
(2014) 10 CAL CK 0030
In the Calcutta High Court
Case No : Writ Petition No. 6235 (W) of 2010

Biswanath Samanta

APPELLANT

Vs

The West Bengal State Electricity Distribution Company Ltd.

RESPONDENT

Date of Decision : 29-10-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity Act, 2003 — Section 125(6), 126(5), 135(1)(b)

Citation : (2015) 2 WBLR 529

Hon'ble Judges : Tapabrata Chakraborty, J

Bench : Single Bench

Advocate : Arabinda Chatterjee and Apurba Ghanti, Advocate for the Appellant;
Sumit Panja and Sumit Roy, Advocate for the Respondent

Judgement

Tapabrata Chakraborty, J.—This application under Article 226 of the Constitution of India has been preferred by the petitioner challenging the impugned second show-cause notice dated 17.02.2010 issued by the respondent no. 3.

2. In the writ application it has been averred, inter alia, that the petitioner was employed under the respondent no. 1 since 1978 and in the midst of such service tenure, he was promoted to the post of Junior Manager (F) and (A), Midnapore Transmission Project, (Field Zone-II). To overcome a daily journey of about 30 kms for the purpose of attending office at Tamluk, the petitioner starting residing at a rented house in the town of Tamluk on and from the month of January, 2006 and his other family members were residing in the paternal house at village Kakdighi, Mecheda and in the said paternal house the petitioner, being an employee of the respondent no. 1, was provided a staff service connection for electricity marked as Service Connection No. D-577, the Consumer No. A-07198 and there was also a commercial service connection being No. C-200 and Consumer No. A-07199 in the name of the petitioner's father, namely, Satish Chandra Samanta, since deceased. On 23rd November, 2008 an inspection was conducted by the respondent no. 5 and a complaint

alleging pilferage was lodged against the petitioner on 23rd November, 2008 itself before the Officer-in-charge, Kolaghat Police Station and a criminal case being Kolaghat P.S. Case No. 258/2008 under section 135(1)(b) of the Electricity Act, 2003 (hereinafter referred to as the said Act of 2003) was initiated and the same is still pending. Upon detection of theft of electricity, a provisional assessment bill to the tune of Rs. 3,34,431/- was raised. The said provisional assessment was challenged by the petitioner through an application under Article 226 of the Constitution of India being W.P. No. 30036 (W) of 2008 and that subsequent thereto challenging the delay towards issuance of the final assessment order, the petitioner preferred a further application under Article 226 of the Constitution of India being W.P. No. 5230 (W) of 2009 and that by an order dated 24.03.2009 both the said writ applications were disposed of granting liberty to the petitioner to prefer an appeal.

3. In the midst thereof by a memorandum dated 31st December, 2008 the petitioner was placed under suspension with immediate effect and that subsequent thereto a disciplinary proceeding was initiated through issuance of a charge sheet dated 7th January, 2009 and in reply to the said charge sheet the petitioner contended inter alia that as the charges in the criminal proceeding are identical to the charges in the departmental proceeding, the latter is required to be stayed but such contention of the petitioner was not accepted by the authorities and a Memorandum dated 14th February, 2009 was issued by the respondent no. 3 appointing an Inquiry Officer and directing the petitioner to participate in the said inquiry and pursuant thereto, the petitioner duly participated in the said inquiry and cross-examined the witnesses deposing on behalf of the respondent no. 1 but the said petitioner, however, did not produce any witness to adduce evidence for and on his behalf.

4. Upon recording the evidence as tendered by the witnesses and upon considering the materials on record, the Inquiry Officer submitted a report dated 4th February, 2009 observing inter alia that the charges under regulations 38, 59, 61(b) and 61(e) of the West Bengal State Electricity Board Employees' Service Regulations (hereinafter referred to as the said Regulations) stand proved against the petitioner.

5. The petitioner duly replied to the said inquiry report on 21st December, 2009 and thereafter, the respondent no. 3 issued the second show-cause notice vide Memorandum dated 17th February, 2010.

