
(2009) 09 GAU CK 0078
In the Gauhati High Court
Case No : Writ Petition (C) No. 7605 of 2005

Bibhav Behari Mukherjee

APPELLANT

Vs

Brahmaputra Valley Fertilizer Corporation Ltd. and Others

RESPONDENT

Date of Decision : 23-09-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Hindustan Fertilizer Corporation Limited Employees (Conduct, Discipline and Appeal)
Rules, 1981 — Rule 23, 26, 28, 37, 5

Citation : (2010) 4 GLR 181

Hon'ble Judges : Anima Hazarika, J

Bench : Single Bench

Advocate : R.P. Sarmah, for the Appellant; B. Chakraborty and U. Das, for the Respondent

Judgement

Anima Hazarika, J.—Challenge in this writ petition is made against the order dated 1/4.4.2005 whereby and whereupon the penalty of reduction of two stages lower in the time scale of pay for a period of three years six months w.e.f. 2nd April, 2005 with cumulative effect was imposed upon the petitioner by the Disciplinary Authority and the order dated 23.8.2005 passed by the Appellate Authority affirming the order of Disciplinary Authority.

2. Before examining the legal issues raised by the Learned Counsel for the parties, it will be convenient to notice the facts of the case in brief.

The petitioner is a qualified engineer having obtained the Bachelor of Engineering degree in Mechanical Engineering in the year 1973 and thereafter he obtained the diploma in Material Management from the Indian Institute of Material Management, Mumbai. The petitioner initially joined the service in the year 1975 as a Junior Executive Trainee (Mechanical) in the erstwhile Fertilizer Corporation of India Ltd., which was later on named as Hindustan Fertilizer Corporation Ltd., (HFCL).

The petitioner while working as Chief Materials Manager, Brahmaputra Valley

Fertilizer Corporation Ltd., (BVFCL), Namrup was served with a memorandum dated 11/16.8.2003 issued by the Chairman and Managing Director, the Disciplinary Authority whereby the respondents herein proposed to hold an enquiry under Rule 26 of the HFCL Employees (Conduct, Discipline and Appeal) Rules, 1981 ("CDA Rules"). The BVFCL, which, is an autonomous institution was separated from its erstwhile HFCL Ltd., after its constitution in the year 2002. However, the employees of BVFCL covered by CDA rules are governed by the HFCL Employees Rules, 1981. Accordingly as per aforesaid Rules, the substance of the imputations of misconduct along with the statement of articles of charges, a list of documents and a list of witnesses by whom the articles of charges are proposed to be sustained was served on the petitioner directing him to submit his written statement of defence within 15 days stating whether he desires to be heard in person. The imputations of misconduct against which the disciplinary proceeding was proposed to be held reads as follows:

- (i) That for the negligence of the petitioner the suppliers were able to evade payment of excise duties and sales taxes to the concerned authorities;
- (ii) That the factory inspection report submitted by the Committee, of which the petitioner was also a member, was false as the factories did not exist at the location as written in the report.

3. On receipt of the articles of charges where imputation of misconduct was leveled against the petitioner, he submitted his written statement of defence on 29.8.2003 denying the charges and praying to drop the charges as the same were not maintainable.

4. The Disciplinary Authority being not satisfied with the written statement of defence proceeded to hold the enquiry by appointing one Mr. MND Bordoloi, General Manager (Tech.) as the Enquiry Officer and one Mr. L. Medhi, senior Vigilance Officer as the Presenting Officer. The enquiry proceeding was held on 15.10.2003 whereby certain objections were raised in regard to certain documents which were not served upon the petitioner causing serious prejudice in effectively making his defence. The sitting in regard to charge No. 1 was held on 17.11.2003 whereby the delinquent denied the charge. The third sitting was held on 31.1.2004 wherein the deposition of the delinquent officer was recorded and thereafter some officers were examined and upon completion of the evidence, the Presenting Officer submitted his written presentation which would reveal that the petitioner cannot be held guilty of the charges leveled against him.

