

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

**HON'BLE JUSTICE SUBRATA TALUKDAR
AND
HON'BLE JUSTICE HIRANMAY BHATTACHARYYA**

**FMA 679 of 2019
Subrata Nath
-Vs-
Union of India & Ors.**

**With
FMA 680 of 2019

Union of India & Ors.
vs.
Subrata Nath**

For the Appellants in
FMA 679 of 2019 and
For the Respondents in
FMA 680 of 2019

: Mr. Soumya Majumder
Mr. Dwaipayan Sengupta
Mr. Samrat Dey Paul

For the Respondents/Union
of India in FMA 679 of 2019
and the appellants in
FMA 680 of 2019

: Mr. Swapan Kumar Nandy

Heard on

: 23/07/2021

Judgment on

: 09/09/2021

Subrata Talukdar, J.:

The two analogous appeals have been filed challenging the common
Judgement and Order dated 25th of June 2018 passed by the Hon'ble Single

Bench in the writ petition filed by the appellant of FMA 679 of 2019, *viz.* Subrata Nath (hereinafter referred to for short only as SN).

By the said impugned Judgement and Order, the Hon'ble Single Bench decided the legality of a Disciplinary Proceeding (DP) initiated against the SN who was charged *vide* Article of Charge-I (AoC-I) with gross negligence, dereliction of duties and connivance to steal while being on duty as a Constable of the respondents/ Central Industrial Security Force (CISF) at its Alif Nagar scrap yard under the Kolkata Port Trust. *Vide* Article of Charge II (AoC-II) of the Charge-Sheet (CS) dated 7th of December 2007, SN was charged with having failed to correct his conduct after serving eight punishments in the past 13 years of his service as a Constable of the CISF.

The admitted facts leading up to the CS are that SN was deputed for "C" shift duties at the Alif Nagar Scrap Yard on the intervening night between 2100 hours on the 7th of November 2007 to 0500 hours on the 8th of November 2007. On the next morning, at around 0800 hours, it was noticed by the on duty and supervisory personnel of the CISF that major signs of criminal activity occurred around the Duty Post where SN was deployed on the intervening night between 2100 hours of 7th November to 0500 hours of 8th November 2007.

It was, *inter alia*, noticed that the vegetation around the Duty Post was trampled and a pathway had been created up to the perimeter wall of the yard. The concertina wire atop the perimeter wall was found to have been cut and a

rope was hanging from the top of the perimeter wall. It was further discovered that around 800 kgs comprising 42 bundles of copper wire was missing from the yard.

At around the same time after the discovery of the theft by the CISF inside the yard, the local West Port Police Station detained a truck containing copper wire identical to the bundles stolen from the scrapyard. *SN*, being on duty during the intervening night as aforesaid, was therefore charged with gross negligence, dereliction of duty and connivance to steal *vide AoC-I*. In addition, *AoC-II* was slapped on *SN*, as also stated above.

Mr. Soumya Majumder. Learned Counsel appearing for *SN*, submits that there is a gross discrepancy between the charges leveled in *AoC-I* and the findings of the Enquiry Officer (*EO*). It is submitted that while the charge is of gross negligence of duties, the findings of the *EO* is connivance in the commitment of theft. It is also submitted that connivance in an act of theft colours such act with a particular motive. However, negligence does not demonstrate any ill-motive on the part of the Charged Officer (*CO*) *per se*. Therefore, no finding of connivance to theft can be arrived at *qua AoC-I* which charges *SN* with gross negligence on the one hand and, arrives at a finding in the *DP* by the *EO* of connivance in theft.

It is submitted that it is an admitted position that *SN* handed over charge to his reliever on the morning of 8th of November 2007 after completion of his duty. His reliever, one P.S. Chowdhury, did not report any theft of copper wire.

The supervising officer had also reported upon completion of his round of inspection at the yard on the intervening night (of 7th of November/ 8th of November 2007) that Constable *SN* was found to be *Alert* at his Duty Post.

It is thus argued on behalf of *SN* that the documentary evidence to be found in the Register of duties connected to the intervening night of 7th of November 2007/ 8th of November 2007 did not show *SN* to be complicit in the theft of the copper wire. *SN* is also not named in the First Information Report (FIR) filed with the local West Port Police Station connected to the alleged theft.

It is further submitted that the findings of the *EO* suggesting an active role of *SN* in the theft of the copper wire are presumptive in nature. Since the best evidence connected to the Register of duties and materials for the intervening night (*supra*) stood not proved against *SN*, it is a wrongful *DP* that resulted in an illegal decision of dismissal from service *qua SN*.

