

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4099 of 2002

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Shri Jagdish Kumar, son of Shri Dasarath Yadav, resident of Shrikrishna Vihar Colony, Yadav Nagar, Bhagwanpur, Muzaffarpur, Police Station Sadar, (Muzaffarpur), District Muzaffarpur

.... Petitioner/s

Versus

1. Bihar State Electricity Board through its Chairman, Patna
2. Joint Secretary, Bihar State Electricity Board, Patna

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Chitranjan Singh, Sr. Advocate
Mr. Surya Nilambari

For the Respondent/s : Mr. Vinay Kiriti Singh, Sr. Advocate
Mr. Vijay Kumar Verma
Mr. Akhileshwar Singh

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 08-01-2018

Heard learned counsel for the petitioner and learned counsel for the Bihar State Electricity Board.

In the present writ petition, the petitioner is challenging the order dated 11.9.1999, as contained in Memo No.2426, passed by the Bihar State Electricity Board, Patna (hereinafter referred to as the Board) whereby and whereunder the order of compulsory retirement has been passed and the same has been affirmed vide memo no. 1290 dated 25.7.2001 in appeal preferred by the petitioner. In both the orders the petitioner has been made to compulsory retirement of the service of the Board with immediate effect.

This present case can be disposed of on a short point which



has been raised by the petitioner that the Enquiry Officer has submitted its report wherein major part of the charges were not found proved except certain charges where it was partly proved and further raised a point that the Enquiry Officer recorded a finding with respect to misconduct which was not subject matter of the charge, further submitted that if the disciplinary authority is intended to differ with the finding recorded by Enquiry Officer, in such circumstances, it was incumbent upon the Enquiry Officer to record a separate finding of disagreement and serve the same upon the petitioner, asking the delinquent, to submit explanation, and authority considering his explanation, including materials on record would pass a reasoned order in accordance with law, has submitted that instead of following the proper procedure the disciplinary authority has failed to record a separate finding of his disagreement with the Enquiry Officer and passed the order of compulsory retirement.

Learned counsel for the petitioner has placed reliance on number of judgments such as Punjab National Bank and others v. Kunj Bihar Misra, reported in (1998) 7 SCC 84, Yogi nath Bagde v. State of Maharashtra and another, reported in (1999) 7 SCC 739, High Court of Judicature at Bombay v. Shashikant S. Patil and another, reported in (2000) 1 SCC 416.



The short facts of this case is that the petitioner was working at Muzaffarpur as Assistant Electrical Engineer, Electric Supply Division, Muzaffarpur. The petitioner was posted at Muzaffarpur on or after 4.9.1988. M/S Ganesh Foundary and Casting Pvt. Ltd. Muzaffarpur as well as M/S Deepak Electro Castings India Ltd. were consumers of the Board. They were committing the theft of massive power. A raid was conducted on 4.8.1995 at M/S Ganesh Foundary and Casting Pvt. Ltd. Muzaffarpur as well as M/S Deepak Electro Castings India Ltd. on 5.8.1995 and it was found that they were committing theft of the electric power by different manner i.e. bypassing the meter, installed the transformer of high KVP without approval from the Board. As the petitioner was discharging the duty of Assistant Engineer the area of raid was falling in his administrative jurisdiction that led to initiation of a departmental proceeding against the petitioner by issuing charge sheet dated 30.1.1996. In the memorandum of charge sheet altogether six charges have been mentioned which are as follows:

“1. In course of raids conducted by Anti Power theft squad of B.S.E. Board, Patna in the premises of M/S Ganesh Foundary and Castings Pvt. Ltd., Muzaffarpur and M/S Deepak Electro Castings Pvt. Ltd. On 4.8.95 and 5.8.95



respectively, massive theft of energy was detected.

It was found that M/S Ganesh Foundary was consuming electric power directly by bypassing the meter by cutting out the CT/PT metering unit on the circuit. The MRT seal on the A.B. Switch was also found broken. Besides above six transformers were detected in the premises out of which one transformer was connected with the generator and five nos. of transformers were connected with the electric supply system of the Board. The nameplate consisting specification of the transformer as available on only one transformer and four were without nameplates, however as per the report of the technical team of M.I.T. Muzaffarpur the total capacity of transformers by which power was being availed comes to 7719 KVA.