5. However, the Enquiry Officer submitted his report whereby he came to the conclusion that the charge No. 1 leveled against the petitioner has not been established. In regard to charge No. II, the Enquiry Officer has found the same partially proved. During the intervening period, the report of Enquiry Officer along with the views of Disciplinary Authority was conveyed to the Central Vigilance Commission, Government of India, who vide office memorandum dated 24.8.2004 has held that both the charges are fully proved against the delinquent

and accordingly advised imposition of a suitable major penalty on the petitioner. Thereafter, the Disciplinary Authority by taking a different view from that of the report of the Enquiry Officer has held that the delinquent has exhibited lack of absolute integrity and violated the Rules 5, 6(5), 6(6) and 6(9) of the CDA Rules thereby failed in his duty and, thus, held that the charges are duly proved and being the Disciplinary Authority in vigilance case recommended reduction of two stages from Rs. 20,700 to Rs. 19,900 in the time scale of pay of Rs. 17,500-400-22,300 for a period of three years six months with cumulative effect from 2nd April, 2005 and accordingly passed an order on 1/4.4.2005 as indicated above.

6. The imposition of penalty by Disciplinary Authority was taken on the file of the appellate authority on 12.4.2005 raising various grounds:

(i) With regard to the question of evading excise duties and sales tax by the parties as charge in the article of Charges, it was contended that those documents are directly submitted to the Finance Department for its reimbursement. Therefore, there was neither any scope left for verification of its authenticity by the petitioner. The reimbursement and sales tax were realised by the Finance Department as per their practice in vogue. The petitioner has no role at all to ensure the payment of these duties and tax to the Government agencies. The petitioner, therefore, cannot be held responsible for the evasion of tax by the supplier.

(ii) So far as the charges to visiting factories of the parties are concerned, it was contended that the parties are for long known to the HFCL, FCI and other public sector undertaking like NFL, MFL, etc., and have been submitting HDPE/Jute bags for a long time. These parties are empanelled supplier of their products and orders were placed by Marketing Division of erstwhile HFCL for their factories situated at Durgapur, Barauni and Namrup unit which was a part of erstwhile HFCL. Even there was approval of CMD dated 27.2.1996 for placing the orders to these parties was submitted during the course of enquiry. Since the parties credentials for supply of HDPE/Jute Bags were sufficiently proved to be existed and as such enlisted at the corporate level of HFCL with due approval of CMD, the sub-Committee never imagined that their visit or credentials or location would ever be questioned. It was not at all the terms of reference of the sub-Committee to authenticate the documents or location of the factory of the parties nor any documents in this regard was given to the sub-Committee Members but the only terms of reference was to see whether the factories of the parties are in running condition and are able to supply the required quantity of bags, if selected and placed for orders and the Committee did their job, as asked for, in regard to each of the factories of the parties separately which was observed during their visit. The Members of the sub-Committee were never asked for to authenticate the documents or location of the factory of the parties nor any documents.

(iii) The Vigilance Department of KPLO did sample collection from the same

location for monitoring, quality control from vigilance angle but they were never asked for authenticity of the documents relating to ownership, location, electricity bill, etc. Therefore, charges of any nature in regard to the authentication of the documents on location of the factories, etc., cannot be placed on the petitioner or to other Members of sub-committee. The assigned job of verifying the manufacture capability of the parties was taken up and submitted the report exclusively on that parameter and party wise.

The petitioner, therefore, by submitting the appeal prayed that on the ground stated in the appeal his case be considered and to exonerate him from the charges by not imposing the penalty as mentioned in the memorandum dated 1/4.4.2005.

7. On receipt of the appeal, the Senior Personal Officer of the Corporation issued the memorandum dated 23.8.2005 whereby the appeal was rejected but the ground of rejection was not furnished to the petitioner. The order of the appellate authority is cryptic and no reason has been assigned as required under the law. Hence the writ petition praying for quashing the impugned orders dated 1/4.4.2005 and 23.8.2005 mentioned hereinabove.