It is submitted on the strength of the legal authorities as reported in 2009) 2 SCC 570 (at Paragraph 23), *In Re: Roop Sing Negi Versus Punjab National Bank and others*; and 2011) 6 SCC 376 (at Paragraph 18) *In Re: Commissioner of Police, Delhi and Others Versus Jay Bhagwan* that even a high level of suspicion connected to the conduct of the *CO*/ the delinquent officer does not amount to legal proof in a *DP* against such officer.

It is argued that there is a clear distinction between a preponderance of probability and suspicion. It is pointed out that the report of the *EO* shows that the *EO* had, *inter alia*, presumed that *SN* might have *facilitated the theft to take*

place. The *EO* goes on to hold that *SN*'s complicity at connivance in theft cannot be ruled out.

Mr. Majumder submits that the *EO* has engaged in pure surmise. Such surmise is based on a high level of suspicion connected to the role of *SN* on the intervening night (*supra*), without any evidence at the ground level substantiating such role. Suspicion cannot lead to an inference that *SN* connived in the theft. It is therefore a case of no evidence at all. It was the duty of the authorities in charge of the *DP* to have distinguished pure evidence from conjectures.

It is therefore submitted that *SN* was illegally dismissed from service. The punishment of dismissal which cannot be allowed to stand at all in the facts made out (*supra*), was therefore erroneously substituted by the Hon'ble Single Bench with the punishment of *Compulsory Retirement*. The Hon'ble Single Bench, although having noticed that an essential evidence in the form of Beat Book did not constitute part of the evidence taken in the *DP*, could not have substituted an illegal punishment of dismissal with a different punishment of *Compulsory Retirement*. Accordingly, following the law laid down in 2013) 10 SCC 324 (Paragraphs 32 to 38.3), it is claimed that the relief of reinstatement be granted to *SN* with full back wages.

Per Contra, Mr. Swapan Nandi, Learned Counsel appearing for the respondents/ CISF/ Union of India, who are also the appellants in FMA 680 of 2019, submits that evidence was placed before the *EO* in detail. The evidence

was accordingly discussed in detail by the *EO*. The Disciplinary Authority (*DA*) applied its mind to the materials placed before it including the reply of *SN*/ the *CO* to the report of the *EO*.

Thereafter, the appeal filed by *SN* was duly considered and rejected by the Appellate Authority (*AA*). Still thereafter, the decision of the *AA* was considered and rejected by the Revisional Authority (*RA*), on such revision being filed by *SN*.

Mr. Nandi submits that in such a scenario of a multi-tiered *DP*, *SN* cannot complain of any infraction of natural justice. Since reasoned orders have been passed at all stages of the *DP* from the *EO* to the *DA* and thereafter by the *AA* to the *RA*, such administrative decision ought not to be interfered with by the Hon'ble Court on the mere asking of *SN*. It is submitted that the scope and the power of the Writ Court to exercise jurisdiction in such a scenario, as above, stands limited. Reliance was placed by Mr. Nandi on the authorities of *AIR 1963 SC 1723*(at Paragraphs 7 and 11), *AIR 1975 SC 2151* (at Paragraphs 21, 24 and 25) and *AIR 2010 SC 137* (at Paragraph 12).

It is therefore submitted by Learned Counsel for the CISF, that the Hon'ble Single Bench could not have substituted the order of *Dismissal* by the order of *Compulsory Retirement*. It is pointed out that such a substitution in the punishment without there being valid reasons for doing so, vitiates the meticulous findings in the *DP*. Furthermore, the Hon'ble Single Bench was palpably wrong in holding that the Beat Book did not form part of the evidence.

Having heard the parties and considering the materials placed, this Court finds persuasive value in the submissions of Mr. Majumder that the evidence on the ground may not speak of *SN*'s direct involvement in the theft of copper wire. It appears on paper that *SN* handed over duties to his reliever on the 8th of November, 2007 and his reliever, the said P.S. Chowdhury, did not find anything amiss while taking charge of the said Duty Post in the yard.

It is also on evidence in the *DP* that the supervisory inspecting personnel found *SN* to be *Alert* in his Duty Post on the intervening night of 7th November, 2007/8th November, 2007. The theft was discovered subsequently in the morning and the FIR was registered at 15.30 hours on 8th November, 2007. Therefore, the factual scenario as available with the documentary evidence would lead to a conclusion that *SN* stood away from a direct association with the alleged theft of copper wire.

However, this Court having deeply considered the gamut of the materials on record, is not persuaded to conclude that such a major theft of 800 kgs comprising 42 bundles of copper wire could have happened in the blink of an eyelid.

It is not disputed that vegetation around the particular Duty Post of *SN* was found to be trampled and a pathway cut through the vegetation up to the perimeter wall which can only be the handiwork of several persons. There is evidence to suggest that the 800 kgs of copper wire were dragged up to and lifted above the perimeter wall after cutting open the concertina wire on top.

