

(2004) 03 BOM CK 0010
In the Bombay High Court
Case No : Writ Petition No. 142 of 1998

Sanjay Bhondekar

APPELLANT

Vs

Chairman, Maharashtra Small Scale Industries Development
Corporation Limited and Another

RESPONDENT

Date of Decision : 25-03-2004

Acts Referred:

Employees Service of Maharashtra Small Scale Industries Development Corporation
Rules — Rule 28, 96

Citation : (2004) 4 BomCR 717 : (2005) 1 MhLj 171

Hon'ble Judges : J.N. Patel, J;B.R. Gavai, J

Bench : Division Bench

Advocate : Ramesh Darda, for the Appellant; D.C. Daga, for the Respondent

Judgement

J.N. Patel, J.—This petition is preferred seeking quashing and setting aside the impugned order of dismissal dated 28th May, 1997 passed by the respondent No. 2, with a direction to recover the amount of Rs. 17.37 lacs, from the petitioner and further as regards the findings recorded by the Enquiry Officer, holding that the part of Charge Nos. 5 and 7 of the Charge Sheet dated 17th January, 1995 are proved against the petitioner and also to quash and set aside the impugned appellate order dated 19th September, 1997 passed by the respondent No. 1, rejecting the appeal preferred by the petitioner against his order of dismissal.

2. The petitioner who has Degree in Bachelor of Engineering (Mechanical), from Shivaji University, Kolhapur applied to the respondents for being appointed on the post of Manager. The petitioner was interviewed on 6th October, 1990, pursuant to which he came to be appointed as Manager by letter dated 3rd January, 1991. In response to the letter of appointment the petitioner joined his duties as Manager in the Head Office of the Respondent Corporation at Bombay in the grade of Rs. 3000-100-3500-125-4500-Extn-125-5000. The petitioner was transferred vide transfer order dated 19th May, 1995 to Thane Office as Regional Manager and as a consequence of which the petitioner took charge of the said

post of Regional manager w.e.f. 10th June, 1993 at Thane.

3. The respondent is a Registered Corporation and is a creation of the State of Maharashtra. The basic aim and object of the respondent is to undertake necessary activities of developments of Small Scale Industries in State of Maharashtra, and for the said purpose the respondent Corporation has spread its network by opening Regional Office at Pune, Kolhapur, Thane, Nagpur, Akola, Nashik, Nanded and Aurangabad and has various branch offices at all District Level. The respondent Corporation in addition to promoting the development of Small Scale Industries Units in the State, also offers marketing assistance to the Small Scale industries Units, under the scheme all Small Scale Units can avail upto 80% of the advance against its order of supply of goods to the purchaser by submitting delivery challans or required documents to the Corporation, so as to extend the credit facility to the Small Scale Unit under their promotional scheme.

4. The services of employees of the respondent Corporation governed by the Employees Service Rules. As per Rule 28, age of retirement is the date on which the employee attains the age of 58 years, provided on completion of 30 years of service with the Corporation the employee has an option to retire.

5. The respondent Corporation held a performance review meeting on 15th and 16th July, 1993 at Head Office, Bombay and a policy decision was taken to have aggressive marketing in order to promote the Small Scale Industries. This was in the backdrop that though the respondent Corporation has noticed some change in the orientation and outlook of some officers, many officers are still continuing the same old ways, and therefore, in the changed circumstances it was felt necessary to change the approach which should be commercial and market oriented, keeping the consumer at centre point to provide him possible services, and in the minutes of the meeting the action plan for Achieving Target, Private Marketing, making the S.S.I. Registration as a pre-condition and other important decision were taken.

