

(2005) 02 GAU CK 0019
In the Gauhati High Court
Case No : WP (C) No. 3170 of 2002

Md. Rajab Uddin Ahmed

APPELLANT

Vs

Numaligarh Refinery Limited and Others

RESPONDENT

Date of Decision : 11-02-2005

Acts Referred:

Conduct, Discipline and Appeal Rules — Rule 19
Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 408

Citation : (2005) 2 GLR 418 : (2005) 1 GLT 376

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : A.S. Chaudhury, R. Majumdar and I. Hussain, for the Appellant; S.N. Sarma, for the Respondent

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—An order, dated 31.7.2001 passed by the Advisor (HR), Numaligarh Refinery Limited, dismissing the writ petitioner from service has been put to challenge in the present writ application.

2. The facts relevant to the present adjudication as revealed by the pleadings of the contesting parties and the other materials placed on record, may, in brief, be recited hereunder :

The petitioner, after due selection, was appointed as a Graduate Engineer Trainee (Mechanical) in the Numaligarh Refinery Limited (hereinafter referred to as (NRL) by an order dated 7.8.1998. Immediately, after his appointment, the petitioner was seconded (deputed) to render service in the I.B.P. Company Limited, a co-promoter of NRL. Thereafter, by an order dated 3.11.1998, the petitioner was appointed in the post of Officer (Retail) in the Company owned and Company operated Retail Outlet at Numaligarh. According to the employer of the petitioner, in the course of a visit and inspection by the Additional Divisional Manger of IBP Company, it was found that for the period April 1999 to August 1999, the

relevant records of the retail outlet showing the cash sales were not being maintained. Accordingly, the petitioner, by a letter-dated 5.9.1999, was informed to update the records. According to the petitioner's employer, the petitioner did not carry out the aforesaid instructions and when a second team of officers had gone to the retail outlet to carry out a reconciliation of the accounts, the non-availability of the records was again evident for which reason, the petitioner was asked to produce all the relevant records within a period of 24 hours. According to the petitioner's employer, the petitioner, on 23.11.1999, appeared before the inspecting team and admitted the commission of several irregularities and illegalities including misappropriation of money and the petitioner had further agreed to reimburse the company a sum of Rs. 40,000. The aforesaid admission of the petitioner was made in writing on 23.11.1999. Thereafter, the petitioner's employer by a communication dated 24.11.1999, informed the Advisor (HR) NRL of the commission of the illegalities and irregularities by the petitioner including the admission/confession of guilt made by his. The authority of the NRL was also requested to file a F.I.R. with the police in this regard. Thereafter, on the same day, i.e., 24.11.1999, F.I.R was filed before the Officer-in-Charge of the Golaghat Police Station and on the basis thereof, Golaghat Police Station Case No. 325/99 u/s 408 IPC was registered. Immediately, thereafter, i.e., on 26.11.99, a letter was issued by the Additional Divisional Manager, Gauhati Division, IBP Company Limited informing the petitioner that the reconciliation of the accounts of the retail outlet during the period 1.4.1999 to 22.11.1999 had revealed that the petitioner is guilty of gross negligence of duty with regard to maintenance of statutory records besides being guilty of misappropriation of funds and fabrication of dubious records. Allegations of carrying out different jobs in the retail outlet and incurring expenditure in connection therewith without taking prior approval, was also brought against the petitioner. By the communication dated 26.11.1999, the petitioner was further informed that during the period in question, i.e., 1.4.1999 to 22.11.1999, the discrepancy in the accounts was to the extent of Rs. 2,25,717.53 and that out of the said amount, the records could satisfactorily account for adjustment of a sum of Rs. 1,28,762.20. The difference between the two figures, i.e., Rs. 96,955.33 was claimed to be due from the petitioner. The petitioner was further informed that the reconciliation of accounts and the figures computed on that basis were provisional and that any further amount found to be recoverable might be added to the amount already quantified.

3. The petitioner submitted a reply denying the allegations recorded in the letter dated 26.11.1999. The authority not being satisfied issued a formal charge-sheet dated 21.12.1999 to the petitioner stating that the inspection of the accounts of the Retail Outlet at Numaligarh on 23.11.1999 for the period 1.4.1999 to 22.11.1999 had revealed an unexplained amount of Rs. 2,25,717.53 and that on adjustment of a sum of Rs. 1,28,762.20 for jobs carried out by the petitioner, a balance amount of Rs. 96,955.33 remained unexplained. The petitioner was alleged to have misappropriated the said amount. In the charge sheet issued to

the petitioner, it was also alleged that the petitioner had failed to maintain the daily sales register, density register, cash register, etc., and that he had also indulged in fabrication of dubious records to cover up the misappropriation committed by him. In particular, fabrication of the daily sales register and the daily cash sales book was mentioned in the charge sheet issued. Incurring of expenditures without prior approval and relinquishment of the control of the safe containing cash was also alleged against the petitioner. On the said facts, commissions of the following misconduct were alleged : -

"(a) Theft, fraud, forgery, embezzlement, misappropriation, dishonesty in connection with the business or property of the company or of property of another person within the premises of the company.

