(2011) 08 GAU CK 0051

In the Gauhati High Court

Case No : Writ Petition (C)No. 5108 of 2003

Amulya Kumar Gogoi APPELLANT

Vs

Assam State Electricity Board & Ors. RESPONDENT

Date of Decision : 09-08-2011

Acts Referred:

Citation : (2012) 1 GLR 15 : (2011) 4 GLT 857

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

Bench : Single Bench

Advocate : For the Petitioner: Ms.P.Goswami & Ms.E.Ahmed, Advocate appeared for the Respondents: Mr.N.Goswami, SC, ASEB., Advocates appearing for Parties

Judgement

B.K. Sharma, J.

1. The petitioner is aggrieved by Annexure9 and 14 orders dated 11.10.2000 and 27.12.2002 respectively. By Annexure9 order, the petitioner was imposed with the penalty of stoppage of two increments with cumulative effect. The penalty so imposed was pursuant to a departmental proceeding initiated and completed as per the provisions of ASEB (General Service) Regulations, 1960. Being aggrieved by the order of penalty, when the petitioner preferred an appeal before the Departmental Appellate authority, the said authority by its Annexure14 order disposed of the same upholding the order of penalty. Being aggrieved, the petitioner invoked the writ jurisdiction of this Court assailing the legality and validity of the said two orders.

2. I have heard Ms. P. Goswami along with Ms. E. Ahmed, learned counsel for the petitioner as well as Mr. N. Goswami, learned Standing Counsel, ASEB. I have also perused the entire materials on recorrd and have given my anxious consideration to the same.

3. While the petitioner was serving as Upper Divisional Assisstant (UDA) at Mariani, EHV Grid Sub Station, ASEB, he was placed under suspension by Annexure3 order dated 13.10.1997. He was so suspended on the ground of

looting ASEB''s money to the tune of Rs. 1,67,411.84. The order of suspension was followed by Annexure4 charge sheet dated 4.2.1998 leveling the charges of "theft, fraud and dishonesty in connection with the business of the Board or its property."

4. Along with the charges sheet, statement of allegation on which the charges were based was also enclosed. For a ready reference the statement of allegation as incorporated in Annexure1 to the charge sheet is reproduced below:

"Statement of allegation against Sri Amulya Kr. Gogoi, UDA (u/s), 132 KV Garmur Grid Sub Station, ASEB, Jorhat. Sri Amulya Kr. Gogoi, UDA (u/s) of 132 KV Garmur Grid Sub Station, ASEB, Jorhat is found looted money meant for staff salary of Garmur Sub Station, which constitutes gross misconduct under ASEB''s General Service Regulations, 1960. Regulation 10 of the said regulations provides that every employee of the Board shall discharge the duties assigned to him with integrity, loyalty and promptitude, and carry out all lawful and reasonable order of his superior in respect of the work allotted to him. On the contrary, Sri. Gogoi, UDA (u/s), embezzled Board''s money to the tune of Rs. 1,67,411.84 on 1.10.97 after withdrawing the same from the United Bank of India, Jorhat Branch on the same day.

On 1.10.97 Sri Dulal Saikia, Resident Engineer, 132 KV Garmur Grid Sub Station, ASEB, Jorhat collected a cheque No. 339939 dated 1.10.97 in favour of United Bank of India, Mariani Branch from the Resident Engineer, TypeI EHV Grid Sub Station, ASEB, Mariani amounting to Rs. 1,67,747.84 (Rupees one lakh sixty seven thousand seven hundred forty seven and paise eight four) only against following bills:

1. D.B.No.129dtd.29.9.97 (Imprest) Rs. 700.00

2. DBB. No. 163 dtd. 29.9.97 (leave salary of Sri P. Goswami, SBO(S.G) Rs. 2,242.00

3. D.B. No. 164 dtd. 29.9.97 (Salary of security guards

For the month of Sept'' 97) Rs. 29,394.34 4 D.B. No. 165dtd.29.9.97 (payment of part time sweeper for the month of Sept''97 Rs. 225.00

5. D.B.No.166 dtd. 29.9.97 (Salary of staff for the month of Sept''97) Rs. 1.34.850.50 Rs. 1,67,411.84

6. Bank commission Rs. 336.00 Rs. 1,67,747.84

Sri Saikia, Resident Engineer, deposited the above cheque at United Bank of India, Mariani Branch at around 11.00 A. M. and against the above cheque amount, United Bank of India, Mariani Branch had issued the following Demand Drafts encashable at U.B. I., Jorhat Branch.