6. The subject matter relates to the conduct of the petitioner as regards the transaction cleared by him under this Policy of aggressive marketing. By letter dated 20th July, 1994 an order was passed by the Managing Director, that a disciplinary action has been contemplated against the petitioner, who was at the relevant time working as Regional Manager at Akola, and in exercise of the powers conferred under Rule 99 of the Employees Service Rules, he was placed under suspension with immediate effect. It was also communicated to him that during the suspension period his Headquarters will be at Akola and he shall not leave the headquarter without the prior permission of the Respondent Corporation. Thereafter, by letter dated 17th January, 1995 a memorandum came to be issued to the petitioner along with (1) Statement of Charges (2) Statement of Imputations in respect of the charges framed, (3) List of Documents and (4) List of Witnesses, and he was called upon to submit within 15 days from the receipt of this memorandum his written statement in defence, and also to state whether he deserves to be heard in person. He was also informed

that an enquiry will be held in respect of the charges, if the charges are not admitted by him, and therefore, he should specifically admit or deny each of the charges. He was also cautioned that, if he does not submit his written statement in time specified, and does not appear in person before the Enquiry Officer, or otherwise fails or refuse to cooperate for conducting, in the light of Rule 96 of the Employees Service Rules of the Corporation or the Order or Directives issued in pursuance of the said Rules, the Enquiry Authority may hold enquiry against him ex-parte and suitable punishment will be awarded to him as provide under EST-97. By another letter dated 7th April, 1997 he was reminded to file his reply. It appears that thereafter, an enquiry was conducted by one Prakash Ganpat Kapale, who submitted his report to the Disciplinary Authority, and a copy of which was furnished to the petitioner on 11th April, 1997. The petitioner made a representation to the Managing Director of the Corporation, impugning the findings of the Enquiry Officer and sought exoneration of Charge No. 5 and 7, which were proved partly, according to the findings recorded by the Enquiry Officer and Charge No. 4 which was not proved, but was based on the statement of imputation No. 5, and submitted that the Disciplinary Authority may kindly be pleased to give justice keeping the burden of proof and principle of natural justice in his mind. By order dated 28th May, 1997 the Disciplinary Authority in exercise of powers conferred under Clause 97(i)(f), passed an order of dismissal of petitioner from the date of receipt of the order. The petitioner was further informed that in exercise of powers conferred by Clause 97(ii) of the Employees Service Rules of the corporation all financial benefits which have accrued to the petitioner under suspension shall till the date of his dismissal shall be adjusted towards the recovery of financial loss over Rs. 17.37 lacs sustained by the corporation due to negligence of the petitioner, and therefore the petitioner will not be released arrears on account of revision of pay scales, D.A., H.R.A., C.L.A. If any, as also the differential amount of his suspension allowance for the suspension period and leave salary, gratuity, Provident Fund etc. On receipt of this order of dismissal the petitioner preferred an appeal to the Chairman, and the Board of Directors after considering the appeal of the petitioner, in its 267th Meeting held on 19th August, 1997 informed that after detailed deliberations, considering the facts of the case, the Board of Directors rejected his appeal as without merits. It was also observed that the appeal has been rejected in view of the fact that the petitioner has not provided any facts and grounds other than those already considered by the Authority, and ratified by the Management in the subject case. This was communicated to the petitioner on behalf of the Board of Directors, by the General Manager of the Corporation by his registered letter dated 19th September, 1997.

7. Mr. Ramesh Darda, the learned Counsel appearing for the petitioner contended that, the charges which were levelled against the petitioner for the purpose of enquiry does not constitute any misconduct in pursuance of Clause 96, and the entire proceeding stands vitiated. According to Mr. Darda, the charges levelled against the petitioner at Sr. Nos. 1 to 7, were held to be misconduct under Rule

96 (iii), (iv), (viii), (xi) and (xiv). It is submitted that the respondent have not particularised specifically as to which charge amounts to misconduct under the Rules, and in this circumstance it cannot be said that part of the Charge which is said to be proved against the petitioner from charge Nos. 5 to 7, and therefore, the impugned punishment of dismissal stands vitiated.

8. According to Mr. Darda, Service Rule 96, provides for various punishment to be imposed upon the employee for misconduct. Clause 98 of the Service Rules prescribes procedure for imposing punishment and in respect of the misconduct committed under sub-rule (iii) and (iv), only a minor punishment can be imposed on the employee as Censure, Fine or Stoppage of Increments with or without future effect, and in absence of the enquiry officer specifying as to what specific charge has been proved and whether it calls for minor or major penalties. The nature of charge Nos. 1 to 7, according to Mr. Darda would fall within the ambit of Rule 96(iii) and (iv), and therefore, the petitioner could not have been dismissed from services, but at the most could have been censured fined or increments could have been stopped.

