
(2018) 03 GAU CK 0148
In the Gauhati High Court
Case No : WP(C) 1523 of 2010

SUKHEN KANWAR

APPELLANT

Vs

THE ASSAM STATE ELECTRICITY BOARD and ORS.

RESPONDENT

Date of Decision : 29-03-2018

Acts Referred:

Citation : (2018) 03 GAU CK 0148

Hon'ble Judges : HRISHIKESH ROY

Bench : Single Bench

Final Decision : Allowed

Judgement

1. Heard Mr. B. Chakraborty, the learned counsel appearing for the petitioner. The Assam State Electricity Board (ASEB) and their officials are represented by the standing counsel, Mr. S. Chakraborty. The learned counsel Ms. P. Thapa, appears for the respondent No.9.

RELEVANT FACTS

2. The challenge here is to the order dated 30.1.2010 (Annexure-J), whereby dismissal of the petitioner is ordered through the Disciplinary Proceeding (DP), drawn up under the ASEB (General Service) Regulations, 1960 (hereinafter referred to as "the ASEB Regulation"). At the relevant time, the delinquent served as LDA cum Cashier in the Dibrugarh Electrical Sub-Division and the following allegation was leveled against him, under the charge memo dated 31.8.2009: "The delinquent is charged with theft of electricity in the Dibrugarh Electrical Sub-Division-III on 24/06/2009 and also non deposit of a part of Meter security collected at DSED-III. As reported by the Sr. Manager, Dibrugarh Electrical Division and subsequent preliminary enquiry, - on 23/6/09 Sri Sukhen Konwar, LDA-cum-Cashier asked

Sri Sankar Rabi Das, Sr. Peon to bring cash of Rs.5,05,217.00 to keep in the chest. Accordingly Sri Sankar Rabi Das kept the amount in the chest and locked the chest and the door of the room where chest was kept, then he handed over the bunch of keys to the Cashier at about 4.00 PM. On 24/6/2009 at around 10.10 AM Sri Sukhen Konwar, LDA-cum-Cashier asked Sri Sankar Rabi Das to bring back the amount and provided him the bunch of keys. As soon as Sri Sankar Rabi Das entered the room opening locks of the door, heavy smoke inside the room were found. The employees of the DSED-III doused small fire inside the room. In the mean time Sri Sukhen Konwar found and disclosed that the chest was empty and it was in unlocked condition. It prima facie, implied involvement of Sri Sukhen Konwar, LDA-cum-Cashier and Sri Sankar Rabi Das, Sr. Peon in that theft case of Rs.5,05,217.00 from the chest of DSED-III discovered on 24/6/09, as both of them were directly involved in keeping of the amount and the bunch of keys of the chest. In preliminary investigation, it also reveals that you are involved in misappropriating of Board's money by not depositing a part of meter security of Rs.25,270.00 collected at Dibrugarh Electrical Sub-Division-III.

3. In his reply, given on 12.9.2009, the delinquent denied the charge and explained that the theft incident on 24.6.2009, must be the act of some unknown miscreants and requested for exoneration from the charge. However, the explanation of the delinquent was found to be unsatisfactory and accordingly, one D. K. Boruah was appointed as the Inquiry Officer. He mentioned the three charges under enquiry as follows:

- (i) Fraud and Dishonesty
- (ii) Disorderly conduct in connection with business of the UAEDCL/ASEB by your involvement in the theft case of DESD-III on 24/6/09.
- (iii) Non deposit of a part of Meter security collected at DSED-III.

4. In the Enquiry proceeding, initially the oral statement of the delinquent was recorded along with the statement of the co-delinquent Sankar Rabi Das. Thereafter, the three witnesses from the prosecution side were presented. After assessment of the material on record, the Inquiry Officer held that the loss of Rs.5,22,507/-, due to misconduct of the delinquent is proved and accordingly, on 14.11.2009, he recommended dismissal of the

petitioner.

5. Then the enquiry report was furnished to the delinquent on 9.12.2009 and in the covering letter of 9.12.2009 (Annexure-H), the Disciplinary

Authority proposed to inflict the penalty of termination against the petitioner.

6. In his reply to the 2nd show cause notice, the delinquent referred to the biased evidence of the PW.3, Sushila Devi, a part time cleaner, whose son

was involved in a theft case in the same Sub- Division. He also stated that consequences were drawn improperly by ignoring the materials on record.

However, the response to the 2nd show cause notice was considered to be dissatisfactory and on that basis, the dismissal was ordered on 30.1.2010

(Annexure-J).

PETITIONER'S ARGUMENTS

7.1. Assailing the legality of the disciplinary action, Mr. B. Chakraborty, the learned counsel submits that the Inquiry Officer committed a fundamental

error by not directing the prosecution to first prove the charge and he deviated from the due process by directing the delinquent to first give his

statement. In fact, the conclusions have been mostly drawn on the basis of the initial statement of the delinquent and not as much, on the basis of the

testimony of the prosecution witnesses.

7.2. According to the petitioner's lawyer, the prescribed procedure was not followed by the Inquiry Officer, as is mandated by Regulation 10 of

the ASEB Regulation and the finding on the charge of theft from the cash-box is a perverse finding, based on surmise and conjunctures, without any

material evidence.

7.3. Since a Criminal Case was registered on the stolen cash from the office cash-box and trial was started against the petitioner and the co-

delinquent, in the G.R. Case No.1110/2009, the petitioner's lawyer produces the judgment dated 30.3.2017 of the learned CJM, Dibrugarh,

whereby the learned Criminal Court ordered for acquittal of the delinquent.