1. D. D. No. 2143/97 dtd. 1.10.97 Rs. 49,000.00

2. D.D. No. 2144/97 dtd. 1.10.97 Rs. 49,000.00

3. D.D. No. 2145/97 dtd. 1.10.97 Rs. 49,000.00 4.D.D.No.2146/97 dtd. 1.10.9/ Rs.20.411.84 Rs. 1,67,411.84

Rs. 336.00 being the Bank commission was deducted by the United Bank of India, Mariani Branch.

After collection of the above mentioned Bank Drafts the U. B. 1., Mariani Branch Sri D. Saikia, Resident Engineer, reportedly went straight to the UBI, Jorhat Branch and submitted all the Bank Drafts amounting to Rs. 1,67,411.84 for encashment vide Bank Token No. Misc. 37 dtd. 1.10.97 at about 2. P. M. Thereafter, Sri Saikia went back to his office at Garmur Sub Station and handed over the said Bank Token to Sri Amulya Kr. Gogoi, Sub Divisional Head Asstt. for collecting the cash amount for the UBI, Jorhat Branch with the verbal instruction to take police escort, since the requisition for police escort was sent to the Jorhat Police Station earlier on that day, by the Resident Engineer vide his letter No. REG/G13/97/1415. Accordingly, Sri Gogoi, left the office at about 2.30 P. M. and proceeded towards the UBI, Jorhat Branch in the Vehicle No. AME 9346 (Petrol Jeep) along with Sri Bharat Kalita, Deptt. Security Habildar. The vehicle was driven by Sri Tarun Dutta. Sri Gogoi got down from the vehicle in front of the UBI, Jorhat Branch and instructed Sri Bharat Kalita, Habildar and Sri Tarun Dutta, Vehicle Driver to proceed to the Jorhat Police Station for Armed Police escort. Accordingly, Sri Kalita proceeded towards the Jorhat Police Station along with the vehicle and reported to police station for armed escort party at about 2.50/3.00 P. M. But due to non availablity of the police personnel in the police station Sri Kalita was not provided with the Armed escort party, and hence they had to wait for the same in the Police Station till at about 4.30 P.M.

In the meantime, it was found that Sri Gogoi was lying unconsciously within the premises of the Bank. After getting sense Sri Gogoi informed the Board''s officials, who were present there at that time on hearing the incident, amongst them Sri Kalita, Security Habildar and Sri Dutta, Vehicle Driver, also present, that somebody looted the money. On query, Sri. Gogoi said that at the time of drawal of money from the cash counter, another two persons were present with him in front of the cash counter. After drawal of money, while Sri Gogoi was sitting on the Bench just in from of the cash counter suddenly one of the persons had shacked one handkerchief right in front of his face and he felt unconscious and did not remember thereafter. Subsequently, a case was registered in the Jorhat Police Station vide No. 431/97 under Section 380 1PC, following which Sri Gogoi was arrested by the police. Also during the course of investigation, an amount to the tune of Rs. 30,000/ (Rupees thirty thousand) being the part of the stolen money had been recovered from the house of Sri Gogoi by the investigating officer of the Jorhat Police Station.

From the above, deliberation, it is apparent that Sri Amulya Kr. Gogoi, UDA (u/s), himself embezzled the Board''s money amounting to the tuneofRs. 1,67,411. 84 on 1.10.97 aftei withdrawing the same from the UBI, Jorhat Branch, which constitutes misconduct of ''Theft, fraud and dishonesty in connection with the business of the Board or its property in his part, under Regulation 10 (b) of the ASEB''s General Service Regulations, 1960 and hence, Sri Gogoi is charged under the said Regulations.

Sd/

Illegible 3.2.98

Chief Engineer (D) ASEB,

Paltanbazar, Guwahati1"

5. In response to the charges leveled against the petitioner asking him to show cause, he submitted Annexure5 reply dated 18.3.1998 denying the charges. His defence was that he had withdrawn the amount from the Bank and while was waiting for escort to come, one unknown person sitting by his side did a trick on him and he became unconscious. Thereafter the said unknown person committed mischief by taking the amount away from him. The petitioner categorically denied that it was a case offraud committed by him. The petitioner also expressed his surprise as to why the Resident Engineer, who had taken the token from the Bank for withdrawal of the amount did not withdraw the amount himself, but instead gave the same to the petitioner for withdrawal.

6. In due course, enquiry was conducted by appointing Enquiry officer in which apart from the three listed witnesses, another witness was examined. On conclusion of the enquiry, the Enquiry officer submitted his report dated 22.12.1999 concluding that the petitioner intentionally drew the cash amount of Rs.1,67,411.84 and embezzled the Board''s money by making an unbelievable story of looting money from his custody. Accordingly, it was held that the charges of theft, fraud and dishonesty leveled against the petitioner had been established.