9. Mr. Darda, the learned Counsel appearing for the petitioner submitted that in the case of petitioner, the Disciplinary Authority has deviated from the findings recorded by the Enquiry Officer, and has proceeded to pass an order of dismissal without issuing any show cause notice of its intention to the employee, it is submitted by Mr. Darda, that it is a well settled law that if the Disciplinary Authority wants to deviate from the view taken by the Enquiry Officer and wants to impose major penalty, he ought to have issued show cause notice before doing so, so as to give an opportunity to the petitioner and having failed to do so, the impugned order dated 28th May, 1997 passed by the respondent No. 2 is per se illegal and the action of confirmation of the said illegal order by the respondent No. 1, vide its communication dated 19th September, 1997 is also per se illegal and deserves to be quashed and set aside.

10. According to Mr. Darda, the Enquiry Officer in his report dated 7th April, 1997 has not recorded any finding which calls for imposing of major penalty, nor at any point of time the petitioner was made aware that the enquiry was to be conducted in the matter of the impugned dismissal order passed by the Disciplinary Authority holding that he is aggrieved by the finding of the Enquiry Officer as unwarranted, hence the same needs to be quashed and set aside.

11. Mr. Darda, the learned counsel has also pointed out to us that the conduct of the petitioner was in keeping with the policy decision taken by the respondent Corporation in regard to conferring assistance to the Small Scale Industries Unit, in the matter of supply to the Government. In such circumstances, there was no different procedure which was mandatorily to be adopted by the petitioner regarding offering financial assistance in Private Marketing and therefore, the petitioner cannot be held liable for any financial loss as caused to the Corporation for their own default, and therefore, insofar as the part of charge No. 5 and 7 is concerned, the findings recorded are unwarranted and contrary to the evidence

brought on record and deserves to be quashed and set aside. It is submitted that the respondent Corporation could not have suffered loss if it had taken proper steps to recover the amount from the defaulting party i.e. M/s Space Pac Machines Limited, Thane and also taken necessary action u/s 138 of the Negotiable Instruments Act for dishonour of cheques issued by the said Firm, and for that the petitioner cannot be blamed.

12. Mr. Darda, submitted that the respondent Corporation has already recovered substantial amount from the party and also from the petitioner, and therefore, the order of dismissal deserves to be quashed and set aside.

13. Mr. Darda, the learned Counsel appearing for the petitioner further submitted that, though the petitioner raised various grounds to challenge his dismissal from service, and mainly placed reliance on ground No. D and E, as specified in the petition, as it is indisputed that the petitioner was not given any opportunity by the Disciplinary Authority, and that the Disciplinary Authority had decided to deviate from the findings recorded by the Enquiry Officer and wanted to impose a punishment of dismissal, as such a decision taken by the Disciplinary Authority was contrary to the Rules of natural justice and fair play.

14. Mr. D. C. Daga, the learned Counsel appearing for the Respondent Corporation, submitted that, the petition can be dismissed only on the ground that the petitioner has not joined necessary parties, i.e. M.S.S.I.D.C which is a necessary and proper party as the petitioner was in service of the corporation and not in service of the Chairman or the Managing Director. It is further submitted that, the petitioner with deliberate intention misguided Court, by suppressing the fact that the charges for which the petitioner was impleaded also incur penalty of dismissal, which fact the petitioner has withheld from the Hon'ble Court and therefore, the attempt on the part of the petitioner to portray before the Hon'ble Court, that the charges for which the petitioner was implicated would not entail the punishment of dismissal, and hence the punishment of dismissal is not at all bad in law as the petitioner is guilty of suppression of material facts from this Hon'ble Court, and on this count also the petition can be dismissed. As regards the merits of the matter, Mr. Daga, submitted that the articles of charge and statement of imputation speaks volumes of the serious misconduct committed by the petitioner while discharging his duties as Regional Manager causing loss to the extent of Rs. 17.37 lacs to the corporation, and the loan amount could not be recovered from the consignee or from the supplier unit. It is submitted that the petitioner knowingly approved the transaction between two sister concern by certifying about their trustworthiness and viability by personally visiting the unit. It is submitted that the subject matter of the charge was supply of Hand Sealing Machines worth Rs. 26,25,000/- and for that purpose the petitioner entered into a Private Marketing transaction with M/s Space Pac Machines Limited, Thane for supply of Hand Sealing Machines worth Rs. 26,25,000/- and orders were executed by M/s Space Heat Electricals, Thane and also released 80% of its payment to M/s Space Heat

