(2014) 09 DEL CK 0022

In the Delhi High Court

Case No : Writ Petition (Civil) 6733/2014, CAV 864/2014 and CM APPL. 15948-15949/2014

Union of India APPELLANT

Vs

Salim Beg RESPONDENT

Date of Decision : 30-09-2014

Acts Referred:

Citation : (2014) 09 DEL CK 0022

Hon'ble Judges : Vipin Sanghi, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Saqib, Advocate for the Appellant; Priyanka M. Bhardwaj, Advocate for the Respondent

Judgement

S. Ravindra Bhat, J.

CAV 864/2014

Respondent has put in appearance.

Caveat stands discharged.

CM APPL.15949/2014 (Exemption)

Allowed, subject to all just exceptions.

W.P. (C) 6733/2014, CM APPL.15948/2014

1. Issue notice.

2. Mrs. Priyanka M. Bhardwaj, Advocate accepts notice.

3. With consent of counsel for the parties, the petition was heard finally.

4. The Union of India is aggrieved by an order of the Central Administrative Tribunal (hereafter referred to as "CAT") dated 3.1.2014 passed in OA 3454/2012. By the impugned order, CAT quashed the minor penalty ("the

penalty") of reduction to lower stage in the time scale of pay by two stages for a period of one year with further direction that the respondent will earn increments of pay during the period of such reduction and on expiry of such period, the reduction will not have the effect of postponing the future increments of pay, imposed upon the respondent (hereafter referred to as "applicant") .

5. Briefly, the facts are that the applicant was issued a charge memo proposing major penalty proceedings against him on 20.08.2007 in respect of alleged misconduct during the time he was working as Divisional Engineer (OCB) , Indore in the BSNL, Moradabad, in 1998-99. The three articles of charge were spelt out:

"Article-I

That Shri Salim Beg while posted and functioning as DE (OCB-Indoor) , BSNL, Moradabad during the period 1998-99 committed gross misconduct inasmuch as he tampered with the Exchange computer and the Log of the exchange for providing ISD facilities on two ISD barred telephones at the TAX level and subsequently deleting the commands used in tampering the Exchange and Log of the Exchange.

Article-2

That the said Shri Salim Beg while posted and functioning as DE, OCB/TAX, BSNL, Moradabad during the period 2001-2002, committed gross misconduct inasmuch as he failed to perform his duties as incharge Moradabad TAX, as a result of which unscrupulous elements innumerous unmetered ISD calls from the dependent exchanges of Thakurwara, Bhojpur and Dingarpur by tampering the computer of the said exchanges which resulted in huge loss to BSNL worth minimum of Rs. 34,77,966.00.

Article-3

That the said Shri Salim Beg while posted and functioning as DE (TAX) , BSNL, Moradabad during the period 2001-2002 committed gross misconduct inasmuch as he abused his official position and deliberately favoured his real elder brother Shri Mohammed Akram and issued him a false experience certificate, which made him eligible to participate in BSNL contracts."

6. The Articles of Charge were supported by an elaborate statement of imputation which also annexed list of witnesses and other materials sought to be relied upon. The disciplinary authority appointed an Enquiry Officer of the rank of General Manager on 18.10.2007; after completing the enquiry proceedings, the report was submitted by the Enquiry Officer on 21.10.2010 to the disciplinary authority. The disciplinary authority referred the matter to the Central Vigilance Commission for second stage of enquiry on 9.3.2011 and after receiving its comments - advising imposition of minor penalty, a disagreement note dated 16.6.2011 was prepared and furnished to the applicant who represented against it on 16.7.2011. The entire material including the disagreement note and the

applicant''s representation was forwarded to the UPSC for its advice on 14.11.2011; the latter concurred and recommended imposition of minor penalty on 24.7.2012. Accordingly, the minor penalty which was initially proposed was in fact imposed on 30.8.2012. Complaining that the penalty was perverse arbitrary, and based on entirely erroneous premises, the applicant approached the CAT for quashing of that order. By the impugned order, the CAT allowed the application.

7. Mr. Saqib, counsel for the Union of India argues that the CAT fell into error in holding that the disagreement note in the present case was without any factual basis. Counsel highlighted that the CAT placed undue emphasis on the final findings of the Enquiry Officer without appreciating that there was sufficient material on the record, in the report which implicated the respondent/applicant especially with regard to his acts of omission and commission. Learned counsel relied upon portions of the enquiry report and submitted that having regard to these, even though, all the charges levelled against the applicant could not be said to be proved, there was sufficient material to proceed and impose the minor penalty which was ultimately done. It was further argued that the findings of the CAT virtually amount to an appellate appreciation or review of the material which was in the exclusive domain of the disciplinary authority and could not have been gone into. Relying upon the decision of the Supreme Court in B.C. Chaturvedi Vs. Union of India and others, , it was submitted that judicial review does not extend to re-appreciation of material but only looking into the regularity of the proceedings adopted, the only exception being that if the conclusions arrived at are so unreasonable that no reasonable man would take such a decision, the Court or Tribunal would be within its rights to set it aside. It was highlighted that the CAT''s findings with regard to the second stage advice by the Central Vigilance Commission and also its observations that the UPSC''s role is merely to recommend and should not have been taken into consideration, appears to have been based upon the misappreciation of law. It was lastly urged that the CAT was coloured by its opinion that the disciplinary authority had pre-judged the issue, which was not the case in the present instance.

