

(2003) 12 GAU CK 0016
In the Gauhati High Court
Case No : WP (C) No. 5715 of 1999

Amrit Dewan

APPELLANT

Vs

Assam State Co-operative Marketing and Consumer
Federation Limited and Others

RESPONDENT

Date of Decision : 23-12-2003

Acts Referred:

Assam Services (Discipline and Appeal) Rules, 1964 — Rule 9

Citation : (2004) 3 GLR 11 : (2004) 1 GLT 69

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : D.C. Mahanta, T.J. Mahanta and P. Bhattacharya, for the Appellant;
M.K. Choudhury and M. Dutta, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—The writ Petitioner while was serving as Assistant Manager in Assam State Co-operative Marketing and Consumer Federation Limited (STATEFED) and was posted at. Jorhat Branch, was placed under suspension by an order dated 25.10.1994. This was followed by a show cause notice dated 25.10.1994 asking him to submit his written statement of defence in respect, of two charges levelled against him as indicated in the said show cause notice. Two charges levelled against the Petitioner were in respect of his incumbency as Assistant Manager, in-charge of the STATEFED Main godown at Jorhat during the year 1989-90 and 1990-91. By both the charges it was alleged that goods (dietary articles) worth Rs. 41,631.20 for the year 1989-1990 and goods (dietary articles) for the year 1990-1991 worth Rs. 3,27,120.45 were found short and thereby the STATEFED suffered loss.

2. The Petitioner by his letter dated 4,11.1994 asked for certain documents for his inspection in order to submit his written statement. The STATEFED authority by its latter dated 10.11.1994 directed the Branch Manager, STATEFED, Jorhat Branch to allow the Petitioner for inspection of documents as desired by him.

This was followed by letter dated 10.12.1994 by which the Petitioner asked for four documents for his inspection. This was replied to by the Joint Manager (Legal and Con), Guwahati by his letter dated 1.3.1996 intimating the Petitioner that the documents sought for inspection by him were not relevant. However, the Petitioner once again asked for inspection of the four documents namely (i) Godown receipt book (page No. 9701 to 9800) (ii) Correspondence file (godown) for the year 1989-1990 (iii) Stock book of godown for the year 1990-91 and (iv) Correspondence file (godown) for the year 1990-91. The Joint Manager (Legal and Con) once again intimated the Petitioner by his letter dated 23.3.1996 that as per the information furnished by the Branch Manager, STATEFED, Jorhat, the Petitioner had already inspected the documents to his full satisfaction. However, by the said letter the Petitioner was asked to indicate as to what were the documents he had already inspected. The Petitioner reiterating his earlier stand, once again wrote to the Joint Manager (Legal and Con) by his letter dated 8.4.1996 of the Petitioner, the Joint Manager in-charge STATEFED) asked Joint Manager (Legal) STATEFED, Guwahati intimating the fixation of date as 26.4.1996 for re-inspection of documents by the Petitioner subject to his approval. Nothing is revealed as to what transpired thereafter. It is the case of the Petitioner that he was not given access to those four documents which seriously prejudiced his defence.

3. The Petitioner submitted his reply to his show cause notice on 2.5.1996 denying both the charges. In his elaborate written statement of defence, the Petitioner indicated as to how he was not responsible for the shortage of the goods in the godown in question. In the said written statement, the Petitioner, inter alia, took the plea of his absence for a particular period when he was sent for a training, the damaged condition of the articles and the dilapidated condition of the godown in question and the sale of certain damaged dietary articles as the cause of shortage. The Disciplinary Authority being not satisfied with the reply furnished by the Petitioner, conducted a departmental enquiry in which as many as six witnesses were examined and certain documents were exhibited. The Petitioner also made his statement of defence on 4.12.1996 reiterating the stand taken in the written statement of defence.

4. On conclusion of the enquiry, the Enquiry Officer submitted his report holding the Petitioner guilty of both the charges. The report was submitted on 19.6.1997 which was forwarded to the Petitioner by letter dated 5.8.1997 asking him to submit his written representation, if any, against the enquiry report. In the said letter dated 5.8.1997, the proposal to inflict the punishment of removal from service and recovery of the alleged mis-appropriated amount of Rs. 3,65,650.67 was indicated. The Petitioner on receipt of the copy of the enquiry report submitted his representation on 15.9.1997.