Electricals, to enable them to manufacture the required particulars. This itself shows that the petitioner was guilty of serious misconduct. It is submitted that, this negligence and dereliction of duty resulted in blockage of large amount of funds of the Corporation which lead to undue favour to the purchaser. According to Mr. Daga, that though there was overwhelming evidence on record in respect of the articles of charges, the Enquiry Officer only found him guilty of having overruled the objections raised by the subordinate to release 80% payment to the exporters. According to Mr. Daga, the Disciplinary Authority was justified in coming to the conclusion that the services of the petitioner deserves to be dismissed for this serious misconduct, as it was an act of dishonesty in connivance with the two units in the matter of transaction of purchase of Hand Sealing Machines, at the cost of causing huge financial loss to the corporation and therefore, as no fresh material was considered by the Disciplinary Authority, the punishment inflicted by the Disciplinary Authority of dismissal is justified in the facts and circumstances of the case, and therefore, deserves no interference.

15. Mr. Daga, submitted that the Disciplinary Authority has passed its decision on the basis of record and findings arrived at by the Enquiry Officer, and therefore, it cannot be said that the Disciplinary Authority deviated from the record or imposed a punishment which was shockingly disproportionate, so as to call for interference by this Hon"ble Court in its extra ordinary jurisdiction. Mr. Daga, further submitted that it is a settled law in service jurisprudence, whereby charges are proved and are of serious nature, the Court should not interfere with the quantum of punishment, therefore, according to Mr. Daga, the decision taken by the respondent in dismissing the petitioner from service does not call for any interference and the petition deserves to be dismissed.

16. We have examined the material placed before us, and considered the rival contentions made by the learned Counsel for the parties at bar. In view of the fact that the Enquiry Officer Mr. P. G. Kapale, in his report dated 17th January, 1997 found that the article of charge No. 5 as partly proved with particular reference to not verifying the financial soundness of M/s Space Pac Machines, and in respect of article Charge No. 7, he found that it is proved that the petitioner neglected in recovery of dues, resulting into blockage of dues, but the Enquiry Officer found that it is not proved, the undue benefit was given to the purchaser. As from the records available it is seen that when the last payment was released one of the bill was overdue only for two days.

17. On receiving the Enquiry Report and considering the representation made by the petitioner, the Disciplinary Authority by its order dated 28th May, 1997 under which the petitioner came to be dismissed from service observed that "Whereas the Disciplinary Authority has agreed with and accepted the major findings of Enquiry Report". This docs not in any manner discloses to what extent the Disciplinary Authority has agreed and accepted the major findings of the Enquiry Report. We have repeatedly asked Mr. D. C. Daga, the learned Counsel appearing for the respondent Corporation to place before us any material to show that the

Disciplinary Authority has examined the Enquiry Report so that it can throw some light on the fact that which part of the report of the enquiry officer has been accepted and what are those findings which are not agreed or accepted by the Disciplinary Authority. Mr. Daga, could not place before us any such material and submitted that except for the impugned order there is no other material. Mr. Daga the learned Counsel for the respondent Corporation submitted in the decision rendered by the Supreme Court in the case of *State Bank of India v. S. S. Koshal* 1994 Suppl. (2) SCC 468, it has been held that, it may be remembered that the Enquiry Officer's report is not binding upon the Disciplinary Authority and that it is open to the Disciplinary Authority to come to its own conclusion on the charges. It is not in the nature of an appeal from the Enquiry Officer to the disciplinary authority. It is one and the same proceeding. It is open to a disciplinary authority to hold the inquiry himself. It is equally open to a disciplinary authority to appoint an enquiry officer to conduct the inquiry and place the entire record before him with or without his findings. But in either case, the final decision is to be taken by him on the basis of the material adduced, and therefore, according to Mr. Daga, the contentions of Mr. Darda, the learned Counsel appearing for the petitioner that the failure to give fresh notice to him by the Appellate Authority who disagreed with the findings of the Enquiry Officer on some of the charges and the fact that the appellate authority passed a non speaking order in violation of the principles of natural justice, cannot be accepted and it does not vitiate the impugned order, and therefore the petition deserves to be dismissed,