Similarly another H.T. consumer M/S Deepak Electro Castings India (Pvt) Ltd. was also found indulged in massive theft of power. Sri Kumar as a incharge of the sub-division never tried to restrict such type of huge theft power, Sri Kumar has been also visiting to the premises in course of taking meter reading of the consumer but in connivance with the consumers he never reported regarding theft of energy, rather he allowed and helped in such action. As per instructions contained in Board's letter no.Rev/K3/RCD/552/83-986 dated 7.10.83 and



letter no.Rev./C2/Com/537/86-488 dated 8.7.86. He should have inspected the premises of all H.T consumers within his jurisdiction in every month to ensure proper billing and metering of power supply but in connivance with the consumer he never followed the Board's instruction and allowed massive theft of energy in his area for his wrongful gains.

2. Sri Kumar submitted a report on 21.7.95 to Electrical Superintending Engineer, Muzaffarpur directly about the details of transformers installed at the premises of M/S Ganesh Foundary and Castings Pvt. Ltd., Muzaffarpur. In his report he has admitted that the consumer has replaced the transformers and installed other transformers in its place between the interval of 2-3 months. He has also indicated that for the purpose of additional loads to be sanctioned, the consumer had installed two nos. of transformers but had not examined them. As reported by Sri Kumar these transformers were of 1000 KVA and 700 KVA. It is surprising that he could not verified/investigated how the transformers got replaced without the clearance certificate and inspection report from the office of Electrical Inspectorate, Govt. of Bihar.

At the time of raid in the premises on 4.8.95, all five transformers were found availing power, which clearly shows that the report of Sri



Kumar dated 21.7.95 is misleading and given in the interest of consumer to facilitate him in theft of energy for his personal gains.

3. Additional load of 1000 KVA was sanctioned to M/S Ganesh Foundary by the General Manager, Muzaffarpur vide his letter no.3306 dated 29.7.95 subject to certain formalities being completed, i.e.

(i) deposit of additional security

(ii) to execute agreement in four copies

(iii) deposit the requisite fee and submit a diagram of the Electrical Inspectoriat and inspection and clearance report from Electrical Inspectorate, Govt. of Bihar

(iv) Capacity of installed power transformers should be within permissible limit of prevailing tariff.

Sri Kumar did not care to get the formalities completed by the consumer and facilitate him in massive theft of energy.

4. The metering unit of power substation from which power was being supplied to above H.T. consumers was out of order since long but Sri Kumar never bothered to give there aspects to prevent theft of energy and for assessment of actual power consumption etc. In this way he facilitate the consumer in massive theft of energy causing huge financial loss to the Board.

5. There was a provision in Board's tariff



published in the year 1991 and 1993 that transformer capacity of H.T. and E.H.T. consumers should not be more than 150% of contract demand. Prior to the above this limitation was 175% of the contract demand. In view of the above it was responsibility of Sri Kumar to check and verify the transformers capacity of each and every H.T/EHT consumers.

Besides above the Board also issued instruction vide letter no.Com./Misc.1073/93-350 dated 11.8.94 that registered notice be sent to such consumers whose transformer capacity is more than 150% of the contract demand to bring down the transformer capacity within the limit laid down in the tariff in clause 16.4(i within 6 months and in case of violation of the notice so issued the line of the consumer be disconnected. It is quite clear that no such action in this case had been taken by Sri Kumar although the transformers capacity of the consumer (7715 KVA) was more than 500% of the contract demand (1500 KVA).

6. According to agreement executed by the consumer M/S Ganesh Foundary and Castings (Pvt.) Ltd. The date of commencement of supply has been exhibited as 4.2.90 but it appears from the bill served to the above consumer that the date of commencement of supply is 2.4.90. The bill had also been served showing consumption



from 2.4.90. In this way consumption for the period from 4.2.90 to 1.4.90 had not been billed resulting huge financial loss to the Board and undue benefit to the consumer due to negligence and connivance of Sri Kumar.”

Before issuance of the charge sheet the petitioner was placed under suspension vide order dated 22.8.1995 and the same was challenged by the petitioner in C.W.J.C. No.6215 of 1998. The Court refused to interfere with the order of suspension but directed the erstwhile Electricity Board to complete the departmental proceeding within a period of two months. In failure to co-operate the proceeding by the petitioner the Board was at liberty to proceed ex-parte in accordance with law whereupon the petitioner participated in the enquiry, the proceeding was concluded the Enquiry Officer on 28.6.1997 has submitted his enquiry report with respect to six charges. With regard to charge no. I it has been recorded as follows:

“The earlier order of the Member (Dist,) and Member (F) have however not been withdrawn and the AEE is overall incharge of his jurisdiction should have checked the installation of such important consumers. He should have reported about absence of the transformers nameplates. He should have pointed out the low contract demand with respect to



finance capacity, which raises doubts about transformer capacity.