8. Counsel for the respondent/applicant submitted that there was in fact no material to connect the applicant with the alleged loss caused to the BSNL. It was submitted that the original documents, which allegedly showed how the tampering of the meter and other devices was done were not available during the course of the enquiry and in the circumstances, the ultimate conclusion of the Enquiry Officer was reasonable and justified. In rejecting it, the disciplinary authority acted perversely and the CAT''s order quashing the penalty was within jurisdiction.

9. This Court notices at the outset that the basis for the CAT''s decision is that the disagreement note which ultimately prevailed and resulted in a minor penalty upon the applicant was unwarranted; secondly that the disciplinary authority had pre-judged the issue while appreciating and issuing the notices for disagreement itself to the respondent/applicant; and thirdly the CVC''s advice and UPSC''s

recommendations were not binding upon the disciplinary authority even though the latter appeared to treat them as such.

10. Before discussing the merits of the CAT''s order in the light of the conclusions made, it would be necessary to notice at this stage the relevant material which the enquiry report indicated, and formed the basis of the disagreement note in respect of the second charge that the applicant while functioning as DE, OCB/ TAX, BSNL, Moradabad during 2001-02 committed gross misconduct as he failed to perform his duties as Incharge, Moradabad TAX which resulted in unscrupulous elements making unmetered ISD calls resulting in losses to the BSNL worth Rs. 34,77,966/-. The relevant portions of the report reads as follows:-

"In this enquiry Shri P.K. Srivastava then TDM, Moradabad found that the all allegations against Shri Salem Beg were true and prima facie it was reflected that some high-tech tampering was done by Shri Salim Beg, who was having the Master Password of the Moradabad OCB/ TAX Exchange, in report of following:-

(I) The meter reading of the said two telephone numbers maintained at OCB/TAX Moradabad level was deliberately reduced.

(II) The threshold printouts of the said two telephone numbers which were provided to me by the said officers were found washed out from the log of the Exchange during the course of enquiry which clearly established that Shri Salim Beg had tampered the log of the Exchange before handing over the charge to Shri Sanjay Prasad.

That Shri P. K. Srivastava also examined Shri Salim Beg and asked him as to how these numbers were opened and tampering was done. During examination, Shri Salim Beg revealed that these telephone nos. belonged to two persons who were related to his brother Shri Mohd. Akram who had recommended for opening of these two numbers in the names of Shri Mohd. Salim S/o Bashir Ahmed and Shri Mohd, Kasim S/o Ashiq Hussain.

Shri P.K. Srivastava in the said enquiry recommended to CGMT, UP (W) Telecom Circle, Dehradun that the charges against Shri Beg seemed to be proved, however, if deemed fit the matter may also be got examined from some Technical Expert for taking necessary action, he stated that he himself visited the CGMT. Office at Dehradun and handed over the said enquiry report in original along with the original documents to the CGMT. Shri Ashok Kumar However, no action seems to has been taken on his report since Shri Salim Beg was not only promoted as DGM but was also posted as DGM (A and P) who was the overall in-charge of OCB/TAX Moradabad during the tenure of Shri R.P.S Panwar the then GMTD. Moradabad and Shri Ashok Kumar, the then CGMT UP (W) Telecom Circle, Dehradun and on the other hand he was dragged out of not only from Moradabad but also from UP (W) Telecom Circle and posted to Gujarat Telecom Circle without any reason. The said enquiry report along with the documents are neither available in original nor in any other copy. Only photocopy of the advice note of the said two numbers are available. During investigation, Shri P.K. Srivastava the then TDM, Moradabad now GMTD, Agra. Shri Manoj Sharma. SDE, Shri Anurag Mehrotra, JTO (TAX) and Shri R.N. Chakraborty, SDE and Shri H.O. Kamboj were examined separately and all of them have confirmed the above incident."

