

GAHC010116052015



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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2684/2015

NARESH KUMAR UPADHYAYA
NO. GS-177116-L, SENIOR STORE SUPERVISOR, PRESENTLY SERVING
WITH THE 116 ROAD CONSTRUCTION COMPANY GENERAL RESERVE
ENGINEERING FORCE, C/O 99 APO

VERSUS

THE UNION OF INDIA and 5 ORS
REP. BY THE SECY. TO THE GOVT. OF INDIA, MINISTRY OF DEFENCE,
SOUTH BLOCK, NEW DELHI-11

2:THE DIRECTOR GENERAL OF BORDER ROADS
DIRECTORATE GENERAL BORDER ROADS
SSB
RING ROAD
DELHI CANTT.
NEW DELHI-10

3:THE CHIEF ENGINEER
HEADQUARTERS
PROJECT DEEPAK
C/O 56 APO
PIN-931709

4:THE COMMANDER
38 BORDER ROADS TASK FORCE
C/O 56 APO
PIN-930038

5:BORDER ROAD DEVEL. BOARD
'B' WING
4TH FLOOR
SENA BHAWAN

NEW DELHI-11

6:OFFICER COMMANDING
94 ROAD CONSTRUCTION COMPANY
GREF
C/O 56 APO
PIN-93009

Advocate for the Petitioner : MR.M K CHOUDHURY, MR.N BARUAH,MR.A
BARKAKATI,MRP BHARDWAJ,MR.T N SRINIVASAN
Advocate for the Respondent : , ASSTT.S.G.I.,,MR.S P CHOUDHURY,C.G.C.

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM

JUDGMENT & ORDER (ORAL)

Date : 12-09-2024

Heard Mr. D. Bora, learned counsel appearing in this case in place of Mr. M.K. Choudhury, learned Sr. counsel, who has argued the matter with the permission of this Court. Also heard Ms. B. Devi, learned counsel appearing in place of Mr. S.P. Choudhury, learned CGC for all the respondents.

2. By filing this writ petition, the petitioner has questioned the legality and validity of the order dated 19-09-2014 issued by the Director General, Border Roads (DGBR), i.e. respondent No. 2 herein imposing the penalty of Rs. 1,84,907/- upon the petitioner on the ground of alleged misappropriation of Government Stores. The writ petitioner has also assailed the memorandum dated 14-01-2015, containing article of charges, served upon him with a view to initiate a departmental proceeding against the petitioner on the ground stated in the writ petition. From the facts projected in the writ petition, it appears that the basic case of the writ petitioner is that the allegation of misappropriation of

Government Stores is based on the assumption of deliberate manipulation and tampering of records by GS No. 188295W Store Supervisor Roshan Kumar, facilitating such irregular activities. However, in a separate Court of Inquiry held against Roshan Kumar, the allegation of record tampering has been found to be baseless inasmuch as the Enquiry had come to a conclusion that it was an error of "omission" and not an error of "commission" and has exonerated Roshan Kumar. The contention of the writ petitioner is that since Roshan Kumar has been found to be innocent and considering the fact that the allegation of record tampering has been found to be baseless in a Court of Inquiry held against Roshan Kumar, there was no justifiable ground, either to make any recovery from the writ petitioner or to initiate any departmental proceeding against him since, the allegation brought against the writ petitioner would be wholly un-sustainable without the complicity of Roshan Kumar.

3. The writ petitioner herein, who was serving as Sr. Store Supervisor of 94 RCC GREF at the relevant point of time, i.e. during the period from 08-08-2011 to 01-12-2011, claims that he did not have any role to play in any kind of misappropriation in the store leading to shortage of Government supply nor is there any finding of fact recorded against him to such effect in any Enquiry. Notwithstanding the same, the respondents have not only passed an order of recovery of an amount of Rs. 1,84,907/- from the writ petitioner but has also proposed to initiate a departmental proceeding against him under Rule 14 of CCS(CCA) Rules, 1965 on the same allegation, thus, causing serious prejudice to the interest of the writ petitioner.

4. In support of the case projected in the writ petition, Mr. Bora has argued that the

entire proceeding of the Court of Inquiry (C of I) leading to issuance of the order dated 19-09-2014 was totally flawed inasmuch as, the provisions of the relevant rules and the principles of natural justice have been given a complete go by. Mr. Bora submits that during the Court of Inquiry, his client has not been granted proper opportunity to defend his interest by cross-examining the witnesses. Moreover, due to the presence of Sr. officers during the Court of Inquiry, the proceeding itself was heavily influenced against the petitioner, much to the detriment of his interest.