As an Officer of the Board, the AEE has to ensure that the power is supplied to various consumers in his area and correct revenue is realized. He should have reported and taken action to ensure removal of the AB Switch, which was installed in the premises of the consumer and could easily be tampered.

Asstt. Law Officer, in his argument or through BSEB witnesses could not prove the prima facie involvement of Shri Kumar. In the theft of energy or connivance with the consumer for his wrongful gain but Shri Kumar is responsible for his failure to perform his duty and to ensure correct realization of revenue from the EHT consumers of his area.”

The Enquiry Officer recorded that the Board could not prove the prima facie involvement in the theft of commission for his wrongful gain. But other part of charge was found proved

With regard to charge no.2 it has been recorded as follows:

“ No facility is available with the AEE, supply to find out the transformer capacity and therefore he has to base his report on the papers for procurement of transformers made available by the consumer. It has been mentioned in the report of CE, BSEB, who had gone after the raid for the detailed inspection



that 4 nos. of invoices issued by M/S Preetisale of transformer of 700 KVA and 3 of 1000 KVA were available in the file Muzaffarpur Electrical Circle. However, it has been mentioned that the details of order no. and date has not been mentioned in the invoices and

Commercial Dvn. of Muzaffarpur Circle did not certify, the invoices on the ground that there were photo copy, which did not contain signature of any officer of the Board. But the Revenue Cell of the Circle did not raise any objection to sanction of load nor execution of the agreement. Thus the Revenue Dvn. Of the

Circle was informed of the transformer capacity as per consumer records but no action for test was taken. As confirmed by EEE (Com. & Rev.) and also AEE (Com. & Rev.) that this report was available with them prior to sanction of the additional load, since circle MRT did not have proper facility or suitable instruction such test was not done prior to agreement in circle office for additional load. This agreement was signed on 31.7.95. The AEE, however, did not mention about the missing nameplates on the transformers in his report.

The stand taken by the defence was that though transformers were installed, these were not connected to the system on 21.7.95 when the inspection was carried out by the AEE prior to reporting to the ESE, nor on 31.7.95 when AEE



visited for the meter reading. No witness or any record was produced against this stand.”

With regard to charge no.3 it has been recorded as follows:

“However, the additional security money was not deposited by the consumer prior to the raid on 4.8.95. The defence of Shri Kumar is that he has not allowed by the consumer to connect the two transformers installed by the consumer for availing additional load applied for. In support of his argument, he has referred to the meter test report dt. 5.7.95 and 21.7.95 and meter reading statement dt. 31.7.95. None of these documents mentioned about any of the five transformers being connected to the power supply system. These reports only mention about meters. There is no mention about transformers and therefore cannot be said to be proof for non-connection of the two transformers. These reports even do not mention about the other existing 3 transformers connected for availing earlier sanctioned load of 1500 KVA.

It may be possible that action for unauthorized connection of the two transformers was taken by the consumer but these transformers cannot be connected to the system without taking shut-down of the 33 KV system. The transformers found connected on 4.8.95 should have been connected earlier by either availing unauthorized shut-down of the 33 KV system or by isolating the



AB switch allowed to be kept inside the consumer's premises. AEE should have proper control to ensure that such shut-down are not given without his permission. It is not possible to believe that the shut-down etc. are being availed without knowledge of local officers".

Charge nos. 4 and 6 were not found to be proved as during that period he was not posted.

With regard to charge no.5 following are the findings of the Enquiry Officer which are as follows:

"It is established that the Circle organization do not have adequate testing facility but in case of doubt instruction could have been sought from the Board's headquarter. None of the inspecting officers also bothered to get the transformer capacity checked and issued necessary instruction in this connection to the AEE. Where was also failure on the part of Commercial Revenue organization to verify the installed load of the consumer thereby establishing the minimum transformer capacity necessary. As per Board's order, notice should have been served by Executive Engineer, AEE, supply, therefore, is not responsible for this act of omission for serving notice."