(b) Acting in a manner prejudicial to the interest of the company.

(c) Neglect of work or negligence in the performance of duty including malingering or slowing down of work.

(d) Breach of rules duly notified or violation of procedures laid down in connection with the company's business.

(e) Commissioning of any act subversive of discipline or good behaviour.

(f) Non-observance of any safety precautions or rules on the subject.

(g) Tampering with or unauthorised destruction of the official records of the company."

4. The petitioner was directed to submit his written explanation to the charges levelled within 10 days from the date of receipt of the charge-memo. By the charge-memo dated 21.12.1999, the petitioner was also put under suspension pending enquiry.

5. The petitioner submitted his reply to the charges levelled by the charge-memo dated 21.12.1999 denying all the charges and stating the detailed facts and circumstances in which the petitioner contended the allegations brought against him to be baseless. The trend of the defence taken in the written statement filed by the petitioner appears to be that the amount alleged to have been misappropriated as mentioned in the charge-memo dated 21.12.1999 was liable to be further adjusted under different heads of legitimate expenses incurred by the petitioner in connection with the discharge of his official duties. It was contended that on such adjustments being made in a proper manner, no amount will be due from the petitioner, as alleged in the show-cause notice. The allegations of non-maintenance of accounts, tampering with the official records, negligence, etc., were specifically denied by the petitioner.

6. Thereafter, the respondents not being satisfied with the explanation submitted by the petitioner, decided to hold an enquiry and appoint an enquiry officer to go into the charges levelled against the petitioner. The aforesaid appointment of the enquiry officer was made by an order-dated 20.4.2000. While the matter was so

situated, the IBP Company Limited issued a communication-dated 22.5.2000 to the petitioner amending the figures of unexplained cash; the amount liable to be adjusted and the amount due from the petitioner. As per the said communication dated 22.5.2000, the unexplained cash was quantified at Rs. 3, 37,821.06 and the amount liable to be adjusted was worked out at Rs. 1,69,683.65. The amount due from the petitioner after adjustment was calculated at Rs. 1,68,137.41. The petitioner, by the communication-dated 22.5.2000, was called upon to arrange for payment of the aforesaid amount of Rs. 1,68,137.41. No amendment of the charge-memo dated 21.12.1999 was, however, carried out by the respondents in the light of the figures contained in the communication-dated 22.5.2000. The petitioner, in response to the letter-dated 22.5.2000, submitted his reply dated 5.6.2000 denying that the amount of Rs. 1,68,137.41 was due from him.

7. Thereafter, the enquiry into the charges levelled against the petitioner proceeded and as it appears from the records of the said enquiry, as placed before the Court, 3 witnesses were examined by the respondents in support of the charges levelled. A large number of documents were adduced by the respondents and some documents were also brought on the record of the enquiry by the petitioner. The petitioner actively participated in the enquiry and cross-examined the witnesses examined by the respondents. Thereafter, the enquiry officer submitted his report dated 1.6.2001 holding all the charges except charge Nos. F and G, as extracted earlier, to be proved against the petitioner. The report of enquiry was furnished to the petitioner along with a show cause notice and on consideration of the reply submitted by the petitioner thereto, the Advisor (HR) NRL thought it proper to pass the impugned order dated 31.7.2001 dismissing the petitioner from service. Aggrieved, the present petition has been filed.

8. I have heard Shri A.S. Chaudhury, learned senior counsel for, the writ petitioner and Shri S.N. Sarma, learned senior counsel for the respondents.