5. Thereafter the impugned order dated 25.6.1999 was passed imposing the penalty of removal from service on the Petitioner. In the said order the earlier proposal to inflict the penalty of removal from service, the enquiry report, and

the reply thereto of the Petitioner were also referred to. In the order it was indicated that the Petitioner would not be entitled to get any benefit except, what he had already received as subsistence allowance during the period of suspension.

6. It is the said order of removal dated 25.6.1999 against which the present writ petition has been filed, Mr. D. C. Mahanta, learned senior counsel appearing for the Petitioner. During his course of argument urged and took the following grounds assailing the legality and validity of the enquiry proceeding and the aforesaid order of removal dated 25.6.1999 :

"(a) The show cause notice dated 25.10.1994 was in violation of the provision of Rule 9 of the Assam Service (Discipline and Appeal) Rules, 1964 inasmuch as the list of documents and the witnesses by which each articles of charges was proposed to be substantiated was not furnished alongwith the charge sheet.

(b) The Petitioner was denied inspection of vital documents seriously prejudicing his defence.

(c) Right of cross-examination was denied in respect of SW 3 Shri Satya Phukan.

(d) The Petitioner after serving at Jorhat during the relevant period had handed over charge to one Shri Siba Bhuyan, Inspector on 8.4.1991 and said Shri Bhuyan took the charge of the godown after verifying the stock of the godown including books of account and thus the Petitioner could not have been made responsible for the alleged loss occurred during 1989-1990 and 1990-91 and that too in the year 1994.

(e) Finally it was argued that the finding's recorded by the Enquiry Officer as well as by the Disciplinary Authority are perverse and are based on some extraneous considerations and not based any evidence on record."

7. On the other hand Mr. M. K. Choudhury, learned counsel appearing for the Respondents in his persuasive pursuits defended the action of the Respondents against the Petitioner. Although no affidavit-in-opposition has been filed by the Respondents. Mr. Choudhury produced before the court the records of the enquiry proceeding in support of his arguments: According to Mr. Choudhury the evidence on record are overwhelming so as to establish both the charges against the Petitioner. Mr. Choudhury submitted that the Petitioner was give access to all the relevant documents and even if the four documents mentioned by the Petitioner were not given access to, same did not cause any prejudice to the defence of the Petitioner inasmuch as the said documents were not relied upon during enquiry and were not the basis of the show cause reply. It was further submitted that the Petitioner was the custodian of the said documents and they were found missing. In any case the said documents having not been relied upon, the defence of the Petitioner was not prejudiced for non-production of those documents. As regards the allegation that the Petitioner was not allowed to cross-examine SW 3, i.e., Shri Satya Phukan, Mr. Choudhury referring to the

enquiry proceeding File submitted that the Petitioner, in fact had cross-examined the said witness. He relied upon a decision of the Apex Court, as reported in State Bank of Patiala and others Vs. S.K. Sharma, to bring home his point that in absence of any established prejudice shown by the Petitioner, the arguments advanced on behalf of the Petitioner are fallacious and not tenable in law.

8. In reply to the said arguments advanced by Mr. M. K. Choudhury, learned counsel for the Respondents, Mr. D. C. Mahanta, learned senior counsel reiterated his arguments and placed reliance on the decisions of the Apex Court as reported in U.P. State Road Transport Corporation Vs. Muniruddin, Kashinath Dikshita Vs. Union of India (UOI) and Others, Committee of Management, Kisan Degree College Vs. Shambhu Saran Pandey and Others, to bring home his basic thrust of argument that non-supply of four documents, inspection of which was specifically sought for by the Petitioner resulted in serious prejudice to the defence of the Petitioner.

9. I have perused the materials on record including the disciplinary proceeding as produced by the learned counsel for the Respondent as produced by the learned counsel for the Respondent Mr. M. K. Choudhury. In consideration of the materials on record and upon hearing the counsel for the parties, the following issues are framed for a proper adjudication of the rival submissions made on behalf of the parties :

(a) Whether the non-furnishing of the list of documents and witnesses resulted in any prejudice to the defence of the Petitioner ?

(b) Whether the non-furnishing of the four documents inspection of which was sought for by the Petitioner resulted in any prejudice to the defence of the Petitioner ?