5. It is also the submission of Mr. Bora that although, as per the relevant rules, the Chief Engineer (Project) was the disciplinary authority of the petitioner, yet, the order of penalty dated 19-09-2014 has been issued by the Director General of Border Roads (DGBR) who is the appellate authority. He submits that since the original order of penalty dated 19-09-2014 was issued by the respondent No. 2 (DGBR), hence, the appeal preferred by the petitioner before the appellate authority, i.e. DGBR, was not considered, thus, causing serious prejudice to the interest of the petitioner.

6. By referring to the materials available on record, Mr. Bora has further argued that since the fundamental basis of the Court of Inquiry was that by manipulation of records, there was misappropriation leading to loss of Government stores for which the petitioner was responsible, after exoneration of Roshan Kumar of such allegation, there is no basis for the authorities either to recover any amount from the petitioner or to proceed against him on the basis of the memorandum of charge dated 14-01-2015. As such, a prayer has been made to set aside the orders dated 19-09-2014 as well as 14-01-2015.

7. Ms. B. Devi, learned counsel appearing for the respondents, on the other hand, has

referred to the counter-affidavit filed on behalf of the respondents to argue that the departmental proceeding is still pending and no finding of fact has yet been recorded therein till today. According to Ms. Devi, it was incumbent upon the petitioner to first participate in the departmental proceeding and put forward his defense before approaching this Court. However, instead of doing so the petitioner has straight away filed this writ petition so as to preclude the departmental proceeding. She submits that the writ petition is premature and is liable to be dismissed on such count alone. The learned counsel has, however, not advanced any argument so as to meet the other allegations made by the petitioner's counsel, questioning the validity of the entire process.

8. I have considered the submissions made at the Bar and have also gone through the materials available on record. The basic facts of this case are not in dispute. It is not in dispute that on 02-01-2012 a Court of Inquiry was convened so as to investigate into the following allegation brought against the petitioner, as contained in the terms of reference of the COI:-

“(2) The terms of reference for the C of I are as under:-

(a)To investigate circumstances under which misappropriation of Govt. Stores.

(b)To find out the foul pay if any, by GS177116L SSS Naresh Kumar Upadhyaya, while performing the duties of Senior Store Supervisor.

(c)To pin point the responsibility, if any.

(d)To assess the loss of Govt. stores and mode of its regularization.

(e)To suggest preventive measures to avert such cases in future.

(3) The C of I Proceedings duly completed in all respect will be submitted to this HQ (EIE Section) in septuplicate including manuscript copy latest by 10 Jan 2012.”

9. On 02-02-2012, the terms of reference to the COI was amended so as to include

the following item in paragraph 2:-

“f) To find out/ assess/ investigate misappropriation of any other Govt. Stores (Dry Ration, POL, K/Oil and others) in addition to 1260 Nos Eggs.”

10. It appears that during the course of the Court of Inquiry several deficiencies were noticed in the procedure so adopted. As a result of the same, the Chief Engineer, i.e. the Disciplinary Authority, himself had written a letter dated 17-05-2012 with a request to rectify the deficiency in the proceeding. The deficiencies pointed out by the Chief Engineer in the letter dated 17-05-2012 includes an observation to the effect that the Court has not incorporated the sale of ration stores to the civilian with deficiency in ration stores; there is no basis of the figures of misappropriation of ration stores; the statement of Roshan Kumar had not been recorded although fingers also point towards him; Naresh Kumar Upadhyaya (writ petitioner) had not been asked about the deficiency of stores.

11. It further appears that in order to cure the defects, a second Court of Inquiry was held. According to Mr. Bora the copy of the Court of Inquiry or the findings recorded therein were never made know to the petitioner. Notwithstanding the same, on 19-09-2014 the following order of penalty was passed by the respondent No. 2.

“(3) I, therefore, direct the following:-

(a) GS No. 177116L Senior Store Supvr Shri Naresh Kumar Upadhyaya, be called upon to pay Rs. 1,84,907/- (Rupees one lakh eighty four thousand nine hundred seven only) to make good the loss.

(b) Disciplinary action under Rule 14 of CCS (CCA) Rules, 1965. Be initiated against GS No 177116L Senior Store Supvr Shri Naresh Kumar Upadhyaya, for his misconduct in misappropriation of Government stores with Rs. 1,84,907/- (Rupees one lakh eighty four thousand nine hundred seven only).

(c) Disciplinary action under Rule 14 of CCS (CCA) Rules, 1965, be initiated against GS No 188295W Store Supvr Shri Roshan Kumar, for manipulation

tampering with the official records i.e. Convoy Notes which facilitated Senior Store Supvr Shri Naresh Kumar Upadhyaya, in misappropriation of Government stores.