9. Shri Chaudhury, learned senior counsel for the petitioner, while assailing the order dated 31.7.2001 dismissing the writ petitioner from service, at the outset, had placed before the Court the relevant documents showing that in the police case registered in respect of the same allegations against the writ petitioner, i.e., Golaghat PS Case No. 325/99, the investigating officer had submitted a final report exonerating the writ petitioner and the said final report has since been accepted by the competent Criminal Court. Learned counsel has, therefore, argued that the charges brought by the memo dated 21.12.1999 on the same facts would have no legs to stand. Arguing further, learned counsel for the petitioner has contended that the enquiry held against the writ petitioner on the basis of the charge-memo dated 21.12.1999 must be held by the Court to be vitiated in law and the consequential action taken on the basis of report of enquiry submitted must accordingly be interfered with by this Court. Shri Chaudhury has contended that the gravamen of the charges levelled against the

petitioner is misappropriation of money belonging to IBP Company Limited. Curiously, the amount of money alleged to have been misappropriated, had changed from time to time. In the charge memo dated 21.12.1999, the petitioner is alleged to have misappropriated an amount of Rs. 96,955.33. Thereafter, the amount had been enhanced to Rs. 1,68,137.41 without, however, formally amending the charge. The enquiry officer, in his report, found the petitioner guilty of misappropriation of an amount of Rs. 60,000.03. Shri Chaudhury, by placing before the Court, a letter dated 2.2.2002 (Annexure-20 to the reply affidavit of the petitioner) has pointed out that even subsequent to the dismissal of the petitioner, the figure had been changed to Rs. 31,927.43 by giving the petitioner the benefit of the amount liable to be adjusted against the permissible testing/handling loss. In such circumstances, Shri Chaudhury has contended that the petitioner cannot be held to be guilty of misappropriation, as the respondents themselves are not sure of the amount allegedly misappropriated by the petitioner. Pointing out the different stands taken by the respondents with regard to the figures, as noticed above, Shri Chaudhury has argued that the allegations levelled, really raise a question of settlement of accounts and merely because on such settlement some amount is found to be due, misappropriation will not logically follow. Misappropriation having not been established, the other charges brought against the petitioner, has to necessarily fall through, it is argued. Two of the charges having been found not to be proved by the enquiry officer himself, Shri Chaudhury has contended that the order of dismissal is legally infirm and needs to be appropriately interfered with by this Court.

10. Arguing further Shri Chaudhury has submitted that in any event the enquiry held against the petitioner is vitiated in law, inasmuch as, the petitioner had not been furnished along with the charge memo dated 21.12.1999 a list of documents and list of witnesses on the basis of which the charges were to be proved. The petitioner was not informed of his right to have the services of a defence assistant, which, according to the learned counsel, would have the effect of vitiating the enquiry. That apart, it is contended that there has been no consideration of the petitioner's case as submitted by him in the reply to the show-cause notice issued to the petitioner, either by the enquiry officer or by the disciplinary authority. Lastly, it is contended by Shri Chaudhury that under Schedule I, Part III of the Conduct, Discipline and Appeal Rules for Management Staff as in force in NRL the power of dismissal is vested in the Functional Director/Executive Director and not in the Advisor (HR). who had passed the impugned order of dismissal dated 31.7.2001.

11. The arguments advanced by Shri Chaudhury, learned senior counsel for the petitioner has been sought to be refuted by Shri S.N. Sarma, learned senior counsel for the respondents. Learned counsel for the respondents has argued that the failure to furnish to the petitioner the list of documents and the list of witnesses along with the charge memo and the absence of a defence assistant would not, ipso facto, vitiate the enquiry unless prejudice is shown to have been

caused. In the present case, the petitioner fully participated in the enquiry and, therefore, he cannot have any complaint in this regard. Shri Sarma by relying on an Office Order dated 25.11.1999 (Annexure-H to the affidavit of the respondents) has submitted that the power of the Executive Director as the disciplinary authority had been delegated to the Advisor (HR) by a decision of the Board as contemplated under Rule 19 of Part III of the Discipline and Appeal Rules, and, therefore, the Advisor (HR), NRL was competent and authorised to impose the punishment of dismissal on the writ petitioner.

12. Shri Sarma, learned counsel for the respondents has further argued that the amounts under different heads including the amount alleged to have been misappropriated as mentioned in the charge memo dated 21.12.1999 were tentative in nature as full reconciliation of the accounts were in progress. Such reconciliation led to alteration in the figures mentioned. Shri Sarma has contended that the aforesaid alterations had not caused any prejudice to the petitioner as the petitioner was continuously informed, at all relevant times, whenever the figures were altered by the respondents. The petitioner knew the charge against him and the case that he was required to meet and, therefore, merely because alterations in the figures as mentioned in the charge memo had taken place the same will not vitiate the enquiry. Shri Sarma has submitted that the charges against the petitioner were held to be proved after a full-fledged and detailed enquiry in course of which oral and documentary evidence were led and exchanged by the rival parties. Placing the records of the enquiry before the Court, in original, Shri Sarma has submitted that it is not for the writ Court to sit in judgment over the decision of the enquiry officer and the disciplinary authority and this Court will not convert itself into a Court of Appeal on findings of fact recorded by the enquiry officer and the disciplinary authority. The petitioner having been given full opportunity to contest the case against him, the limited scrutiny of this Court must come to an end and the order of dismissal must be upheld.