Such a strenuous exercise would have involved collective effort and a good length of time during the dark of the night and the sleepy quietness of an early winter morning and, it is nobody's case that the event happened on the intervening night of any other night but that of 7th November, 2007 and 8th November, 2007 which corresponded to the 'C' shift duty of SN.

The visible signs of the theft were discovered by CISF personnel only when morning visibility cleared on the 8th of November, 2007 and, post SN being relieved of his 'C' shift duty at 0500 hours.

It is also with the record that SN's reliever, the said P.S. Chowdhury, was not familiar with duties at the yard since, he was taking charge for the first time. It is again a matter of record that SN's reliever found the conditions to be foggy which has a proximate bearing with the onset of winter around such time and not unfamiliar with the early morning hours of 0500 hours when handed over charge. SN's reliever, the said P.S. Chowdhury, has also given evidence that at the time of handing over charge at 0500 hours of 8th November, 2007, SN did not show him around the yard or explain anything but, left in a hurry. Accordingly, as the morning cleared, the evidence of the theft of the previous night could be discovered.

Read with the above factual material, it is also a matter of record that the supervisory officers of CISF upon inspection found SN to be *Alert* on the intervening night of 7th November, 2007/8th November, 2007. In the above view of the matter this Court is required to revisit the conclusion of the *EO* as

accepted by the *DA* and affirmed by the *AA* and the *RA* to the extent that *SN* connived in the theft, are presumptive.

From a detailed reading of the evidence placed before the *EO* it does not however, appear to this Court that essential evidence connected to the shift duties on the intervening night of 7th November, 2007/8th November, 2007 were unavailable for drawing the conclusion that a theft of such a magnitude could only have happened corresponding to the duty period of *SN* in the intervening night of 7th November, 2007 and 8th November, 2007. Merely because no discrepancy was recorded in the Register connected to handing over and taking over charge *inter se SN* and his reliever, the proposition that falling short of connivance, the finding on the basis of preponderance of probability could not have been returned against *SN* of gross negligence or dereliction of duties is not easy to accept.

While such negligence may not be presumptively equated with connivance, at the same time, notwithstanding the paper evidence shown to be in favour of *SN*, the alleged massive theft of 800 kgs in 42 bundles of *metallic* copper wire, correspond to the time and jurisdiction of 'C' shift duty of *SN* alone. The fundamental plank of *SN*'s argument is to explain away the preponderance and the probability on the role of others gleaned from the evidence on paper, without attempting to remove the cloud of his own negligent role in preventing the events during his duty hours and within the sole jurisdiction of his Duty Post.

Next, this Court finds that AOC-II relates to 8 other Charges earlier issued against SN and hence, although not directly within the ambit of the DP under discussion in this appeal, it would not be out of place to notice the past service record as emanating from (i), (vi) & (vii) of the said Charges.

*“i) “Censure” for **sleeping** (emphasis supplied) while on duty vide AC, CISF Unit ONGC Mehsana final order No. (1781) dated 18.10.1996.*

*vi) “Three days pay fine” for **carelessness** (emphasis supplied) in preserving ten rounds issued to him while on duty in his safe custody, vide DC, CISF Unit IOC GR Baroda final order No. (1350) dated 30.04.2001.*

*vii) “Five days pay fine” for gross indiscipline, **carelessness** (emphasis supplied) and disobedience of lawful order of his superior, vide DC, CISF Unit ONGC Nazira final order No. (417) dated 28.05.2002.”*

In the backdrop of the above discussion, this Court finds as follows:-

- I)** AOC-II cannot be read substantively as part of AOC-I.
- II)** Central to the DP and its findings is AOC-I connected to the facts in issue.
- III)** There is no direct evidence of SN conniving in the theft.
- IV)** The Charges in AOC-I pertaining to negligence and dereliction of duties stand sustained.
- V)** The finding of the Hon’ble Single Bench that evidence in the form of the Beat Book was not produced is not accepted having regard to the materials placed on record in the DP.

- VI)** The decision of the Hon'ble Single Bench that the punishment of *Dismissal* be substituted by one of *Compulsory Retirement* is also not accepted and, hence set aside.
- VII)** *SN* shall be entitled to reinstatement in service with back wages from the date of his dismissal.
- VIII)** However, the *DA* shall be entitled to issue a fresh order of punishment commensurate to gross negligence and dereliction of duties other than a punishment of dismissal, removal from service or, compulsory retirement.

There shall be no order as to costs.

Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree.

(Hiranmay Bhattacharyya, J.)

(Subrata Talukdar, J.)