7. On receipt of the enquiry report, the Disciplinary Authority by its letter dated 3.5.2000(Annexure7) asked the petitioner to submit representation against the proposed penalty of reduction to a lower post. Along with the letter, copy of the enquiry report was also furnished.

8. hi response to the said notice, the petitioner submitted his detailed representation dated 25.9.2000 (Annexure8) denying that the evidence and the findings recorded by the Enquiry officer had established the charges. Referring to the criminal case, that was lodged against the petitioner in respect of the incident and the alleged recovery of Rs. 30,000/ from his residence, it was pointed that such a plea made out by police was not correct and in fact an amount of Rs. 3000/ only was taken out from the house of the petitioner and that the said amount had nothing to do with the amount in question i.e. Rs. 1,67,411.84.

9. On receipt of the reply of the petitioner, the Disciplinary Authority passed the impugned Annexure9 order dated 11.10.2000 holding the petitioner guilty of the charges and imposing the penalty of stoppage of two increments with cumulative

effect. Being aggrieved, the petitioner preferred Annexure10 appeal dated 5.12.2000 and as noted above, the said appeal also disposed of by Annexure14 order dated 27.12.2002 upholding the impugned order of penalty. In the meantime, the police submitted final report under Section 173 CrPC in respect of the criminal case i.e. GR Case No. 939/1997. In absence of any evidence against the petitioner, the Investigating officer submitted the final report requesting the Court to exempt the petitioner from the liability of the criminal case. As regards seizure of the amount of Rs. 3000/from the residence of the petitioner, it was submitted that as the same could not be established to be the part of the amount in question, the said amount should also be released in favour of the petitioner.

10. Based on the said report, the learned Chief Judicial Magistrate, Jorhat acquitted the petitioner upon acceptance of the final report submitted by police with further direction to return the amount of Rs. 3000/ to the petitioner that was seized from his residence.

11. Ms. P. Goswami, learned counsel for the petitioner has submitted that having regard to the facts and circumstances, involved in the case, the authority could not have passed the impugned orders on the basis of surmises and conjecture. She submits that there being no evidence and no finding of embezzlement of the amount by the petitioner, he could not have been held guilty of the charges attributing negligence on his part, which was never the foundation of the charges.

12. Countering the above argument, Mr. N. Goswami, learned Standing Counsel, ASEB has submitted that there being no allegation of any procedural irregularity in conducting the enquiry, the Writ Court will be reluctant to sit on appeal over the findings recorded by the Enquiry officer, Disciplinary Authority and the Appellate Authority. He also submits that mere acquittal of the petitioner from criminal charge cannot lead to exoneration from the charges leveled in the decision of the Apex Court reported in (2011) 4 SCC 584: State Bank of Bikaner and Jaipur Vs. Nemi Chand Nalwaya, in which making distinction between criminal proceeding and departmental proceeding, the Apex Court pointed out the different standards of proof. In the said case, it was held that subsequent acquittal by criminal Court will not in any way render completed disciplinary proceedings invalid nor affect validity offinding of guilt or consequential punishment.

13. Mr. Goswami, learned Statnding Counsel, ASEB has also placed reliance on the decision of the Apex Court reported in (2005) 7 SCC 338 : V. Ramana Vs. A. P. SRTC & Ors., in which reiterating the scope of judicial review in the matter of departmental proceeding, the Apex Court observed that the Writ Court could not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision for that of the administrator. It was also observed that the scope of judicial review is limited to the deficiency in decision making process and not the decision.

14. While there is no quarrel with the proposition of law laid down by the Apex Court, it will have to be seen as to whether in the present case and in the facts and circumstances involved, the said principles are applicable. So far as the acquittal of the petitioner in the criminal case is concerned, the same was on the basis of the final report submitted by the police. Ms. Goswami, learned counsel for the petitioner during the course of her argument also did not try to put emphasis on the acquittal of the petitioner from the criminal charges. Her submission towards assailing the impugned orders are confined to the finding arrived at by the Enquiry officer as recorded in the enquiry report and the consequential impugned orders passed by the Departmental Authority and the Appellate Authority.

15. Having regard to the distinctive features of criminal and departmental proceeding, coupled with the fact that in the criminal case, the petitioner was acquitted in absence of any evidence, I am also not prompted to take the view that because of acquittal of the petitioner in the criminal case, he is also entitled to get exonerated from the charge in the departmental proceeding. Departmental proceeding will have to be judged independently of the criminal charge.