(c) Whether the findings recorded by the Enquiry Officer is perverse and based on no evidence ?

10. Mr. Mahanta, learned senior counsel for the Petitioner did not seriously argue that the non-furnishing of the list of documents and witnesses resulted in any prejudice to the defence of the Petitioner. Even otherwise also I find that such a failure on the part of the Disciplinary Authority has resulted in prejudice to the defence of the Petitioner. As regards the witnesses I find from the proceeding File that out of the six witnesses, five witnesses namely SW 2, SW 3, SW 4, SW 5 and SW 6 were examined at the instance of the Petitioner. As regards the list of documents, the proceeding File revealed that only three documents were relied upon and exhibited during the course of the enquiry and those documents were marked as SW 1, SW 2 SW 3. No other documents were examined or exhibited. Documents Section 1 is a letter from the Joint Manager-in-charge, Jorhat to the Managing-Director, STATEFED, Guwahati forwarding the statement of shortage of stock for the period 1989-1990 and 1990-1991 at STATEFED main go-down, Jorhat which was exhibited as exhibit-S2. Exhibit S3 is a letter written by the Joint Manager in-charge, STATEFED, Jorhat to the Joint Manager (Legal)

intimating that the Petitioner during his incumbency as Assistant Branch Manager, STATEFED, Jorhat during the period 1989-1990 and 1990-1991 had prepared and submitted statements and reports to the Branch Manager of STATEFED, Jorhat pointing out the shortages. On perusal of the proceeding File I do not find that the Petitioner had raised any objection regarding non-furnishing of the list of witnesses and documents alongwith the charge sheet, in fact in his written statement of defence submitted on 2.5.1996 also, the Petitioner did not raised any objection regarding non-furnishing of the list of documents and witnesses alongwith the show cause notice. This being the position I am of the opinion that no prejudice was caused to the Petitioner by not furnishing the list of documents and witnesses alongwith the show cause notice.

11. As regards the issue relating to the denial of inspection of four documents to the Petitioner, I find that although the Petitioner had sought for inspection of the four documents in question same were neither relied upon nor made the foundation of the charges. He was not given access to those documents on the ground that those documents were not relevant. The documents were in fact missing as revealed from the records. The Apex Court in the cases relied upon by Mr. Mahanta has emphasised the need of furnishing the documents relied upon by the Disciplinary Authority to the delinquent.

12. In the instant, case it is ad admitted position that the Disciplinary Authority did not rely upon the four documents inspection of which was sought for by the Petitioner. The Disciplinary Authority had replied to the Petitioner that those documents were not relevant. Mr. Choudhury during the course of his argument submitted referring to SW 3 exhibit that the said documents were missing and it was the Petitioner who was the custodian of those documents during the period in question. However, nothing could be pointed out that it was the Petitioner during whose incumbency the documents were missing and/ or it was the Petitioner from whose custody the documents were lost. Mr. Choudhury submitted referring to the decision of State Bank of Patiala (supra) that the alleged prejudice caused to the defence of the Petitioner will have to be judged in the touch-tone of the relevance of the documents, procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer. They are conceived in his interest. However, violation of any and every procedural provision cannot be said to automatically vitiate the enquiry. The complaint of violation of procedural provision will have to be judged from the point of view of prejudice. In the instant case having regard to the fact that the four documents inspection of which was sought for by the Petitioner were not relied upon by the disciplinary authority and in the enquiry proceeding the Petitioner did not insist for production of the same, although he could have asked for production of the same as defence documents. On the other hand he submitted an elaborate written statement of defence highlighting every aspect of the matter. Under the circumstances I am constrained to hold that non-production of the four documents for inspection of the Petitioner did not result in any prejudice to the defence of the Petitioner. The issue No. (b) is answered

accordingly.