8. Heard Mr. B. Chakravorty, Learned Counsel appearing for the petitioner. Also heard Mr. M.Z. Ahmed, Learned Senior Counsel, assisted by Mr. R. Chetia, Advocate appearing for respondent Nos. 1, 2 and 3 and Mr. D. Das, learned Central Government counsel, appearing for respondent No. 4.

9. Learned Counsels representing the petitioner and respondent Nos. 1, 2 and 3 have submitted their respective written arguments. In the written arguments submitted by the Learned Counsel for the petitioner, the following points have been raised for consideration:

(i) The petitioner was seriously prejudiced as certain documents, which form part of lists of documents were not provided thereby causing handicapped in preparing his defence;

(ii) Disciplinary Authority as well as the Appellate Authority has committed wrong attributing the charge to the petitioner relating to the placing of order, receiving the materials and in releasing the payment which was done by the Corporate Office, New Delhi as the same was done by three different sections to which the petitioner has no control or access. The vendors were enlisted long before the tender process initiated in 1999-2000. All the vendors supplied HDPE bags in 1996-97 and 1998-99 having enlisted by the Calcutta Purchase and Liaison Office ("CPLO") whereby their names were recommended by the CPLO office and approved by the higher authority of the Corporate Office and, thus, the petitioner cannot be attributed with the charge being one of the member of Tender Committee;

(iii) The evidence on record, more particularly, the depositions of the petitioner's witnesses whereby they clearly deposed that they did not notice any deficiency in

the bills submitted by the tenderers including the original excise duty invoice and that the payments were made after the bills were authorized by the Corporate Office, New Delhi. But the Disciplinary Authority as well as the appellate authority have misread the depositions in attributing the imputations of misconduct against the petitioner;

(iv) The Presenting Officer in his written brief has categorically stated that the charged officer was not aware whether the parties submitted the relevant documents or not and it was the duty of the anti-evasion unit of the Excise department to ensure payment of excise duties. The Presenting Officer has also stated that the parties submitted excise and tax papers as revealed from defence witnesses and all the bills submitted to the Finance Department were accompanied with the documents as stated in the NIT. The Presenting Officer has further disclosed that the vendors M/s. Akhilesh Polymer and M/s. Krishna Synthetic Fibre were selected through press advertisement with the approval of the Chairman-cum-Managing Director and accordingly, they supplied materials in the year 1996 as ordered by the then. Chief Marketing Manager, Corporate Office and, therefore, would urge that on the clear findings and submission of the Presenting Officer, the petitioner could not have been held guilty of the charges and as such, he could not have been punished;

(v) The vendors were placed orders for supply of materials by none other than the Chairman-cum-Managing Director on various occasions reference of which have been made in the writ petition, but the same have not been controverted by the respondents in their pleadings and as such, the imputation of misconduct is misconceived and requires interference in exercise of power under Article 226 of the Constitution of India;

(vi) The Disciplinary Authority and the appellate authority cannot be allowed to approbate and reprobate in a disciplinary proceeding relating to sales tax registration certificate No. JK/5896 A of M/s. Krishna Synthetic Fibre which was relied as Ext. E-3 to prove false existence of the factory whereas the same Sales Tax Registration Certificate with same number was relied on to say that the second of the said Unit of the said vendors was started on 12.9.2000 which is a serious lapse on the part of the Disciplinary Authority and on this ground alone the entire disciplinary proceeding is vitiated for non-application of mind and the petitioner cannot be held guilty in the facts and circumstances of the case.

(vii) The allegations in regard to charge No. 11 was negated by the Vigilance Report dated 10.8.2001 which is a factory visit report dated 30.3.2000 by a different Committee member who had found the existence of the factories there and also from the sample collection memos from various factories who stated that the factories do exist thereby negated the allegations that the petitioner as a member of the Tender Committee submitted false report and on this ground, the second charge falls and interference is required in the instant case.