6. Alleging, inter alia, that the authorities have illegally proceeded with the departmental proceeding in spite of being aware of the fact that on identical fact situation, a criminal proceeding was pending before the competent forum, the petitioner challenged the second show-cause notice through the instant writ application.

7. In the said writ application no interim order was passed and the respondents proceeded with the disciplinary proceedings and the final order of punishment

was issued by the respondent no. 3 vide Memorandum dated 20th May, 2010 imposing a punishment of dismissal from service.

8. The petitioner brought the said order of dismissal on record through an application for amendment being CAN No. 8151/2010 incorporating the grounds of challenge against the said order of dismissal and upon contested hearing, by an order dated 21st December 2010, the said amendment application was directed to form a part of the writ petition and the respondents were directed to file counter affidavit. Pursuant thereto, the parties exchanged their affidavits.

9. Mr. Arabinda Chatterjee, Learned Senior Advocate appearing for the petitioner, submits that the specific charge against the petitioner was pertaining to his domestic service connection and that the said charge was not proved to its hilt since none of the witnesses had deposed that the alleged theft was pertaining to the petitioner's service connection and that on the contrary the petitioner had been found guilty of an alleged theft pertaining to the commercial service connection which was neither the specific charge nor there is any finding to the effect that the alleged theft pertaining to the commercial service connection can be imposed upon the petitioner in the backdrop of the admitted fact that the said commercial service connection was existing in the name of the petitioner's father, since deceased.

10. He further submits that in terms of the provisions of Section 126(5) and Section 125(6) of the Electricity Act, 2003, the respondents were statutorily bound to proceed in terms of the category in respect of which the theft was alleged to have occasioned and that for the purpose of final assessment the respondents could not have proceeded on the basis of an alleged theft pertaining to the commercial service connection, existing in the name of the petitioner's father.

11. According to him, the petitioner by a letter dated 6th April, 2010 requested the respondent no. 3 not to take any action on the basis of the said second show-cause notice as the Hon"ble Court was in seisin of the writ application preferred challenging the impugned second show-cause notice. No formal order of rejection of the petitioner's representation dated 6th April, 2010 was communicated to the petitioner and instead a final order was passed dismissing him from service vide Memorandum dated 20th May, 2010.

12. Mr. Chatterjee contends that the perusal of the said order of dismissal from service would reveal that there has been no independent application of mind on the part of the said respondent no. 3 and the petitioner has been punished only on the ground that no specific reply to the second show-cause notice has been received from the petitioner.

13. He further submits that even in the absence of any reply to the second show-cause notice, the said respondent no. 3 ought to have considered the reply given by the petitioner to the Inquiry Report and ought to have arrived at independent finding that the petitioner was guilty of violation of regulations 38, 59, 61(b),

61(e).

14. In support of his submissions, Mr. Chatterjee places reliance upon the following judgments:-

a) Nani Gopal Majumder Vs. State of West Bengal, , in support of the proposition that the Enquiry Officer was required to look for corroboration by eye-witnesses and in the absence of any eye-witness, the version of the complainant does not stand proved.

b) Union of India (UOI) and Others Vs. Gyan Chand Chattar, , in support of the proposition that the charges should be specific, definite and giving details of the incident which formed the basis of the charges.

c) Ex-Constable Ramvir Singh Vs. Union of India (UOI) and Others, , in support of the proposition that the punishment is disproportionate to the gravity of misconduct.

d) Dipendra Narayan Munsi Vs. West Bengal State Electricity Board and Others, , as regards the scope and ambit of the judicial review.

e) Pradip Kumar Banerjee Vs. Airport Authority of India and Others, , in support of the proposition that a charge of corruption/bribe, in a disciplinary proceeding, needs to be proved beyond doubt and not on mere probabilities or hearsay evidence.

f) Sri Satyabrata Bhattacharjee Vs. State of West Bengal and Others, , in support of the proposition that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and with an open mind and in consonance with the principles of natural justice.