13. This brings us to the final issue" as to whether the findings recorded by the Enquiry Officer are perverse and based of no evidence insufficiency of evidence. Before dealing with this question, it will be appropriate to refer to the two charges levelled against the Petitioner. Both the charges are in respect of the alleged shortage occurred in the godown in question during the incumbent of the Petitioner. However, the charges are not that it was the Petitioner who was responsible for the alleged shortage. Both the charges were in respect of shortage detected during the period in question in which the Petitioner was working as Assistant Manager incharge at the godown in question. It may be argued that since it was the Petitioner who was in-charge of the godown in question, the loss of the articles necessarily attributable to him only. This aspect of the matter will have to be considered on the basis of the evidence on record. The Enquiry Officer in his report after reflecting the statements made by the witnesses came to the abrupt conclusion that the Petitioner was liable for the shortage of the commodities as mentioned in the enquiry report. The finding recorded by the Enquiry Officer holding the Petitioner guilty of the charges is quoted below :

"Taking all the statements, documentary as well as oral, adduced before me into consideration, I am of opinion that the Charged officer caused shortage of stock valued at Rs. 3,65,650.67 of STATEFED Jorhat Main Godown during the, years 1989-90 and 1990-91 which was working as in charge of the said godown and thus Shri Dewan misappropriated the aforesaid Stock thereby causing a loss to the Federation, hence the charges brought against the Charged Officer was sustained."

14. Since no affidavit-in-opposition has been filed on behalf of the Respondents, I have gone through the proceeding File as produced by the learned counsel for the Respondents. As against the analysis of evidence made by the Enquiry Officer in the enquiry report more particularly in respect of the statements made by SW 1 Md. Omar Ali to the effect that he found that the Petitioner misappropriated the stock of different items during 1989-1990 and 1990-1991 valued at Rs. 41,631.20 and Rs. 3,27,120.45, the actual statements made by said Shri Ali available in the proceeding File does not reveal such a statement on his part. What he stated during the enquiry was that a report was prepared regarding the shortage in the godown and that a similar report was also prepared by the Petitioner. Similarly the SW 2 and SW 3 also did not make any allegation against the Petitioner in their depositions and their only statements in the enquiry was that there were shortage in the godown during the period 1989-1990 and 1990-1991. However, as against such statements the Enquiry Officer in his report while analysis the statements of SW 2 and SW 3 held that the said two witnesses by their depositions made the Petitioner liable and responsible for shortage and dis-appearance of stock in the godown. It is really surprising as to wherefrom the Enquiry Officer could gather such statements. On

the face of it on perusal of the statements given by the said two witnesses do not reveal any such statements as the Enquiry Officer has stated in his enquiry report to have been made by the said two witnesses attributing guilt to the Petitioner. Same is the case in respect of the statements made by SW 6. I have perused the statements made by the said witness. Apart from his statements that there was shortage in the godown, he has not attributed any guilt to the Petitioner. . However, the Enquiry Officer like in the case of SW 1 and SW 2, has stated in the enquiry report that the SW 6 also during his course of deposition made the Petitioner liable for the shortage. On the face of it such falsification of statements made by the witnesses is illegal and unfortunate.

15. As discussed above none of the witnesses has attributed any guilt and/or responsibility on the part of the Petitioner. Their only statements during the course of the enquiry were that there was shortage in the godown during the period 1989-1990 and 1990-1991. The charges are also not to the effect that it was the Petitioner who was responsible for such shortage in the godown.

16. The Petitioner all throughout the proceedings maintained that he was not responsible for such shortage in the godown. In his elaborate written statement of defence he has attributed several factors towards the shortage in the godown such as dilapidated condition of the godown, bad quality of the dietary articles some of which were sold out by the authority and were not taken into account while levelling the charges against him and as to how he himself had prepared the statements showing the shortage in the godown mentioning the factors therein. It was his further case that for a period during his incumbency in 1989-1990 and 1990-1991, he was away from his office and the go-down for the purpose of undergoing a training and during that period somebody else was, the in-charge of the godown and if any incident happened during that time he could not be made responsible for the same. The stand taken by the Petitioner in his written statement of defence was reiterated by him while examining himself in the enquiry. Surprisingly, the Enquiry Officer has not discussed anything in the enquiry report regarding the stand taken by the Petitioner both in the written statements of defence and in the statements made by him during the enquiry.