(viii) The documents in the disciplinary proceeding in order to substantiate the

charges have been authenticated by the Notary and there cannot be caste a doubt over the documents and the authentication by a notary public is a solemn act and on such documents the petitioner cannot be held guilty since a member of the Tender Committee cannot sit over the above documents and, therefore, the Disciplinary Authority and Appellate Authority have committed a wrong in imposing the punishment; (ix) Some Members of the Tender Committee were allowed to go scot free or been imposed punishment of censure only. For instance, in case of Mr. U.P. Choudhury, a member of the Tender Committee has been imposed punishment of Censure for 6(six) months and, thus, he would be eligible for promotion in due time. Another member of the Tender Committee Mr. M. K. Karmakar, Incharge, CPLO, who was responsible for the visits to the locations of factory was imposed with punishment of recovery of 10% from his gratuity. Mr. N. Roy Choudhury, Mr. B.N. Dewan and Mr. D. Basu, etc., were allowed to retire without any action taken against them and the petitioner has been singled out, which is discriminatory and cannot be sustainable under the law.

(x) The evidence on record would show that, the Disciplinary Authority was influenced by the office memorandum dated 24.8.2004 whereby Central Vigilance Commission, Government of India has held that both the charges were fully proved and advised for imposition of a suitable major penalty on the petitioner and on the basis of such advise, the Disciplinary Authority was determined to impose the punishment which lacks application of mind and bias on the part of the Disciplinary Authority which is not sustainable under the law.

(xi) The order of the appellate authority affirming the order of the Disciplinary Authority is cryptic and no reasons have been assigned as required under the law and as such, the orders impugned deserve to be interfered with in the facts and circumstances of the case.

10. In support of his submission, the Learned Counsel appearing for the petitioner has placed reliance on the following decisions:

- (1) Kuldeep Singh Vs. The Commissioner of Police and Others,
- (2) Babulal Das v. State of Assam and Ors. (2004) 2 GLT 259.
- (3) Smt. Kamla Rani and Others Vs. Texmaco Ltd.,
- (4) Bongaigaon Refinery and P.C. Ltd. and Others Vs. Girish Chandra Sarmah,

11. In the written argument submitted on behalf of respondent Nos. 1, 2 and 3 supported the action of the Disciplinary Authority as well as the appellate authority. It has been contended, inter alia, therein in reference to the article of charges, imputation of misconduct, the enquiry report and the findings of the Disciplinary Authority imposing the punishment and affirmed by the appellate authority, which according to the respondents do not require to be interfered with on the following grounds:

(i) The charges for which the punishment was imposed on the delinquent was that while functioning as Materials Manager/Chief Materials Manager during the year 1997 to 2002 did not take necessary action nor brought to the notice of the concerned authorities about deficiencies in the bills/invoices received from HDPE/Jute bags suppliers, viz., M/s. Krishna Synthetic Fibre, M/s. Akhilesh Polymers, M/s. Ajay Plastics and M/s. Rourkela Polymers where cost of bags, sales tax and excise duties were not segregated which resulted in the evasion of payment of excise duties and sales tax to the concerned Government authorities.

(ii) The inspection report submitted by the Tender Committee of which the delinquent was a member for inspection of factories of the above HDPE/Jute bags supplier against tender No. CPLO/HDPE/98-99/1 in order to ensure physical existence of these factories and their manufacturing abilities was misleading, false and fabricated, inasmuch as, the factories inspected did not exist at all at the given addresses, nor the delinquent had ever visited the factories at the given addresses and thereby failed to maintain absolute integrity, contravening the provisions of Rule 5, 6(5), 6(6) and 6(9) of CDA Rules, 1981.

(iii) The report of the Enquiry Officer to the effect that charges framed against the petitioner viz., Charge No. I was not established and Charge No. II was partly established was not binding upon the Disciplinary Authority. The Disciplinary Authority after going through the materials on record came to an independent finding holding that the charges against the petitioner stood proved.