15. Mr. Panja learned senior advocate appears on behalf of the respondents and submits that challenging the order of final assessment the petitioner previously approached this Court through an application under Article 226 of the Constitution of India and the same was disposed of by an order dated 24th March, 2009, observing inter alia that the petitioner would be at liberty to prefer a statutory appeal against the order of final assessment.

16. According to him, the petitioner suppressed a material fact in the said writ application inasmuch as prior to 24th March, 2009, the petitioner paid the amount as arrived at upon final assessment.

17. He further submits that an inspection was conducted in the residential premises of the petitioner on 23rd November, 2008 and the said report clearly reveals that by direct hooking from the nearest L.T.O.H. line and bypassing the meters electricity was enjoyed by the petitioner in the entire house. In support of such contention, Mr. Panja draws the attention of this Court to the inspection report dated 23rd November, 2008, annexed at page 51 of the affidavit-in-opposition wherein it has been inter alia recorded as follows:

"Abnormality/note - by direct hooking through single core and double core PVC cable from the nearest L.T.O.H. line. At the first floor we found main switch where hooking cable incorporated and outgoing was extended to the other change-over switch and outgoing to the second change-over switch was connected to the house of Sri B. Samanta and his rental house as well as most of the equipments of the shop. Also there was commercial service connection bearing CM-200 in the name of Sri Satish Samanta, father of Sri Biswanath Samanta."

18. He adds that the devices utilized for hooking of a cable and for change-over of switch are not available to all and the petitioner, as an employee of WBSEDCL had access to such devices. He further submits that the petitioner and his family members have been consuming electricity by direct hooking from L.T.O.H. line through two core PVC cable which was tapped at the nearest P.C.C. pole of WBSEDCL and that as such, the nexus between the charges alleged and the action of the delinquent stands established. In support of such submission, he has also drawn the attention of this Court to the evidence adduced by the witnesses. He further submits that the petitioner was given ample opportunity to contest the disciplinary proceedings and the petitioner duly participated in the same till the stage of issuance of second show cause notice.

19. Replying to the argument of Mr. Chatterjee to the effect that the concerned electric meters were not inspected by the authorities, he submits that the question of inspection of the concerned meters did not occasion inasmuch as the allegation was that the petitioner had enjoyed electricity bypassing the meters existing in the premises.

20. According to him, the order of final assessment pertaining to the meters in the premises in question have attained finality inasmuch as the petitioner has made the requisite payment in terms of the final assessment order. Having not preferred any appeal against the order of final assessment, the petitioner has accepted the liability pertaining to the said proceeding.

21. He further draws the attention of this Court to the circular annexed at Page 89 of the writ application wherein it has been categorically incorporated as follows:

"It is reiterated that if an employee is found involved in any malpractice of extracting electricity from W.B.S.E.B. system by unlawful means, he will be liable to disciplinary proceeding in terms of the provision contained in W.B.S.E.B. Employees' Service Regulations, besides being prosecuted on charges of theft of energy under the recently amended provisions of I.E. Act, 1910."

22. According to him, the allegation to the effect that the respondents have violated the principles of natural justice, is absolutely unfounded inasmuch as the second show cause notice was issued on 17th February, 2010 asking the petitioner to reply to the said notice 6th March, 2010 and in reply thereto the petitioner prayed for an extension of time to file reply till 27th March, 2010 and

such prayer was also allowed and time was extended till 27th March, 2010 but on the said date also the petitioner did not file any reply and thereafter a further opportunity was given to him to submit his reply by issuing a reminder vide notice dated 1st April, 2010 but even thereafter no reply was filed. Such sequence reveals that the petitioner was granted ample opportunity to file a reply and having deliberately denied to file the reply, the petitioner cannot take a plea of violation of the principles of natural justice.