17. The Enquiry Officer after pointing out the alleged statements made by the witnesses abruptly came to the conclusion in paragraph 8 of the enquiry report that the Petitioner is liable for the shortage of the commodities mentioned in the enquiry report without, however, discussing the evidence on record. To arrive at such a finding the Enquiry Officer has not even obliquely referred to the written statements of defence submitted by the Petitioner and the defence statements adduced by him during the enquiry. Although the Enquiry Officer consciously referred to the statements made by the Petitioner during enquiry, nothing has been discussed as to why those statements are not admissible. The perusal of the proceeding file revealed that the statements made by the Petitioner went unrefuted and nothing could be established against the Petitioner during his cross-examination made by the Presenting Officer on behalf of the disciplinary

authority. Similarly the three documents exhibited on behalf of the disciplinary authority do not even obliquely suggest that it was the Petitioner who was responsible for the shortage.

18. Above being the factual position of the enquiry, I have no hesitation to hold that it is a case of no evidence/insufficiency of evidence and the findings recorded by the Enquiry Officer are perverse. Neither in the charges and the documents exhibited during the enquiry nor in the statements of the witnesses, any guilt was attributed against the Petitioner to the effect that it was he who alone was responsible for the shortage in the godown. Only allegation against the Petitioner was that there was shortage in the godown for the period 1989-1990, 1990-91 during which period he was the Assistant. Manager in-charge of the go down in question at Jorhat, Long four years had passed, when the Petitioner was placed under suspension and the proceeding was drawn against him, records do not reveal as to what transpired during the period of four years.

19. Sufficiency of evidence necessarily postulates existence of some evidence linking the charged officer with the mis-conduct against him. Evidence, however, voluminous it may be which is neither relevant in a broad sense nor establishes any nexus between the alleged misconduct and the charged officer, is no evidence in law. The mere fact that the Enquiry Officer has noted in his report and as extracted above that "I am of the opinion that the charged officer caused shortage of stock valued at Rs. 3,65,650.67" would not in principles satisfy the rule of sufficiency of evidence. Refer Sher Bahadur Vs. Union of India (UOI) and Others,

20. Another aspect of the matter is that the charges levelled against the Petitioner was not that it was the Petitioner who had caused the alleged loss and was responsible for the shortage in the godown for the period in question. As pointed out above both the charges were in respect of shortage in the godown in question during the incumbency of the Petitioner as Assistant Manager in charge. No where in the charges it was alleged that it was the Petitioner who was responsible for such loss and shortage, however, the Enquiry Officer while abruptly coming to the conclusion that the Petitioner is liable for the shortage held, that it was the Petitioner who had caused the shortage of stock valued at Rs. 3,65,650.67. There is no evidence on record to establish that it was the Petitioner who had caused the shortage and such a finding is beyond the charges. This being the position, the findings recorded by the Enquiry Officer are utterly perverse and are based on no evidence at all.

21. In view of the above, the impugned order dated 25.6.1999 imposing the penalty of removal from service against the Petitioner is liable to be set aside and quashed which I accordingly do.

22. This will now necessarily lead to the question as to how the period of absence of the Petitioner from service from 25.10.1991 to 25.6.1999 (period under suspension) and the period from 25.6.1999 to the date of reinstatement in

service shall be treated. Although the impugned order of removal passed against the Petitioner on 25.6.1999 has been set aside primarily on the ground of it being a case of no evidence/ insufficiency of evidence. One cannot lose sight of the fact that it was the Petitioner who was in-charge of the godown in question during the period in question and it was during his incumbency the shortage had occurred. Considering the nature of the charge levelled against the Petitioner and that although there was no allegation against the Petitioner that it was his conduct which led to the shortage, one cannot be oblivious of the fact that the Petitioner being in the supervisory capacity of the godown ought to have exercised due diligence and supervision, however, I am not called upon to deal with that aspect of the matter in absence of any charge to that effect. At the same time having regard to the peculiar facts and circumstances involved in the case and having regard to the principle of "no work no pay" I hold that the Petitioner will not be entitled to any back wages for the aforesaid two periods except the subsistence allowance he has been paid during the period under suspension, however, the period in question will be treated as on duty for all other purposes like seniority, pensionary benefits and notional fixation of pay etc.

23. Before parting with the case records I would like to make it clear that the quashing and setting aside of the impugned order of removal dated 25.9.1999 passed against the Petitioner will not preclude the Respondents from initiating the proceeding afresh on the same set of charge or on any other charge relating to the incident, if so advised.

The writ petition stands allowed to the extent indicated above. No order as to cost.