11. The Enquiry Officer, however, was of the opinion that the charge as levelled was not proved. The disagreement note of 16.6.2011 to the extent it is relevant on this aspect reads as follows:-

"2. Although the Inquiring Authority has held the all three articles of charges as not proved but the Disciplinary authority, in disagreement with findings of I.O. on article I, has observed as under:-

The CO was overall incharge of the exchange, as DE (OCB-Indoor) . The password for subscriber management was vested with Shri R.N. Chakraborty, SDE, as per the version of SW-14 and SW-7. The detailed investigation report, purported to have been done by Shri P.K. Srivastava, GM (SW-7) was not available as has been indicated in the charge memo. On the other hand the exhibit D-12 which is a letter/report from AGM (Vig) which recommended for closure of the complaint against the C.O. However, the C.O. was the overall incharge of the exchange being the DE-OCB (Indoor) . He was supposed to observe the duties/action of his subordinates and to take corrective action for the deficiencies. Since password management was within his subordinates, he failed to supervise the same. Hence the allegation of lack of devotion to duty is proved. Hence the article can be held as proved.

3. In view of above, the President proposes to disagree with the IO''s findings to the extent indicated above and proposes to hold the article-I of charges as proved and to impose a suitable minor penalty."

12. The CAT in the impugned order after outlining the facts proceeded to discuss the disagreement. At the same time, interestingly, the CAT observed:

"If there were any supervisory deficiency on the part of the Applicant, it was a different matter and the Disciplinary Authority was not precluded from taking any action against him, as admissible under the Rules, if it considered necessary. Therefore, the report of the Enquiry Officer that the charge has not been proved against the Applicant, is to be sustained."

13. It is immediately apparent from the extracts of the Enquiry Officer''s report juxtaposed with the disciplinary authority''s tentative findings that what the CAT stated was permissible, was precisely what the disciplinary authority did. This seems to have completely escaped the notice of the CAT. The CAT in this respect appears to have formed an opinion that the disciplinary authority had pre-judged the issue. The reasoning of the CAT in this regard in our opinion is without any basis and merit. The CAT has entirely overlooked the main purport of the second charge which relates to supervisory control, required to have been discharged by

the respondent/applicant. The CAT has assumed that the material available warrants an inference that if the applicant was not culpable in regard to the second charge, at least, his diligent performance of duties did not measure up to the required standards resulting in huge monetary loss. This in the opinion of the Court was the result of the CAT''s hasty opinion that the disciplinary authority had pre-judged the issue. While performing its task, the disciplinary authority is required to apply its mind and not rubber stamp the findings of the Enquiry Officer. The disciplinary authority was aware of this and appears to have done precisely that on an independent appraisal, formed an opinion that the material implicating the applicant in respect of the second charge, was insufficient to warrant imposition of a major penalty; at the same time its opinion was that imposition of minor penalty was reasonable. This view was concurred at two levels - first by the CVC and secondly by the UPSC. Here again, the CAT in our opinion fell into error in holding that the UPSC''s recommendations are merely advisory.

14. Having formed the opinion that the conduct of the respondent/applicant warranted imposition of a minor penalty which was endorsed by the UPSC, there was nothing further to be done on the part of the disciplinary authority. The CAT appears to have expected the disciplinary authority (after issuing notice to the charged officer proposing minor penalty and seeking advice of the UPSC) to again reverse that opinion, which is hardly expected of it. The UPSC''s recommendations are only by way of input; in case those recommendations enure somewhat in favour of the employee, further opportunity is required to be given. Here, however, UPSC''s advice was in complete accord with the disciplinary authority''s opinion.

15. The approach and impugned order of the CAT in our opinion was hasty and contrary to the law declared by the Supreme Court from the earliest point in time in Union of India (UOI) Vs. H.C. Goel, onwards, that the Court would not look into the sufficiency of material as long as some material exists justifying the imposition of a punishment. The only rider is that if the inference or the conclusions of the administrative/executive authority are so unreasonable and cannot be supported by the material or are not based on any material at all, then the Court can intervene and set aside the order. Plainly, that approach was not warranted in the circumstances of the case.

16. One of the main grounds which appears to have persuaded the CAT into doing what it did, i.e., quashing the minor penalty order was the delay in initiation of proceedings. The chargesheet itself would indicate that it pertained to conduct which relates to the period 1998-2000; thereafter apparently it was submitted during the course of hearing that the matter was engaging the attention of the CBI which also recommended initiation of disciplinary proceedings which was ultimately done on 20.08.2007. Furthermore, the CAT shall not to have overlooked the fact that the respondent/applicant himself was the Incharge having been promoted firstly as Dy. General Manager and General

Manager of the same circle where he is said to have committed the misconduct. Given all the circumstances, the assumption that the proceedings was initiated after undue delay was not justified.

17. For the forgoing reasons, the impugned order of the CAT is hereby set aside. Consequently, the penalty is restored and the writ petition is allowed.