23. In support of his arguments, Mr. Panja relies upon the following judgments:

- a) N.K. Prasada Vs. Government of India and Others, , in support of the proposition that if a party after having proper notice chose not to appear, he at a later stage cannot be permitted to say that he had not been given a fair opportunity of hearing.
- b) High Court of Judicature at Bombay through its Registrar Vs. Udaysingh Nimbalkar and Others, as regards the scope and ambit of the power of judicial review.
- c) Nirmala J. Jhala Vs. State of Gujarat and Another, as regards the scope and ambit of the power of judicial review and as regards the application of the principles of natural justice in a disciplinary proceeding.
- d) Govt. of A.P. and Others Vs. Mohd. Narsullah Khan, , in support of the proposition that in the High Court in exercise of the power of the judicial review does not act as an appellate authority and it cannot reappreciate the evidence.
- e) Stanzen Toyotetsu India P. Ltd. Vs. Girish V. and Others, , in support of the proposition that there is no legal bar to conduct disciplinary proceeding and criminal trial simultaneously.

24. I have heard the submissions made by the learned advocates appearing for the respective parties and I have considered the materials on record.

25. A perusal of the charge-sheet would reveal that the charges are definite and that the same do not suffer from any vagueness or infirmity. From the language used in the charge-sheet, I do not find that the Disciplinary Authority has proceeded with a closed and biased mind as alleged by the petitioner.

27. Records reveal that the petitioner was granted ample opportunity to file his reply to the second show cause notice dated 17th February, 2010 and having not availed such opportunity consciously, the petitioner cannot assail the order of punishment alleging violation of the principles of natural justice. It is not a case that no copy of the Inquiry Report was handed over to the petitioner and that he did not avail any opportunity to reply to the said Inquiry Report. On the contrary the Inquiry Report was served upon him and he duly replied to the same. Upon consideration of the said reply, the second show cause notice was issued proposing imposition of a major penalty. In spite of the fact that the said notice was duly served upon the petitioner and the time towards filing the reply was

extended twice, the petitioner chose not to reply to the said second show cause notice.

27. The petitioner was thus given ample opportunity to contest the disciplinary proceedings and that there has been no violation of the principles of natural justice. If fairness is shown by the decision-makers to the man proceeded against, the form, the features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of its situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. It is now well settled that even in those cases where procedural requirements have not been complied with, the action cannot be held to be ipso facto illegal unless it is shown that non-observance of such procedural requirements, have prejudicially affected the petitioner. In the instant case there is no allegation of violation of any procedural requirement.

28. The reason why ordinarily a writ petition should not be entertained against a second show cause notice is that at that stage the writ petition may be held to be premature. A second show cause notice does not give rise to any cause of action since at that stage no legal right of the delinquent stands infringed. In the instant case the second show cause notice was issued on 17th February, 2010 and the petitioner's prayer for extension of time to file the reply was extended twice by the authorities through letters dated 9th March, 2010 and 1st April, 2010 but without filing such reply the petitioner approached this Court on 26th March, 2010. In the backdrop of such factual scenario the allegation of violation of the principles of natural justice is not sustainable in law.

29. The scope of a criminal case is different from that of a disciplinary proceeding. This is so because in a criminal case the charge has to be proved by the standard of proof beyond reasonable doubt while in departmental proceeding the standard of proof for proving the charge is preponderance of probabilities. In the instant case the petitioner was a senior official and it could not be denied by the petitioner that he was enjoying electricity through a staff service connection at his residence at Kakdihi. In reply to the Inquiry Report the defence of the petitioner was that the authorities ought not to have proceeded with the disciplinary proceeding when pertaining to the identical facts, the criminal proceeding was pending. Such contention of the petitioner is not acceptable since the nature and scope of a criminal proceeding is different from the nature and scope of a disciplinary proceeding inasmuch as the former pertains to a criminal offence whereas the latter pertains to a misconduct in course of service, including lack of integrity. Furthermore, in the instant case, in the absence of any complicated question of law or fact, unconditional and complete stay of disciplinary proceeding was uncalled for.