16. The charges leveled against the petitioner as noted above were that of theft, fraud and dishonesty in connection with the business of the Board or its property. The charges were explained in the form of statement of allegation (Annexure1) accompanying the charge memo. The said statement of allegation has been quoted above. If we go by the charge that was leveled against the petitioner, what was attributed to the petitioner was embezzled of Board''s money to the tune of Rs. 1,67,411.84. It will have to been seen as to whether the said charges have been established on departmental enquiry.

17. The Enquiry officer, in his report, while discussing the depositions made by four prosecution witnesses found the following:

(i) The alleged recovery of Rs. 30,000/out of embezzled amounts from the residence of the petitioner was not correct and that the amount of Rs. 3000/ which was seized by the police, in fact belonged to the petitioner and accordingly the said amount was later on returned to him.

(ii) When the petitioner after collecting the money from the Bank, was waiting for escort party, one unknown person did the mischief as a result of which he became unconscious, taking advantage of which the amount was taken away by the said person.

(iii) Although the petitioner after collecting the money from the Bank was waiting inside the Bank for arrival of the escort party for which two of the witnesses had gone to the police station, but there was delay in arrival of the escort party.

(iv) The witnesses examined by the disciplinary authority stated in their depositions that on previous occasion in case of delay in arrival of the escort party, they used to inform the office, but on the fateful day, they could not do so as they did not get the line.

18. hi view of the above, it is an admitted position mat late arrival of escort party could not be informed to the office. It is also evident that the witnesses who were entrusted to bring the escort party, although were informed that the same was not readily available, did not come back to the Bank or informed the petitioner enabling him to take appropriate measures.

19. In the cross examination, the petitioner had stated that on earlier occasions also while waiting for the escort party, he used to collect money from the cash counter of the Bank and used to return to the office along with the escort party.

20. The Enquiry officer discussing the aforesaid evidence in his report m? ,''e the following observation and finding:

"After going through all the recorded written statements, crossexamination records I have summarized the chronological events as below.

1. Sri Gogoi drew the cash from the cash counter alone at 3.30 P.M. and waited upto 3.50 P.M. (as per his own statement).

2. At 4.15 P.M. a bank employee saw him lying unconsciously in a bench in front of the cash counter and sprinkle some water on his face and Sri Gogoi gained consciousness (as per reported statement of R. E. Marianidtd. 22.12.97).

3. At about 4.30 P.M. Sri Bharat Kalita the Security Havildar and Sri Tarun Dutta got the infomation from the police station and rushed to the Bank.

4. On arrival they were informed by Sri Gogoi about the incident and loss of money and Sri Gogoi was taken to hospital for treatment etc.

5. Sri Gogoi was able to walk upto his bed in upstairs with the help of Sri T. Dutta and Sr. B. Kalita and was also able to recognize Sri Ajit Bhuyan the Journalist who was under going treatment at the same hospital.

6. Sri Gogoi was fully conscious to request Sri Dutta to make phone call to a person and also handed over some articles to Sri Dutta.

7. Sri Gogoi assured Sri Dutta in front of Sri Kalita on 2.10.97 in the police station that they need not have to worry about the incident because the money was insured and even if they are suspended they will get back their jobs later on.

From the above chronological events, I found that Sri Gogoi drew the money from the bank in absence of security personnel intentionally and thus violated the order of the superior and the rules of the Board.

Further, from the above deliberation, I believe that the story of making Sri Gogoi unconscious and looting of cash is a cookedup story of Sri Gogoi himself beacuse on the first day of the month normally there is always rush in any bank and it is quite unbelievable that there was no person at that counter area except Sri Gogoi and the so called miscreant. Further, had there been any incident Sri Gogoi could have resist the attempt of making him unconscious by raising alarms etc. Sri Gogoi in his story tried to impress as that the miscreant gave some strong medicine in the handkerchief to make him unconscious for only 25 minutes (i.e. from 3.50 to 4.15 P.M.) and was able to narrate the story. He was also able to walkup to his bed upstairs at the hospital and even recognized Sri Aj it Bhuiya the journalist within a span of about 1 (one) hour.

Therefore, I have come to the conclusion that Sri A. Gogoi intentionally drew the cash of Rs. 1,67,411.84 alone and embezzled the Board''s money by making such an unbelievable story of looting money from his custody. The charges of theft, fraud and dishonesty in connection with the business of the Board and its property is thus established."

