumer ledger, nor they have exhibited the same in the enquiry, as such the petitioner could not cross check the original entries and signatures in the consumer ledger, which has caused prejudice to the petitioner. As such the findings of the enquiry officer as against the charge No. 2(b) is illegal, arbitrary and not sustainable in the eye of law.

VI. On receipt of the petitioner's explanation against enquiry report, the respondent No. 1, the Chief General Manager (D) APDCL, Guwahati-1 could find out another amount of Rs. 40,945/- out of the Rs. 78,138.55/- which was proved as misappropriated amount by the enquiry officer, and as such the respondent No. 1 reduced the amount of misappropriation of revenue to Rs. 37,194/- by illegally and arbitrarily holding that the petitioner is guilty for misappropriation of Rs. 37,194/-. The enquiry officer concluded the misappropriation amount to be Rs. 78,138.55 and the disciplinary authority found it to be only Rs. 40,945/- and therefore, the conclusion of the enquiry officer is illegal, arbitrary and unjust.

VII. In support of his contention, Mr. Das relies on the decision of the Hon'ble Apex Court in ***M.V. Bijlani vs UOI & Ors.*** reported in ***(2006) 5 SCC 88, Thaneswar Kalita Vs State of Assam & Ors.*** reported in ***2003 (2) GLT 157, Krushnakant B Parmar vs UOI & Anr.*** reported in ***(2012) 3 SCC 178*** and ***Phula Gogoi Chutia vs State of Assam & Ors.*** reported in ***2016 (1) GLT 704***.

5. Per contra, Mr. B Choudhury, learned counsel for the respondent APDCL argues the followings:

(I) The petitioner has not come to the court with clean hands inasmuch as the penalty imposed as regards recovery has already been done and reduction in pay by one stage with cumulative effect inflicted upon the

petitioner has already been implemented by recovering a sum of Rs. 36,000/- from the petitioner prior to filing of this writ petition. However, such fact is not pleaded in the writ petition. In support of contention, he relies on the decision of Hon'ble Apex Court in ***K D Sharma Vs SAIL*** reported in ***(2008) 12 SCC 481***.

(II) As regard non furnishing of document to the petitioner, the learned counsel submits that the Anneuxure 3 of the petition itself discloses that the petitioner sought for inspection of consumer ledger for the period with effect from December, 2005 to February, 2006 and therefore such ledger was not relevant at all inasmuch as the period for charge of misappropriation relates to the receipts issued from the year 2007 to 2008. Thus, such documents were not material and therefore non furnishing of the same cannot be said to be a violation of principle of natural justice. In support of his contention, he relies on the decision of the Hon'ble Apex Court in the case ***State of UP vs Ramesh Ch. Mangalik*** reported in ***(2002) 3 SCC 443***.

(III) Mr. Choudhury further contends that the power of judicial review in matter of disciplinary enquiries, exercised by the departmental authority/ appellate authority is limited to correcting of errors of law or procedural errors leading to manifest injustice or violation of principle of natural justice and it is not akin to adjudication of the case on merit

as an appellate authority, however, the petitioner is seeking that this court should sit as an appellate authority over the decision of the disciplinary authority. In support of such contention, the learned counsel relied on the decision of Hon'ble Supreme Court in the case of ***SBI vs Ajay Kumar Srivastav*** reported in ***(2021) 2 SCC 612, Union of India vs P Gunsekharan*** reported in ***(2015) 2 SCC 610, State Bank of India Vs AGB Reddy*** reported in ***(2023) SCC Online SC 1064***.

(IV) Mr Choudhury, learned counsel further submits that even if in a case one charge is proved, the order of penalty cannot be interfered with. Therefore, the respondents were within its jurisdiction to impose the penalty. In support of such contention, he relies on the decision of the Hon'ble Apex Court in the case of ***State of UP vs Nand Kishore Shukla*** reported in ***(1996) 3 SCC 750***.

6. I have given anxious consideration to the argument advanced by the learned counsel for the parties and perused perused the material on record.