(iv) The appeal against the imposition of penalty filed by the petitioner was considered at length by the appellate authority including the order of punishment by the Disciplinary Authority and came to a finding that the petitioner had exhibited lack of integrity, has neglected in performance of his duty as per the Rules and the charge regarding inspection report which mislead the management has been proved and accordingly, did not interfere with the punishment imposed by the Disciplinary Authority and, therefore, would urge that the review in the matter of disciplinary proceeding wherein the Disciplinary Authority has imposed punishment and affirmed by the appellate authority do not require to be interfered with in exercise of power under Article 226 of the Constitution of India.

12. In support of their contentions, the respondent Nos. 1, 2 and 3 have relied on two decisions of the Apex Court viz.:

(a) B.C. Chaturvedi Vs. Union of India and others,

(b) State of Gujarat Vs. Anand Acharya @ Bharat Kumar Sadhu,

13. Before dealing with the respective written arguments submitted on behalf of the parties, it would be appropriate to have a glimpse of the relevant provisions of CDA Rules, 1981 (as amended) which rule is made applicable to the employees of Brahmaputra Valley Corporation Limited.

Rule 5 deals with liability to abide by the rules.

Rule 6 provides for misconduct.

Rule 6(5) deals with "Acting in a manner prejudicial to the interest of the Corporation".

Rule 6(6) provides for "Willful insubordination or disobedience, whether or not in combination with others, of any lawful and reasonable order of his superior".

Rule 6(9) provides for "Neglect of work or negligence in the performance of duty including malingering or slowing down of work".

Rule 19 deals with Appointing Authority.

Rule 20 provides for suspension.

Rule 23 provides for penalties.

Rule 23(f) provides for major penalties (dismissal).

Rule 24 provides for Disciplinary Authority.

Rule 26 provides for imposition of major penalties.

Rule 27 provides for the record of the enquiry.

Rule 28 empowers the Disciplinary Authority to consider the record of the enquiry, record its conclusions on each charge and pass appropriate orders.

Rule 33 provides for appeal against the imposition of penalties specified in Rule 23.

Rule 37 deals with the consideration of appeal.

14. The disciplinary proceeding was initiated against the petitioner on two counts. The Enquiry Officer while submitting its report in regard to article of charge No. I, which relates to evasion of payment of excise duty and sales tax to the concerned Government authorities has found that the charge is not established. In regard to article of charge No. II, the Enquiry Officer has found the same to be partially established against the petitioner.

15. The Disciplinary Authority disagreed with the findings of the Enquiry Officer on both the article of charges and found the charges stood fully proved. In this regard, it would be relevant to quote Rule 28 which reads as follows:

28. The Disciplinary Authority shall consider the record of the enquiry, record its conclusions on each charge and pass appropriate orders.

16. Admittedly, the Disciplinary Authority differed from the report of the Enquiry Officer and came to the conclusion that the charges stood proved. The findings of the Enquiry Officer was favourable to the charged employee. When the Disciplinary Authority differs with the view of the Enquiry Officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and unreasonable that

where the Charged Officer succeed before the Enquiry Officer, he is deprived of representing to the Disciplinary Authority, while the authority differing with the findings of Enquiry Officer, recorded a finding of guilt, imposes punishment on the Officer. In such a situation, in the considered opinion of the court the charged employee must have been given an opportunity of representating his case before the Disciplinary Authority before final findings on the charges are recorded and punishment imposed. Same is found absent in the instant case, thereby violating the principles of natural justice. On this ground alone the impugned order of penalty imposed by the Disciplinary Authority dated 14.4.2005 deserves to be interfered with which accordingly this Court would do. This principles of law finds support from three decisions of Apex court viz.,-

- (1) Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.,
- (2) Punjab National Bank and Others Vs. Sh. Kunj Behari Misra,
- (3) State Bank of India and Others Vs. K.P. Narayanan Kutty,

17. Now, another question is left for consideration relating to appeal filed by the petitioner under the Statute, Rule 37. of the Rules 1981 reads as follows:

37. Consideration of appeals. - The appellate authority shall consider whether the findings are justified and whether the penalty imposed is excessive, adequate or inadequate, and pass orders within two months of the date of appeal. Representations and petitions will also be similarly reviewed as to the fairness of the decision already taken.