18. In our view the law laid down by the Supreme Court on this two important points in service jurisprudence in the case of *S.B.I. v. S. S. Koshal* (cited supra), does not hold the field in view of the subsequent decision of the Supreme Court in the case of *Punjab National Bank v. Kunj Bihari Mishra; Punjab National Bank and Others Vs. Sh. Kunj Behari Misra*, , wherein the Supreme Court has overruled its own decision in *Koshal*'s case, on which reliance has been placed by Mr. Daga.

19. Mr. Daga, has further placed reliance on the case of High Court of Judicature at Bombay through its Registrar *Vs. Udaysingh Nimbalkar and Others*, , and submitted that, the Supreme Court in this case has also reaffirmed that the decision taken by the Disciplinary Authority normally should not be interfered with and submitted that, the technical rules of evidence and proof beyond doubt are not applicable to Departmental Enquiry, and that though the enquiry officer in the case of petitioner did not find that all the articles of charges are proved against him, on there being sufficient material on record to substantiate all the charges, the Disciplinary Authority was justified in passing the impugned order of dismissal.

20. In our opinion the impugned order stand vitiated on two counts; firstly, for the reason that under the impugned order dated 28th May, 1997 the Disciplinary Authority has mentioned that it has agreed with and accepted the major findings

of the Enquiry Report which goes to show that the Disciplinary Authority did not fully agree with the findings of the Enquiry Officer and therefore, in the event the Disciplinary Authority was dissatisfied with the findings of the enquiry Officer, he ought to have given opportunity of hearing to the petitioner, as what we find is that, the enquiry officer's report only indicts the petitioner and that too partially on the count of article charge No. 5 and 7, and in pursuance of having done so, if it wanted to record its own finding on the article of charges framed against the petitioner on the basis of the material available on record, it ought to have given reasons for such disagreement, after giving the petitioner an opportunity to represent, before recording such finding, as held in catena of decisions viz; (1) Punjab National Bank v. Kunj Bihari Mishra; Punjab National Bank and Others Vs. Sh. Kunj Behari Misra, , (2) Bihar State Electricity Board v. Braj Kishore Singh and Ors. 2001 L.I.C. 1627 Patna, (3) Yoginath D. Bagde Vs. State of Maharashtra and Another, . Secondly, the Appellate Authority merely dismissed the appeal by passing a non speaking order, as communicated vide letter dated 19th September, 1997 to the petitioner, that the Board of Director rejected your appeal as without merits, in view of the fact that you have not provided any facts and grounds other than those already considered by the Inquiring Authority and ratified by the Management in the subject case, and therefore, we quash and set aside the impugned order of dismissal and remit the case to the Disciplinary Authority for dealing it in accordance with law, with a direction that the Disciplinary Authority should in its order clearly reflect, whether it agrees or disagrees with the findings of the Enquiry Officer or if, it does not agree than offer the petitioner an opportunity of hearing, and thereafter record his own findings on such charge, if it disagrees with the Enquiry Report on any article of charge or with the finding given in respect of any article of charge, then before it records its own finding on such charge, it shall record its reasons for such disagreement and give the delinquent necessary opportunity to represent before it record its finding. On this exercise being undertaken by the Disciplinary Authority, the consequence will abide by the ultimate result. The Disciplinary Authority will act on our direction and pass appropriate orders within three months of the communication of our order.

21. Rule is made absolute in the aforesaid terms with no order as to costs. C.C. expedited.