7. Law is by now well settled that the Constitutional Court while exercising its jurisdiction of judicial review under Article 226 of the Constitution of India would not generally interfere with the finding of facts arrived at in the departmental proceeding except in cases of mala-fide. The Court may also interfere with the decision, when it is perverse i.e. where there is no evidence to support a finding

or where a finding is such that no man acting reasonably and with objectivity could arrive at those findings. So long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained.

8. The Constitutional Court can also exercise power of judicial review when there is violation of procedure mandated for conduct of such departmental proceedings resulting in violation of the principle of natural justice. It is correct that the power of judicial review is meant to ensure that individuals receive fair treatment, however, such power of judicial review is not to judge the conclusion arrived at by the authority and to verify whether the same is correct or not.

9. Thus, the power of judicial review in the matters of disciplinary authority is circumscribed by limit of correcting error of law or procedural error leading to manifest injustice or violation of principle of natural justice and it is not akin to adjudication of a case on merit as an appellate authority inasmuch as the disciplinary authority is the sole judge of fact. Judicial review by the Constitutional Court is an evaluation of the decision making process and not the merit of the decision itself. It is to look into and ensure fairness in treatment and not to ensure fairness in conclusion.

10. It is also well settled that strict rules of evidence are not applicable in a departmental proceeding. However, the allegation against the delinquent must be established by such evidence acting upon which a reasonable person acting

reasonably and with objectivity may arrive at a finding upholding the gravity of the charge against the delinquent employee.

11. It is equally well settled that mere conjecture or surmises cannot sustain the finding of guilt even in the departmental enquiry/ proceeding.

12. Now, coming to the case in hand, the allegation as regards unauthorised absence, the Enquiry Officer concluded the said charge to be proved on the ground that admittedly the petitioner was absent and he did not bother to wait for grant of his leave. Neither the respondents denied the filing of leave application nor the Enquiry Officer concluded that there was no leave application.

13. The Hon'ble Apex court in the case of ***Krushnakant B Parmar (supra)*** in no un-equivocal term held that whether unauthorised absence from duty amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether the absence is wilful or because of compelling circumstances. In the case in hand, so far relating to the unauthorised absence, there is no discussion whatsoever as regards the defence taken by the petitioner, explaining the reason of absence, not to say of any conclusion of the enquiry authority that the absence of the petitioner was wilful.

14. It is well settled that absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful and in case of absence under compelling circumstances, such absence cannot be held to be wilful. Therefore, in the enquiry proceeding, a determination

was required to be made whether such absence was wilful unauthorised absence or whether the explanation given by the delinquent can be plausible reason, which may ultimately lead to the conclusion that though it was unauthorised absence, but it was not wilful. No such determination has been made by the enquiry officer in the present case. That being so, such conclusion without there being any recorded reason is also a perverse decision.

15. As regards the charge 2(a) i.e. fraud and dishonesty in connection with business of the Board the Enquiry Officer concluded that the evidence relied by the Management is hearsay and therefore, such charge was not proved.

16. The charge No. 2(b) was alleged misappropriation of Rs. 91,138.55/-. The management relied on an inspection report to prove such charge. The inspection report contains of certain entries disclosing the amount. The Enquiry Officer concluded that the entry Nos. 5 and 7 in the inspection report were not made by the delinquent officer. The said entry relates to an amount of Rs. 13,000/- in total. The enquiry officer concluded that the explanation given by the charge officer was not supported by any documentary evidence. Accordingly, concluded that an amount of Rs.78,158.55/- is recoverable.

17. The facts remains that there was no any material on record including statement of the management witnesses to suggest that it is the petitioner, who was responsible or was in fact the person, who created the alleged manipulated entries inasmuch as the ledger, in which the alleged entries were made was not

part of management evidence. Thus, it was not before the enquiry officer, who had in fact entered the aforesaid entry stated in the ledger though such entries alleged to be manipulated is part of the charge memo. There is also no material even to suggest that at the relevant point of time it was the petitioner, who was entrusted with the ledger and to make entry thereof.