(d) Disciplinary action under Rule 16 of CCS (CCA) Rules, 1965 be initiated against CS-181433L Dvr MT VK Sharma and GS-183750K Pnr K Pandi for failing to report to his superior officers the incidents of selling/ misappropriation of Govt Stores by GS No. 177116L Senior Store Supvr Shri Naresh Kumar Upadhyaya.

(e) SOP be framed by CE (P) Deepak specifically highlighting the following information/ aspects:-

(i) 21/C RCC to officiate as Officer Commanding unit in the absence of permanent incumbent being away on duty/ leave etc.

(ii) Proper and upto date maintenance of documents/ records.

(iii) Periodical vigilance/ surprise checks of stores and quality of maintenance of related documents.

(iv) Rotation of personnel/ staff deployed on sensitive appointments at various levels at regular intervals."

12. As mentioned above, although the respondent No. 2 was not the disciplinary authority but only the appellate authority in this case, yet, for reasons not discernable from the materials on record, the respondent No. 2 himself had issued the order of penalty without, however, referring to any specific finding arrived at in the Court of Inquiry as regards involvement of the petitioner in misappropriation of Govt. store. Thereafter, on 14-01-2015, memorandum of charge was served upon the petitioner with the following articles of charges and statement of imputation:-

"Statement of articles of charged framed against Shri NARESH KUMAR UPADHYAYA, GS 177116L SENIOR STORE SUPVR of 94 RCC (GREF) performing the duties senior store supervisor of 94 RCC since 08 Aug 2011.

Article – 1

That the said Shri NARESH KUMAR UPADHYAYA, GS 177116L SENIOR STORE SUPVR of 94 RCC (GREF) while functioning as senior store supervisor of 94 RCC during the period from 08 Aug 2011 to 01 Dec 2011 has been found to be guilty of charge of Misappropriation of Govt. property.

ANNEXURE-II

Statement of Imputation of misconduct of misbehavior in support of articles of charges framed against Shri NARESH KUMAR UPADHYAYA, GS 177116L SENIOR STORE SUPVR of 94 RCC (GREF).

Article – 1

That the said Shri NARESH KUMAR UPADHYAYA, GS 177116L SENIOR STORE SUPVR of 94 RCC (GREF) did not maintained any ledger of ration items stores of 94 RCC.

Shri NARESH KUMAR UPADHYAYA, GS 177116L SENIOR STORE SUPVR of 94 RCC (GREF) carried 1260 eggs from Udaipur HQ 84 RCC on 31 Dec 2011 without any convoy note and without informing OC 94 RCC or other officer with malafide intention.

Shri NARESH KUMAR UPADHYAYA, GS 177116L SENIOR STORE SUPVR of 94 RCC (GREF) who sold 400 Ltrs of K Oil to owner of the wet canteen Mr. Ramesh at Istingri which is illegally disposing of Govt. property.

Shri NARESH KUMAR UPADHYAYA, GS 177116L SENIOR STORE SUPVR of 94 RCC (GREF) collected 1800 Ltrs of Kerosene oil vide CN No. CN.70/SKO/60/E3 dated 30 Nov 2011 and CN No. CN/70/SKO/61/E3 dated 01 Dec 2011. 2200 Ltrs of Kerosin oil received from Instingri. Duty slip of Ashok Leyland Veh No. 3101 did not show any movement/ entry of the same on 30 Nov 2011 and the transaction was done only on papers.

Shri NARESH KUMAR UPADHYAYA, GS 177116L SENIOR STORE SUPVR of 94 RCC (GREF) is solely responsible for the discrepancies of following stores priced as indicated against each items for personal benefits thus violating Rule 3(1)1 of CCS Conduct Rules 1965.

S/ No.	Items	A/U	Quantity	Rate (in Rs.)	Amount (in Rs.)
1.	Kerosene	Ltrs	2200.00	59.00	1,298.00.00
2.	Rice	Kgs	10.00	26.56	1,859.20
3.	Sugar	Kgs	170.00	17.34	2,947.80
4.	Tinned Milk	Kgs	50.00	170.00	8,520.00
5.	Refined Oil	Ltrs	105.00	104.40	10,962.00
				Total	1,54,089.00
				Add 20% DC	30,817.00

