

IN THE HIGH COURT OF DELHI AT NEW DELHI

W. P. (C) 4589/2002

Reserved on: 26th July 2011
Decision on: 23rd August 2011

S.R.TIWARI

..... Petitioner

Through: Mr. Anshu Mahajan, Advocate.

versus

BSES YAMUNA POWER CO. LTD.

..... Respondent

Through: Mr. Nikhil Singla, Advocate.

CORAM: JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT
23.08.2011

1. The Petitioner who was working as Assistant Engineer ('AE') (D) MYR for the Delhi Vidyut Board ('DVB') [which has since in this petition been substituted by the BSES Yamuna Power Ltd. ('BYPL')] is aggrieved by an order dated 14th March 2000 of the Additional General Manager ('AGM') of the DVB by which the Petitioner was awarded a penalty of reduction in the minimum present pay scale of as AE till his retirement by the DVB by an order of its.

2. The Petitioner who was at the relevant point in time AE (D) MYR in the DVB proceeded on leave between 15th July and 17th September 1991 after having fallen from the roof of his house and fractured his back bone. On 13th September 1991 an inspection of ten cooperative group housing societies in Patparganj area was undertaken by officials

of the DVB. It was found that four cooperatives societies, i.e., Milan Apartments Cooperative Group Housing Society ('Milan') Plot No. 72, HWF Cooperative Group Housing Society ('HWF') Plot No. 107, Border Roads Cooperative Group Housing Society ('Border Roads') Plot No. 103, and Sara Cooperative Group Housing Society ('Sara') Plot No. 34, were indulging in direct theft of electricity through the metering equipment. Six other societies were continuing with temporary connections although the period of such connections had ended. A charge sheet was issued to the Petitioner on 24th September 1993. The two articles of charge were:

- (i) That the Petitioner, while functioning as AE (Zone) in 1991 had failed to report to the local police that the four societies, i.e., MACGH, HWF, Border Roads and Sara were indulging in direct theft of electricity, and
- (ii) That six other Societies continued with temporary connections whereas it was the duty of the Petitioner to have disconnected their supply. The Petitioner was charged with failure to maintain absolute integrity and devotion to duty in violative of Rule 3 (I) of CCS (Conduct) Rules, 1964.

3. The Petitioner submitted a reply to the charge sheet on 28th December 1994. *Inter alia*, he pointed out that the DVB had not followed the office order dated 13th December 1991 whereby his explanation had to be called for as well as the comments of the Head of the Department had to be elicited before issuing a charge sheet. As regards the reporting of theft of electricity, he referred to an office order dated 31st July 1989 in terms of which action was to be taken on the basis of a report of theft by the Special Cell/Vigilance Department. Further, the approval of the General Manager (E) was required before lodging an FIR. This was invariably obtained by the Executive Engineer (Enforcement) and conveyed to the Executive Engineer (Directorate). The Petitioner having been on medical leave between 15th July and 17th September 1991 and not being involved with the joint inspection/raid, could not be blamed for not lodging the FIR. As regards the second article of charge, he referred to an office order dated 1st October 1990 in terms of which temporary connections were not to be disconnected for one month where consumers had applied for an extension, and were otherwise eligible for extension but could not be granted extension only because the bill had not been raised. Even in terms of the office order dated 16th September 1985, the responsibility for the disconnection of the supply rested solely with the area inspector and not with the AE (Zone) who was only required to monitor such cases.

4. After recording of the evidence, the inquiry officer ('IO') submitted a report on 19th January 1998 categorically holding the charges not to be proved. As many as seven witnesses were examined on behalf of the management and six witnesses supported the case of the Petitioner. The Petitioner relied on three documents.