18. Yet another aspect remains that after completion of the enquiry, the employer itself found that misappropriation of another amount of Rs. 40,945/- is required to be reduced from the alleged misappropriation. Thus, the amount of misappropriation as reflected in the statement of allegation is Rs. 13,000/- (Rs. 91138.55-Rs. 78138.55), the enquiry officer found it to be Rs.78,138/-and the employer finally found it to be Rs. 37,194/-.

19. Thus, in totality of the matter, such charge against the petitioner was concluded to be proved only on the basis of an inspection report. The fact also remains that the Enquiry Officer shifted the burden of proof of such charge upon the charged employee by concluding that the charged employee has failed to produce any documentary evidence in support of his defence, whereas it is clear and admitted position that the ledger, wherein the manipulation was alleged was even not part of the management evidence. No witnesses even deposed that it is the charged employee, who was entrusted with the responsibility of the ledger and it is he, who has manipulated the ledger. The author of the inspection report on the basis of which the charge of misappropriation was levelled was not even examined.

Thus, from the aforesaid, this court is of the unhesitant view that the said charge against the petitioner was concluded to be proved on the basis of the inspection report, acting upon which, a reasonable person acting reasonably with objectivity would not have concluded in that way, more particularly when the author of such report was not examined and when the ledger on the basis of which such inspection report was submitted. Further, there is also no material evidence that it is the delinquent who manipulated the ledger. Thus, the decision in this regard was a perverse decision, on mere conjecture and surmises.

20. The charge No. 3 relates to misconduct. The statement of allegation relating to charge No. 3 was held to be proved to the extent the charge No. 1 and 2 have been proved. In view of the determination made hereinabove, such decision is also liable to be interfered.

21. Yet another aspect of the matter so far it relates to charge No. 3 is that in the statement of allegation, no specific statement of imputation, which led to framing of charge of misconduct, is discernible. In the case of ***Surath Ch. Chakrabarty Vs State of West Bengal*** reported in ***AIR 1971 SC 752,*** it was held by the Hon'ble Apex Court that it is not permissible to hold an enquiry on a vague charge as the same does not give clear picture to the delinquent to make an effective defence, because he may not be aware, as what is the allegation against him and what kind of defence he can put in rebuttal thereof. It was further observed that the grounds on which the definite charge or charges are

framed is to be communicated to the person charged together with a statement of allegation, on which charge is based and any other circumstances, which it is proposed to be taken into consideration. The Hon'ble Apex Court further holds that such rule embodies a principle which discloses the allegation on which the charges preferred are founded.

22. In ***Sawai Singh Vs- State of Rajasthan*** reported in ***AIR 1986 SC 995,*** the Hon'ble Apex Court held that even in a domestic enquiry, the charge must be clear, definite and specific as it would be difficult for any delinquent to meet the vague charges. It was also held that evidence should not be perfunctory even if the delinquent does not take defence or make a protest that the charges are vague and that does not save the enquiry from being vitiated for the reason that there must be fair play in action, particularly in respect of an order involving adverse or penal consequence. However, in the case in hand there is no whisper in the charge memo or statement of imputation as regards how the delinquent violated Rule 10. Therefore on this count also the charge No. 3 is liable to be set aside.

23. In view of the above determination and decision, this court is of the opinion that the impugned order dated 18.06.2010 is not sustainable under law and same is accordingly, set aside. In the result, it is directed that the recovery already made in terms of the impugned decision, be returned back to the petitioner. Such return be made within a period of four weeks from the date of receipt of the

certified copy of this order.

24. The prayer of the petitioner for direction for release of salary stands rejected inasmuch as admittedly the petitioner was absent during the said period his leave application was not sanctioned. Taking a departmental action on such absence and legality thereof shall require the determination as regards wilful absence and payment of salary during the absence period shall not require such determination and when the petitioner has not worked during the period and his leave was also not sanctioned, he will not be entitled for salary of that period.

25. Accordingly, the present writ petition stands disposed of. Parties to bear their own costs.

JUDGE

Comparing Assistant