The disciplinary authority has disagreed with the finding of the Enquiry Officer but while differing with the Enquiry Officer he has not recorded a separate finding on the basis of the



material placed before the Enquiry Officer but ipsi dixit he has recorded somewhere that he has agreed with the finding of the Enquiry Officer and somewhere he has recorded difference of opinion but not clear cut recorded separate finding as that of the Enquiry Officer has been recorded and served upon the petitioner. Though the disciplinary authority accepted the finding of Enquiry Officer with respect to charge nos 4 and 6 in these charges the petitioner has been let off so in the present case only charge nos. 1 to 3 and 5 are subject matter for consideration of this Court and further grievance has been raised by the petitioner that while issuing the second show cause wherein it has been recorded following:

“And whereas, after careful examination of findings of Enquiring Officer, written statement of the proceedee, depositions of witnesses and relevant case records, it has been found that charge no.1 has been found proved by the Enquiring Officer with regard to failure of Shri Jagdish Kumar, Asstt. Electrical in performing his duties and ensuring correct realization of revenue from HT consumers of his areas. Besides, checking scope of theft of electrical energy by the consumer by not removing the A.B. Switch installed in the premises of the consumer. This clearly indicates his connivance with the consumers of his area in commission of theft of energy by them.



Charge No.2 is proved that he did not given full and correct report to the Elecl. Superintending Engineer through his letter dated 21.7.95 although when power was found availing through 5 nos. of transformers in the premises of M/S Ganesh Foundary which was found during the raid by the vigilance. He did not apprise of the full report to his immediate officer i.e. Electrical Executive Engineer and surpass the information to the Electrical Superseding Engineer directly.

Charge No.3 has been found proved by Enquiring Officer and hence his hands in glove with the consumer in commission of theft of energy may not be ruled out.

The findings of Enquiring Officer against charge no. 4 and 6 are accepted as not proved and substantiated against Shri Jagdish Kumar. So far as Charge No.5 is concerned which is found proved by the Enquiring Officer and the same is accepted as found proved and substantiated against Shri Jagdish Kumar Asstt. Electrical Engineer (under suspension).

Thus the charge no.1,2, 3 to 5 are proved against Sri Kumar, AEE (Divn)

And, therefore, it has been decides to award the following punishment to Sri Jagdish Kuamr Asstt. Electrical Engineer (Under suspension).

He may be dismissed from the service of the Board.

Accordingly while enclosing a copy of the



findings of Enquiring Officer, second show cause notice is served to Sri Jagdish Kumar, Asstt. Electrical Engineer (under suspension) and he is directed to submit his reply in his defence within 15 days from the date of issue of this resolution as to why he should not be dismissed from the service of the Board. If he fails to submit the reply to this show cause notice within the stipulated period it will be deemed that he has nothing to say in this regard and the punishment as proposed above will be awarded to him.”

It has been submitted that recital of show cause shows that disciplinary authority decided to award the punishment to Shri Jagdish Kumar, the petitioner, on that basis learned counsel for the petitioner submits when disciplinary authority has made up his mind, serving second show cause renders meaningless, as he could have proposed tentative punishment but should have avoided to record that it was decided to inflict that punishment. It will be relevant to quota paragraph nos. 31, 32, 33 and 35 of the judgment of the Hon’ble Supreme Court in the case of Orys Fisheries Private Limited v Union of India and others, reported in (2010)13 SCC 427

“31. It is of course true that the show-cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who



is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show-cause notice will be an empty ceremony and he will merely knock, his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi judicial proceedings under a statutory regulation which promises to give the person proceeded against reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show-cause notice.

33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it.

35. Going by the aforesaid test any man of ordinary prudence would come to a conclusion that in the instance case the alleged guilt of the appellant has been prejudged at the stage of show-cause notice



itself.”

The thrust of the judgment is if the authority has made up his mind, issuance of second show cause itself renders meaningless. The disciplinary authority, later on, in final order of punishment though it has been recorded in second show cause, the proposed punishment was for dismissal but final order was passed for compulsory retirement. But the question would arise whether the order of compulsory retirement could survive in the fact that when disciplinary authority has failed to record a separate finding of disagreement, serve and obtain explanation inasmuch as though final order itself indicates that earlier show cause was a proposed punishment but in the event the disciplinary authority has not followed the proper procedure in terms of judgment decided in the case of Kunj Bihari Misra (supra), Yoginath Bagde (supra) and Shashikant S. Patil (supra). In such view of the matter, the order passed by the disciplinary authority does not survive and also the order of the appellate authority.

Accordingly both the orders dated 11.9.1999 and 25.7.2001 are set aside. As this Court has set aside the orders on technical ground, the matter is remanded back to the disciplinary authority, with a direction to proceed in accordance with law and



conclude entire proceeding within a period of four months from the date of receipt/production of a copy of this order.

Accordingly this writ petition is allowed to the aforesaid extent.

(Shivaji Pandey, J)

Vinay/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	30.1.2018
Transmission Date	NA