30. The factum of direct hooking from the L.T.O.H. line bypassing the existing meters stands corroborated on the basis of the evidence of the seven witnesses

and the petitioner has not been able to dislodge such proof. The petitioner has only sought to disassociate himself from the incident on a purported plea that he was not residing in the premises at Kakdihi. In the backdrop of such sequence, the bonafide loss of confidence of the employer stands affirmed on the rudiments of appropriate evidence and that accordingly the order of punishment does not deserve any interference, in exercise of the power of judicial review.

31. A perusal of the enquiry proceedings as brought on record reveals that the charges have been corroborated through the evidence adduced by the management witnesses and that the petitioner was given an opportunity to cross-examine the said witnesses and the proceedings have been conducted in strict consonance with the said Regulations. The detailed report of the Inquiring Authority reveals that the charges have been established through the proved documents and the evidence adduced by the witnesses.

32. The expression "sufficiency of evidence" postulates existence of some evidence which links the charged officer with the misconduct alleged against him and in the instant case the documents reveal that there was a clear nexus between the charges and the action of the petitioner. Furthermore, no procedural irregularity has been committed by the Inquiring Authority.

33. The judgment delivered in the case of Nani Gopal Majumder (Supra) is distinguishable on facts, inasmuch in the said matter during pendency of the proceedings before the learned tribunal the petitioner was acquitted of the offences, by the competent criminal forum, which had been the subject matter of the disciplinary proceedings.

34. The judgment delivered in the case of Union of India & Ors. (Supra) is also distinguishable on facts since in the said matter the enquiry officer took into consideration non-existing material and failed to consider relevant material.

35. There is no dispute as regards the proposition of law laid down in the judgment delivered in the case of Dipendra Narayan Munsi (Supra) but in the instant case the petitioner's allegations of illegality, irrationality and procedural impropriety do not stand established.

36. The judgment delivered in the case of Pradip Kumar Banerjee (Supra) is also distinguishable on facts inasmuch as in the said matter violation of the provisions of Prevention of Corruption Act was under consideration.

37. In spite of grant of repeated opportunities to reply to the second show cause notice, the petitioner consciously did not file any reply and as such the allegation of the violation of the principles of natural justice is untenable in law and accordingly the judgment delivered in the case of Satyabrata Bhattacharjee (Supra) has no manner of application in the instant case.

38. Mr. Chatterjee has also argued that the circular dated 6th February, 1988 could not have been made applicable in the instant case inasmuch as the same had been issued under the Act of 1910 which has been subsequently repealed by

the present Act of 2003 and that the misconduct as alleged against the petitioner is in respect of acts subsequent to the promulgation of the Act of 2003. Such argument of Mr. Chatterjee is not based on the pleadings and such stand has also not been taken by the petitioner in reply to the Inquiry Report and that the said Inquiry Report is also not under challenge in the instant writ application. Furthermore, even assuming that the said circular is not applicable, the employer's right to continue with the disciplinary proceeding against the petitioner does not stand impeded.

39. It is well-settled that any interference with the order of punishment is permissible in very rare cases. In the instant case the punishment is not so disproportionate to the established charges, that it would appear unconscionable and actuated with malice. The punishment should not be merely disproportionate but should be strikingly disproportionate to warrant interference by the High Court under Article 226 of the Constitution of India and it is only in an extreme case, where on the face of it there is perversity or irrationality, the punishment will be amenable for interference under the limited scope of judicial review. The judgment cited by the petitioner in the case of Ex-constable Ramvir Singh (Supra), accordingly, has no manner of application in the instant case.

40. Measure, magnitude and degree of misconduct needs to be taken into consideration for weighing the proportion. The petitioner's conduct was reproachable and his understanding of responsibility and adherence to discipline was questionable. Regard being had to the facts involved, the nature of post held by the petitioner and the conduct expected of him, I am of the opinion that the doctrine of proportionality is not invocable in the instant case.

41. For the reasons as discussed above, no interference is called for and the writ application is, accordingly, dismissed.

42. In the facts of the present case, there will be no order as to costs.

43. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.