21. If we go by the aforesaid findings recorded by the Enquiry officer, what will be seen is that after narrating evidences chronologically and admitting that the petititioner was found lying in an unconscious state, the Enquiry officer recorded the following finding:

"From the above chronological events, I found that Sri Gogoi drew the money from the bank in absence of security personnel intentionally and thus violated the order of the superior and rules of the Board."

22. The aforesaid finding is not related to any charge of drawing the amount in absence of security personnel intentionally and violating the order of the superiors and Rules of the Board. As noted above, the charge against the petitioner was embezzlement of Board''s money and not that of encashing the amount in absence of security personnel intentionally and/or violating the orders/ rules of the authority.

23. Needless to say that in a departmental proceeding, the delinquent official will have to be apprised of definite charges entitling him to defend the same. In the instant case, it was never the charge leveled against the petitioner that he was guilty of withdrawing the amount from the Bank in absence of security personnel and that he had violated the orders/rules of the authority. It will be pertinent to mention here that in fact the amount was to be drawn by one Sri Dulal Saikia, the Resident Engineer, who had deposited the cheque amounting to Rs. 1,67,747.84. Against the same cheque amount, the Demand Draft as indicated in the statement of allegation had been issued. The Resident Engineer submitted the Bank Draft to the Bank for encashment and he was given the Bank token No. Misc. 37 dated 1.10.1997 at about 2.00 P. M.There is no explanation as to why said Sri Saikia did not accept the amount and instead went back to his office and handed over the token to the petitioner for collecting cash.

24. The enquiry report further reveals that on the basis of aforesaid finding on a charge, which was never leveled against the petitioner he has been held guilty of the charge holding the version of the petitioner becoming unconscious as a cooked up one. However, at the same time, the finding of the Enquiry officer is that the petitioner was unconscious for about 25 minutes. While holding the

petitioner guilty of the charges, the Enquiry officer based his finding on surmises and conjectures. While doing so, he held the petitioner guilty of a different charge, which was never the charge leveled against the petitioner. Thus, what could not be established directly, the Enquiry officer established the same indirectly through another charge, which was never the foundation of the charges leveled against the petitioner.

25. The fact of the matter is that the petitioner after drawing the amount and while was waiting for the escort party was confronted with unknown person, who did the particular trick as a consequence of which the petitioner become unconscious, taking advantage of which, the amount was taken away from him. When the fact of the petitioner becoming unconscious is an admitted one including the fact that during the period of unconsciousness, the amount was taken away by a stranger, the petitioner on the basis of a charge stated to have been established, but which was never leveled against the petitioner could not have been held to be guilty of the charges. Going by the facts and circumstances and the entire evidence on record, it cannot be said that the charges leveled against the petitioner to have been established in the departmental enquiry. It is in this context, Ms. Goswami, learned counsel for the petitioner has emphasized that it is a case of no evidence and/or perverse fnding. I am inclined to accept the said submission.

26. None of the witnesses examined by the Departmental Authority in their depositions stated anything about the purported embezzlement of the amount by the petitioner. There might have been some procedural irregularity in making the transaction, but the same not being the charge against the petitioner, he could not have been held guilty of a undisclosed charge. As to what was the charge against the petitioner has been noted above. The respondents in their counter affidavit have enclosed the copy of the letter dated 3.10.1997 addressed to Sri Dulal Saikia, Resident Engineer, who had obtained the token from the Bank, but did not receive the amount. In terms of the said letter, the cash amount of Rs. 30,000/ being part of the stolen amount had been recovered. Unfortunately, inspite of the fact that the said letter did not depict the correct state of affairs and that Rs 30,000/ was never recovered from the petitioner as part of the embezzled amount, but it was only an amount of Rs. 3000/, which was seized from the petitioner, the respondents have chosen to enclose the copy of the said letter to attribute misconduct on the part of the petitioner. In the enquiry report itself, the matter has been clarified and consequently the contents of the said letter being nonexistent, the respondent ought not to have placed reliance on the said letter.

27. From the entire episode, the impression that gets generated in the mind of the Court is that somehow the ASEB authority wanted to attribute guilt on the petitioner unmindful of the fact that the amount was stolen by some unknown person after applying trick on the petitioner as a consequence of which he became unconscious, a fact clearly established in the departmental enquiry. The

entire episode must have had demoralizing effect on the petitioner.

28. For all the aforesaid reasons, I am inclined to accept the submission made by Ms. Goswami, learned counsel for the petitioner and consequently, the writ petition is allowed by setting aside the impugned orders dated 11.10.2000 and 27.12.2002 (Annexure9 and 14) respectively. The petitioner will be entitled to all consequential benefits.

29. The writ petition is allowed, leaving the parties to bear their own costs.