				G/ Total	1,84,906.00
				Say Rs.	1,84,907.00

13. Mr. Bora has also invited the attention of this Court to the findings and the opinions of the Court of Inquiry, referred to in the letter dated 04-11-2019 issued by the Commandant, pertaining to the allegation brought against the Store Supervisor Roshan Kumar. The relevant observations made in the report, as available in paragraphs 3, 4 and 5 of the communication dated 04-11-2019 issued by the Commandant, is reproduced here-in-below for ready reference:-

“(3) Detailed scrutiny of court of inquiry proceedings reveals that the alleged manipulation/ tampering of convey note was prepared based on the indent passed for SK oil in the month of Nov 2011 by GS-188295W, SS Roshan Kumar. SK oil in the alleged manipulation/ tampering convey note was duly endorsed in the Daily Balance Sheet by the individual. Cutting of date on the alleged manipulated/ tampered convey note does not have any financial bearing and it seems to be ‘error of omission’ rather than ‘error of commission’ as opined/ recommended by the Court.

(4) Further, the court established that physical move of SK Oil could not be ascertained at the belated stage due to non availability of sufficient related documents from the units. However, GS-188295W, SS Roshan Kumar produced the extract of gate pass register which reflects the move of veh on 30 Nov 2011 with SK Oil having entry at ser No. 258 in the register maintained at the gate. The court has also opined that physical move of SK oil after receiving the quantity on convey rate is the responsibility of receiving authority.

(5) In the light of opinion/ recommendation of the Court of Inquiry proceeding, I am of the view and recommend that the impugned case be set aside and vigilance clearance be given to GS-188295W, SS Roshan Kumar being a vintage case and the alleged charge could be of only an error of omission as there has been no financial bearing as well

Station: C/O 56 APO

Date 04 Nov 2019

Sign Sd/-

(Uma Shankar)

Col
Commander"

14. From a reading of the communication dated 04-11-2019, it is apparent that the Store Supervisor, viz. Roshan Kumar has been exonerated of the charge of deliberate manipulation and tampering of records and misappropriation of store. It was found to be a case of "error of omission" rather than a deliberate act of malfeasance. No shortfall of S.K. Oil or other store items could be detected in the Court of Inquiry. There is also nothing to show that there is actually any deficiency of store items detected by the authorities nor is there anything to show physical movement of store items outside the depot. As a matter of fact, taking note of those issues, the Chief Engineer himself had earlier raised a question as regards the manner in which the Court of Inquiry was being conducted by ignoring these aspects. If there is no finding of the Court of Inquiry arrived at on the basis of cogent materials to show that the petitioner was involved in misappropriation of Govt. store, in his individual capacity, since Roshan Kumar has been found to be innocent, it is not understood as to how, in the facts and circumstances of the case, the order of recovery of an amount of Rs. 1,84,907/- could be issued against the writ petitioner, that too, without giving him any opportunity of showing cause in the matter.

15. As a matter of fact, the penalty for recovery of Rs. 1,84,907/- had been imposed upon the writ petitioner even before initiation of the departmental proceeding to establish such a charge. Since the foundation of the departmental proceeding is that the writ petitioner is guilty of misappropriation of Govt. store, in view of the observation made in

the foregoing paragraphs, this Court is of the unhesitant opinion that having regard to the peculiar facts and circumstances of the case, such a proceeding would not be maintainable against the writ petitioner alone, since, without the complicity of the other store official, misappropriation of the store materials, in the manner indicated by the authorities, would not be possible.

16. It is also the specific plea of the petitioner that although he had submitted his version before the second Court of Inquiry, his evidence was not even considered by the authorities. Such assertions made by the writ petitioner could not be disputed by the learned counsel appearing for the respondents in this case. If that be so, there can be no doubt about the fact that this is a case where the Court of Inquiry was conducted in violation of the procedural safe guard available to the petitioner thus, leading to an order of penalty of recovery of a sum of Rs. 1,84,907/- which was issued without giving proper opportunity to the writ petitioner of defending himself.

17. Under the circumstances, the impugned order dated 19-09-2014, in the opinion of this Court is not sustainable in the eyes of law. Consequently, the memorandum of charge dated 14-01-2015 is also held to be unsustainable in the facts and circumstances of the case.

For the reasons stated hereinabove the order dated 19-09-2014 is hereby set aside. The memorandum of charge dated 14-01-2015 also stands quashed. Having regard to the peculiar facts and circumstances of the case, this Court is of the opinion that there is no justifiable ground for the authorities to extend a differential treatment to the writ petitioner, as compared to what was extended to Store Supervisor Roshan Kumar who

was exonerated by the Court of Inquiry.

Writ petition is accordingly allowed.

There would be no order as to cost.

JUDGE

GS

Comparing Assistant