5. The Disciplinary Authority ('DA') did not agree with the findings of the IO and issued a show cause notice dated 21st December 1998 to the Petitioner calling him to explain why the punishment of reduction in the present scale of pay by two stages for the period of two years with cumulative effect should not be imposed on him. The DA referred to the above order dated 10th September 1985 and opined that the responsibility for timely disconnection rested with the area inspector and the AE (Zone) was to monitor such cases. This was followed by the Petitioner giving a detailed reply on 14th January 1999. On 24th September 1999 a second show cause notice was issued to the Petitioner by the DA in which it was stated that the Board had considered his reply and decided to ask him to show cause why the penalty of removal from service should not be awarded to the Petitioner. It was opined by the Board that some of the group housing societies continued to illegally draw power from the service line even after disconnection of the temporary supply. This could not happen without the knowledge and connivance of the area inspector "as well as their supervisory officer" who was the Petitioner and further that "any official of the Board, who directly or indirectly connives with the consumer to allow him indulge in direct theft of electricity, cannot be allowed to get away as lightly as has been proposed in the show cause notice."

6. In his reply dated 3rd December 1999 to the second show cause notice, the Petitioner pointed out that the DA could not assume the role of the Appellate Reviewing Authority and there was no occasion to issue him a second show cause notice seeking to enhance the penalty and that too on a charge which was not the subject matter of the inquiry.

7. On 14th March 2000 the impugned order was issued by the AGM of the DVB imposing the penalty of "reduction in the minimum of the present scale of pay as AE till retirement." It was, *inter alia*, stated that "the way the society were indulging in theft of electricity, where large number of flats were there, the mala fides on the part of AE

(C.O.) are apparent as he is a field officer and he was required to take action as per the standing order which prescribes that a temporary connection register will be maintained by the AE at personal level. He totally failed to monitor and take timely action.”

8. The Petitioner preferred a review petition to the Chairman. He pointed out that both HWF and Border Roads Societies were under construction and therefore, the presumption that a large number of flats were involved was not correct. As regards these two societies, theft was detected for the first time on 13th September 1991 when the Petitioner was on medical leave. The approval of the GM for lodging FIR was received on 4th October 1991 and thereafter FIR was lodged. As regards the disconnection of the temporary connections, he referred to the office order dated 1st October 1999 and the provisions of the Handbook of Commercial Practices whereby in Clause XVI it was, *inter alia*, provided as under:

“The supply in respect of Temporary Connection shall be disconnected by the Inspector on 3rd day of its due date of disconnection order from the Commercial Section and Meter removed. The responsibility for timely disconnection of supply shall rest with the Area Inspector. The Assistant Engineer (Zone) shall monitor such cases.”

9. The Petitioner pointed out that the monitoring of such cases, therefore, could be done by the Petitioner only when the disconnection order in respect of temporary connections were received after the expiry of the validity. The Petitioner further pointed out that the question of maintenance of temporary connection register was not part of the charge sheet and, therefore, there was no such finding in the inquiry report. In fact, he had maintained such a register at the zonal level in which all particulars of action taken from time to time were noted. In respect of both the Border Roads and HWF Societies, the fact of temporary connection being disconnected on 15th October 1990 and 24th April 1991 respectively were noted in the temporary connection register. He also referred to the phenomenal increase of work load in the area and that during the period of his medical leave one Shri S.S. Sondhi looked after the work.

10. By an order dated 30th May 2001, the AGM (A) conveyed to the Petitioner the

decision of the Board to reject of the Petitioner's review petition. The Resolution of the Board to the following effect was re-produced in the order:

“The Member (Administration) informed the Board that Shri S.R. Tewari was heard by him on 24.4.2001 and the petitioner Shri Tewari had stated that when he went to disconnect the temporary connection of K. No. 642FT-938 installed at premises. H.W.F. CGHS Society, Plot Number 107, Patpar Ganj Complex, he was informed by the consumer that he had applied for extension of temporary connection, therefore, he returned the disconnection order to AE(PS) for further necessary action. The Board did not find any force in his argument. He should have disconnected the connection, as the consumer did not have the extension of the temporary connection on that day. By returning the papers to AE(PS) for further action without disconnection of the supply he had willfully allowed the unauthorized connection at the said premises. The Board, therefore, finding no merit in the review application, unanimously resolved to reject the review petition of Shri S.R. Tewari AE, E. No. 12232.”