7.4. The material discrepancy in the evidence of Smti. Sushila Devi, who was the PW.3 in the trial Court, is highlighted by the petitioner to project that

her version in the trial Court and before the Inquiry Officer are inconsistent and contradictory and therefore, the guilty finding recorded in the

Disciplinary Proceeding, in reference to her testimony, should be discarded.

7.5. The petitioner further contends that the charge memo did not contain the list of documents or of the witnesses for the prosecution. Moreover the availability of any defence assistance was not intimated to the delinquent and thus he was seriously prejudiced in defending the charges. It is therefore, argued that on the basis of such defective inquiry proceeding, the penalization of the delinquent would be wholly unjustified.

RESPONDENTS' ARGUMENTS

8.1. On the other hand, Mr. S. Chakraborty, the learned standing counsel for the ASEB, submits that only when it is a case of no-evidence and the finding can be described as a perverse one, interference with disciplinary action would be justified by the Court and according to the learned lawyer, the conclusion is drawn in the present case by the Inquiry Officer, on the basis of relevant evidence.

8.2. The respondents point out that acquittal in the Criminal Case would not justify the exoneration of the delinquent, as the degree of proof in the Criminal and the Disciplinary Proceeding, are of different standards. Moreover, it is a case of benefit of doubt and not of clear acquittal, in the Criminal Case.

8.3. As the charges are required to be established on the criteria of preponderance of probabilities, the respondents argue that there are sufficient incriminating materials to rope in the accused and the adequacy of the evidence is not to be scrutinized by the Writ Court.

8.4. The respondents contend that interference by the Writ Court would not be justified for some procedural irregularity, unless prejudice to the delinquent is demonstrable and Mr. Chakraborty submits that the petitioner suffered no prejudice for not being provided with a defence assistance or the list of documents or prosecution witnesses.

DISCUSSION AND DECISION

9. The disciplinary action and punishment for the employees of the ASEB is governed by the Regulation 10 of the ASEB Regulation and the ASEB has prescribed the procedure to deal with the cases of breach of discipline or acts of misconduct. The Sub-Rule (1) of Regulation 10, provides that the charges are to be communicated to the delinquent and he be provided with an opportunity to defend the charges. The specific requirement of the procedure is that:- At the enquiry oral evidence shall be heard as

to such allegations as are not admitted and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish, provided that the officer conducting the enquiry may, for special and sufficient reasons to be recorded in writing, refuse to call a witnessâ??.

10. A clear departure from the above ASEB procedure is seen in the present departmental enquiry in as much as a reverse process was adopted by the Inquiry Officer. Instead of recording the prosecution evidence to establish the charges, the findings were recorded by the Inquiry Officer, with reference to the preliminary statement of the delinquent. Thus a departure is clearly discernible from the laid down ASEB procedure in the domestic inquiry.

11. Therefore, clear infringement of the ASEB Regulation for conducting the Disciplinary Proceeding, as also the general rule of first presenting the case of the prosecution, before the defence/delinquent is given the opportunity to defend the charges, is apparent in this case. This in my assessment, is a defect which goes to the very root of the matter and in such cases, prejudice to the delinquent need not be established independently. On this count itself, the impugned action stand vitiated. In support we can usefully refer to the ratio in *Amulya Chandra Das vs. Assam Administrative Tribunal*, reported in (1989) 1 GLR 233, where the Division Bench of this Court observed that:- â??3. â?|â?|â?|.. it is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. The further observation in this regard is that such a person must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross examination as he desires. The delinquent then must be given a chance to rebut evidence led against him. This was not followed in the present case â??.

12. In the above context, we can further benefit by reading the ratio of *State of Uttaranchal vs. Kharak Singh*, reported in (2008) 8 SCC 236, wherein for a departmental inquiry, the Supreme Court prescribed the following procedure: â??15. From the above decisions, the following principles would emerge:

(i) â?|â?|â?|â?|â?|â?|â?|â?|â?|â?|.

count also the denial of a fair opportunity to the charged employee is noticed in the impugned departmental proceeding.

16. As regards the acquittal of the delinquent, it is well settled that acquittal in the Criminal Case by itself, will not justify reinstatement for the dismissed petitioner. On this point the argument of the ASEB lawyer is accepted. However in my considered opinion, the departmental enquiry in the present case, is vitiated for fundamental breach of the procedural requirement. Moreover, the conclusions have been drawn without any evidence to connect the delinquent with the theft of cash from the office locker.

17. The ASEB Regulation does provide for an appeal against disciplinary action and here the delinquent had filed a representation on 2.2.2010

(Annexure-K) but the same is not yet disposed of. Therefore this matter can also be relegated for disposal by the appellate authority. But after taking note of all the above infirmities and in light of the well enunciated legal principles governing the case, the decision of the appellate forum after all these years, is considered to be an empty formality which need not detain us in this case.

18. In the above circumstances, the disciplinary proceeding is held to be vitiated and the same is thus quashed. The petitioner should therefore be reinstated with all consequential service benefits. But balancing the interest of both the employer and the employee, the payable back wage be limited to 25% of the dues. However, it is observed that it is open to the disciplinary authority to initiate a fresh enquiry if so advised, from the stage of issuing a show cause notice and thereafter to proceed in accordance with the ASEB Regulations. The decision for the fresh enquiry should not however be delayed indefinitely and must be taken within four weeks of this order. It is ordered accordingly.

19 With the above order, the case is allowed, without any order on cost.