18. In order to answer the question, it would be appropriate to quote the order passed by the appellate authority on 23.8.2005.

Memorandum:

With reference to his appeal dated 14.6.2005 addressed to the Board of Directors for exoneration him from penalty imposed vide letter No. BVFCL/Pers/DP/121 dated 1/4.4.2005 "Sri B.B. Mukherjee, Chief Materials Manager is hereby informed that his appeal was examined at the level of appellate authority, hut it was not found possible to accede to his appeal.

19. A reading of Rule 37 of the CDA Rules, 1981 implies a mandate that Rule 37 must be complied with. The word "consider" in Rule 37 implies due application of mind. In the present case, there is no indication in the appellate order dated 23.8.2005 as to whether the appellate authority was satisfied that the procedure laid down in the Rules have been complied with; and if not whether such non-compliance has resulted in violation of any of the provisions of Rules which culminated in failure of justice. The appellate authority had also not given any findings on the crucial question as to whether the findings of the Disciplinary Authority were warranted by the evidence on record. The appellate authority had only applied its mind that the appeal was examined at the level of the appellate authority but it was not found possible to accede to his appeal. There being non-

compliance with the requirements of Rule 37 of the Rules 1981, the impugned order dated 23.8.2005 passed by the appellate authority is liable to be set aside on the ground of noncompliance of the requirement of Rule 37 of the Rules, 1981 by the appellate authority.

20. Another factor in the entire disciplinary proceeding is noticed by the court is that before the Disciplinary Authority differed with the report of the Enquiry Officer dated 1/4.4.2005 while imposing the punishment, the report of the Enquiry Officer was sent to the Central Vigilance Commission on 16.8.2004, whereby the Central Vigilance Commission vide office memorandum dated 24.8.2004 has conveyed the communication to the effect that both the charges were "fully proved" against the delinquent and the Commission had accordingly advised imposition of a suitable major penalty on Shri Mukherjee, the petitioner and thereafter, only the Disciplinary Authority differed from the findings of the Enquiry Officer and imposed penalty under Rule 23 of the Rules and that too without giving a reasonable opportunity to the petitioner wherefrom biasness of the Disciplinary Authority cannot be ruled out in the facts and circumstances of the case.

21. Therefore, this Court finds that the imposition of penalty on the petitioner under Rule 23 of the Rules 1981 by the Disciplinary Authority on 1/4.4.2005 cannot be sustained being violative of the principles of natural justice as laid down by the Apex court in the decisions referred to hereinabove, viz. Managing Director, ECIL, Hyderabad (supra), Punjab National Bank and Ors. (supra) and State Bank of India and Ors. (supra) and simultaneously the order of the appellate authority dated 23.8.2005 also cannot be sustained being violative of Rule 37 of the Rules, 1981 and accordingly, the orders dated 1/4.4.2005 and 23.8.2005 impugned in the writ petition are set aside and quashed.

22. in view of the decision arrived at by this Court on the averments made in the pleadings and evidence on record as indicated above, the decisions cited by the parties have not been referred to elaborately which otherwise would not effect merit of the case.

23. In the result, the writ petition is allowed by setting aside the impugned orders dated 1/4.4.2005 and 23.8.2005 passed by the Disciplinary Authority and the appellate authority respectively.

24. In view of quashing of the impugned orders as aforesaid, the benefit accrued to the petitioner be released within a period of 4(four) months from the date of receipt of a certified copy of this order.

25. The parties are left to bear their own costs.