13. Having noticed the rival arguments advanced, the Court would like to proceed to analyse the same.

The power of the Writ Court to interfere with orders of punishment imposed by the disciplinary authority after holding a full-fledged enquiry into the charges levelled against a delinquent should not require any elaborate discussion in view of the virtually settled position of the law in this regard. Ordinarily, the Writ Court will not reappraise the evidence adduced in the enquiry held or substitute its views for those of the decision maker. The conclusion reached must normally be allowed to prevail unless the conclusion has been reached in flagrant violation of the basic principles of procedural fairness thereby effecting the right of the delinquent to a fair opportunity to defend himself. Another situation where interference would undoubtedly be called for is where the decision maker's conclusion is diametrically opposed to what is disclosed by the weight of the evidence on record. It must, however, be emphasized herein that the above

situations are by no means exhaustive. After all, the contours of the permissible area of interference under Article 226 of the Constitution is the outcome of judicial restraint and not judicial inability or incapacity. In the last resort, it is the satisfaction of the Court with regard to the conclusion reached that would be determinative of the decision as to whether interference should be made.

14. Having noticed the principles governing the exercise of the writ power and before adverting to the main contentious issues in the present case, it may be convenient for the Court to deal with certain subsidiary issues raised on behalf of the petitioner. The documents on record amply demonstrate that the power of the disciplinary authority, i.e., the Executive Director had indeed been delegated to the Advisor (HR) NRL by the Office Order dated 25.11.1999. In view of the clear delegation of powers, there can be little doubt that the Advisor (HR) was competent to impose the punishment in question. Though the Discipline and Appeal Rules in force in NRL require the Disciplinary Authority to communicate to the delinquent, along with the charge memo, a list of documents and the list of witnesses and the delinquent, in course of the enquiry, has the right to have the assistance of a defence assistant, departures from the aforesaid requirements would not automatically invalidate the enquiry unless prejudice is shown to have been caused to the delinquent in defending himself in the enquiry. In the present case, prejudice suffered by the petitioner on any of the above counts has not been satisfactorily explained to the Court. In such a situation, the above grounds urged in support of the challenge made cannot have the Court's approval.

15. The contentions advanced on behalf of the petitioner that as the police case registered against the petitioner had ended in a final report, the disciplinary proceeding must also necessarily fall through, cannot be accepted as dehors the criminal investigation that may be initiated in respect of a particular act or acts of a delinquent, the employer must always be understood to have the right to initiate a disciplinary proceeding against the delinquent employee in respect of the same act(s) and bring the proceeding to its logical conclusion.

16. This would bring the Court to a consideration of the main charge i.e. misappropriation brought against the petitioner which has been held to be proved both by the Enquiry Officer and the Disciplinary Authority. The charge of misappropriation levelled against the petitioner proceeds on the basis that verification of the accounts during the relevant period revealed certain unexplained amounts of cash shortage. The records also reveal the petitioner to be entitled to the benefit of adjustment of certain amounts either on account of expenditure incurred by him or on account of other reasons. After giving the petitioner the benefit of such adjustment, on the basis of bills and vouchers available, there still remained an unexplained amount which has been held by the enquiry officer and subsequently by the disciplinary authority, to be capable of explanation only by taking the allegation of misappropriation to be proved. In the elaborate recital of facts, contained hereinabove, it has been noticed that initially the amount alleged to have been misappropriated stood at Rs.

96,955.33. Thereafter, the figures of unexplained cash and the allowable benefit of adjustment went up considerably and the amount misappropriated also stood enhanced to Rs. 1,68,137.41. Though the aforesaid alterations in the figures were not formally incorporated by an amendment of the charges brought, if the petitioner was otherwise informed of the said alteration and he knew of the altered figures being the subject matter of the enquiry in progress, the aforesaid lapse on the part of the disciplinary authority cannot be understood to be fatal. In the present case, the petitioner was informed of the aforesaid alteration of the figures. But the above facts, by themselves, will not be determinative of the question raised for two significant reasons.