11. In response to the present petition, the Respondent has in the counter affidavit reiterated that the Petitioner as AE (Zone) failed to disconnect the supply of temporary connection of the six Societies in accordance with the office order dated 16th September 1985. It is not denied that the Petitioner stood completely exonerated in the inquiry, but that the DA disagreed with it and issued a show cause notice proposing a penalty of reduction in the present pay scale by two stages for a period of two years with cumulative effect.

12. This Court has heard the submissions of Mr. Anshu Mahajan, learned counsel for the Petitioner and Mr. Nikhil Singla, learned counsel for the BYPL.

13. The report of inquiry against the Petitioner completely exonerated the Petitioner. The witnesses examined on behalf of the management clearly supported the case of the Petitioner. In the first place the incident concerning the inspection took place sometime in 1991 and yet the charge sheet was not issued till 1993. Before the IO seven management witnesses confirmed the finding of the joint inspection but none of them were able to indicate the actual date of the validity of the temporary connection of the societies in question and the dates of disconnection as carried out by the Zonal

Inspectors. None of them visited the societies prior to the raid on 13th September 1991. Most of these witnesses stated that since six years had elapsed they were not sure whether any application for the extension of the temporary connections had been made by any of the Societies. The IO also referred to the two instructions for carrying out disconnection orders as well as direct theft or suspected theft of electricity. The IO concluded that the records did not indicate any failure on part of the Petitioner to issue disconnection orders to the Inspector concerned. It was also noticed that given the work load it was not possible for the Petitioner to carry out the disconnection through his inspector until and unless the disconnection order was received from the commercial wing.

14. The DA had to state reasons for its disagreement with the findings of the IO. The memorandum dated 21st December 1998 where the DA states that he does not agree with the findings of the IO does not indicate the reasons for such disagreement. The DA has made a reference only to the office order dated 10th September 1985 and not to the subsequent instructions dated 1st October 1990. A copy of the latter instructions has been placed on record as Annexure IV to the writ petition. It notes that unless the status of recovery was known, the Engineering Department would not be able to grant extension of temporary connections. The consumers on the other hand were unable to make the payment where a bill was not raised. Consequently, in the said instructions it was stated as under:

“To mitigate these sufferings of the consumers resulting out of delays in timely issuance of the bills for the temporary connections the district engineers are hereby advised not to disconnect the supply for one month of such consumers who have applied for extension, and are otherwise entitled for extension of temporary supply but could not be granted extension only because the bill has not been raised.

The district engineers will simultaneously inform AFO concerned to raise the bill immediately. He will also inform Dy. F.O. (D) for ensuring that the bill is raised and for taking appropriate administration action.”

15. However, the show cause notice dated 21st December 1998 of the DA does not refer to the above instructions. It blames the Petitioner for failing to issue immediate order for

disconnection of the temporary connections. The other clause in the said memorandum already indicated the penalty that was proposed to be levied by the DA which was a reduction in the present scale of pay of two stages for a period of two years with cumulative effect. In terms of the judgment of the Supreme Court in ***ECLI v. Karunakar (1993) 4 SCC 727***, where the DA is in agreement with the finding of the IO, it is incumbent upon the DA to first get the views of the charged officer on the report before deciding to impose any penalty.

16. In the instant case however, even while he issued a show cause notice dated 21st December 1998 to the Petitioner enclosing a copy of the report of the IO, the DA appears to have made up his mind on the question of penalty. This certainly vitiated the show cause order dated 21st December 1998. In ***Yoginath D. Bagde v. State of Maharashtra (1999) 7 SCC 739*** the Supreme Court frowned upon such a practice in departmental inquiries. In more or less similar circumstances, it was observed as under:

“37. The contention apparently appears to be sound but a little attention would reveal that it sounds like the reverberations from an empty vessel. What is ignored by the learned Counsel is that a final decision with regard to the charges leveled against the appellant had already been taken by the Disciplinary Committee without providing any opportunity of hearing to him. After having taken that decision, the members of the Disciplinary Committee merely issued a notice to the appellant to show-cause against the major punishment of dismissal mentioned in Rule 5 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979. This procedure was contrary to the law laid down by this Court in the case of Punjab National Bank (supra) in which it had been categorically provided, following earlier decisions, that if the Disciplinary Authority does not agree with the findings of the Enquiry Officer that the charges are not proved, it has to provide, at that stage, an opportunity of hearing to the delinquent so that there may still be some room left for convincing the Disciplinary Authority that the findings already recorded by the Enquiry Officer were just and proper. Post-decisional opportunity of hearing, though available in certain cases, will be of no avail, at least, in the circumstances of the present case.”

17. Mr. Singla, learned counsel for the BSES Yamuna Power Ltd. has placed reliance on the decisions in ***Damoh Panna Sagar Rural Regional Bank v. Munna Lal Jain (2005)***

10 SCC 84 and *B.C. Chaturvedi v. Union of India (1995) 6 SCC 749* to contend that the scope of the present proceedings is not an appeal from a decision. At the highest it can be a review of the decision making process. Further, the Court should not interfere with the administrative decisions “unless it was illogical or suffered from the procedural impropriety or was shocking to the consciousness of the Court in the sense that it was defiance of logic and moral standards.” However, in *B.C. Chaturvedi* it was observed as under:

“12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. **The Court/Tribunal may interfere where the authority held that proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have never reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.**

13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has co-extensive power to reappreciate the evidence or the nature of punishment. In a disciplinary inquiry the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In *Union of India v. H.C. Goel (1964) ILLJ*

38 SC , this Court held at page 728 that **if the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued.”**
(emphasis supplied)

18. Turning to the facts of the instant case the IO after examining the entire evidence exonerated the Petitioner. As pointed out by the Petitioner in its reply to the show cause notice, the very presumption that a large number of flats were involved in the HWF and Border Roads Societies was factually incorrect. Both the Societies were still at the stage of construction of flats. The detailed instructions concerning disconnection required the reports of the area inspector followed by the approval of the GM before an FIR could be registered. This was in fact ultimately done. Even as regards the temporary connections unless there were specific orders, there was no question of the Petitioner ordering disconnection. The DA disagreed with the findings of the IO but did not indicate the precise reasons for such disagreement. The DA also appears to have made up his mind on the penalty that was proposed to be awarded. Thereafter, when the reply of the Petitioner to the show cause notice was received the DA proposed to enhance the penalty. This was on grounds that did not form part of the charge sheet and therefore was not the subject matter of enquiry. The manner in which the DA proceeded in this case appears to be arbitrary and in violation of Article 14 of the Constitution. Although it was observed by the Supreme Court in *B.C. Chaturvedi* that the DA is the sole judge of facts, it appears that the DA in the instant case has plainly overlooked the evidence on record. The impugned order of the DA stands vitiated for the reason that no reasonable person could have reached the conclusion arrived at by the DA in the present case.

19. For the aforementioned reasons, this Court finds that the impugned order dated 14th March 2000 issued by the AGM and the decision of the Board conveyed to him by the letter dated 30th May 2001 are unsustainable in law and are hereby set aside. The Petitioner having retired in the meanwhile would not be entitled to any arrears of pay. However, his retiral, pensionary and other benefits will be re-worked on the above basis. If the Petitioner has been denied any promotion as a result of the impugned orders, those promotions will be granted to the Petitioner from the respective dates when they were

due to him. The arrears of retiral and pensionary benefits will be paid to the Petitioner within a period of eight weeks together with simple interest @ 9% per annum from the date of the impugned order, i.e., 14th March 2000 till the date of payment. Failure to make such payment within a period as directed will entail penal simple interest @ 12% per annum for the period of delay.

20. The writ petition is allowed in the above terms, with the costs of Rs. 5,000/- which will be paid by the Respondent to the Petitioner within a period of four weeks.

S. MURALIDHAR, J.

AUGUST 23, 2011

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