First of all, in the communication dated 22.5.2000 by which the petitioner was informed of the alteration in the figures of the different amounts, it is mentioned that the petitioner is entitled to the benefit adjustment of a sum of Rs. 1,09,195.20 on account of various expenses incurred by him as per bills/ vouchers available and acceptable. Taking into account other items of expenditures incurred by the petitioner in connection with telephone, fax, Xerox charges and the amount deposited by the petitioner amounting to Rs. 40,000/- the petitioner was held to be entitled to the benefit of adjustment to the extent of Rs. 1,69,683.05 against the total unexplained amount of Rs. 3,37,821.06. On the aforesaid basis, the amount due from the petitioner was worked out and altered to Rs. 1,68,137.41. The enquiry officer, in his report, found the amount due from the petitioner not at Rs. 1,68,137.41 but the same was worked out at Rs. 1,69,196.23 on the basis of Ext. 43 proved in the enquiry. Thereafter, the enquiry officer considered the claim of the petitioner for adjustment of Rs. 1,25,962.20 and held that the IBP Ltd. had agreed that the petitioner is entitled to the claim of adjustment of Rs. 1,09,195.20. Subtracting the aforesaid amount of Rs. 1,09,195.20 from the amount found due by the Enquiry Officer, i.e., Rs. 1,69,196.23 the amount of shortfall was worked out to be Rs. 60,001.03 by the Enquiry Officer. Not only a new amount has been found short/due, misappropriation of the same has been held to be a logical consequence merely because the said amount remained unaccounted after giving the petitioner the benefit of all allowable adjustments. There is an obvious error in the aforesaid computation made by the enquiry officer, which perhaps has escaped the attention of the disciplinary authority. The amount due from the petitioner, i.e., Rs. 1,68,137.41 or Rs. 1,69,196.23, as the case may be, was worked out after giving the petitioner the benefit of Rs. 1,09,195.20. There was therefore no scope for the Enquiry Officer to again give to the petitioner the benefit of the said figure of Rs. 1,09,195.20 as benefit of the same was already given. Viewed from the aforesaid perspective, the amount, i.e., Rs. 60,001.03 found to be due by the Enquiry Officer in his report is obviously incorrect; the amount should have been on the higher side. The enquiry report, therefore, displays a patent lack of application of mind, notwithstanding which, if the matter had rested at that, there could have been no occasion for the Court to interfere. But there is a subsequent event that had taken place, which is reflected in the letter dated

2.2.2002 of the IBP Company to the In-charge of the Numaligarh Police Out post (Annexure-20 to the petitioner's reply affidavit) wherein, after everything was over, the company had informed the police authority that the petitioner is entitled to a sum of Rs. 1,36,109.98 on account of permissible testing/handling loss. Obviously, the aforesaid entitlement of the petitioner was not considered either by the enquiry officer or by the disciplinary authority prior to his dismissal from service. If the petitioner is given the benefit of the said amount, which benefit the Court is of the view, must be given to the petitioner, the amount stands reduced according to the respondents themselves to Rs. 31,927.43. The above facts are sufficiently indicative of the fact that the unexplained cash, which the petitioner is alleged to have misappropriated, could really be a consequence of differences over settlement of accounts between the parties. Any settlement of accounts could leave room for disagreement and/or doubt. Misappropriation, on the other hand, would require a very high degree of proof even in a disciplinary proceeding. That in the present case the benefit of allowable adjustment was given to the petitioner on the basis of bills and vouchers as found acceptable by the employer and that there were certain claims of adjustment made by the petitioner which were not accepted by the employer, is a significant fact that cannot be overlooked alongwith the fact that had the said claims been allowed, the amount due would have stood wiped out. The sequence of events narrated above raises considerable doubt in the mind of the Court as to whether misappropriation had really taken place. There may have been a shortfall in cash and the petitioner may have failed to receive due recognition or approval of certain claims of adjustment made by him. But that would not be sufficient to hold that the allegation of misappropriation has been proved so as to invite the extreme penalty of dismissal from service. In such a situation, the Court is of the considered view that the weight of the materials on record would not reasonably permit the Court to hold that the charge of misappropriation has been brought home against the writ petitioner. The rest of the charges really being consequential to the charge of misappropriation must therefore, necessarily fall thorough. In this regard, however specific notice must be taken of charge "C", i.e., "neglect of work or neglect of performance of duties...", which have been held to be proved against the petitioner. No material has been disclosed as to how the petitioner has been negligent in the performance of duties. Consequently, this Court is of the view that the aforesaid charge must also fail.

17. Consequently and in view of the foregoing discussions, this writ petition has to be allowed. Accordingly, the impugned order of dismissal, dated 31.7.2001 is set aside and quashed. The petitioner be reinstated in service forthwith with such back wages as the disciplinary authority may compute after holding a separate proceeding in this regard, a direction that has been necessitated in the absence of any material on record to enable the Court to discern any acceptable principle for grant of back wages.