

IN THE HIGH COURT OF JUDICATURE AT BOMBAYNAGPUR BENCH : NAGPURWRIT PETITION NO.5660 OF 2018

Umesh Eknath Agalawe,
 aged about 32 years,
 occupation : nil,
 r/o Flat No. 201, Shivshobha
 Enclaves, Ulhas Nagar,
 Manewada Road, Nagpur.

... Petitioner

- Versus -

- 1) Bharat Heavy Electricals Limited
 Powers Sector, Western Region,
 Office at Shri Mohani Complex,
 Kingsway Central Avenue,
 Nagpur – 444001, through its
 Executive Director.
- 2) The Additional General Manager
 and Disciplinary Authority,
 Bhadradi TPS Village Manuguru
 Mandal, District Khammam
 (Telangana) – 507117.
- 3) The Appellate Authority
 General Manager, Project VIII,
 BHEL, PSWR Bhadradi
 TPS Village Manuguru
 Mandal, District Khammam
 (Telangana) 507117, through
 Mr. S.K. Agarwal.

... Respondents

 Shri S.S. Ghate, Advocate for the petitioner.

Shri H.V. Thakur, Advocate for the respondent no.1.

CORAM : DIPANKAR DATTA, C.J. AND
PUSHPA V. GANEDIWALA, J.

DATED : FEBRUARY 4, 2021

ORAL JUDGMENT (PER DIPANKAR DATTA, C.J.) :

Rule. Rule is made returnable forthwith. Heard finally by consent of learned Counsel appearing for the parties.

2) The petitioner was employed by the Bharat Heavy Electricals Limited (hereinafter “BHEL”, for short) as an Engineer Trainee. Following disciplinary proceedings initiated against him, the petitioner was removed from service by an order dated 24/8/2017 passed by the Disciplinary Authority. The order of removal was carried in an appeal before the Appellate Authority; however, the appeal stood dismissed by an order dated 18/12/2017. Aggrieved by rejection of the appeal, thereby confirming the order of removal from service, the petitioner approached this Court seeking quashing of the orders of the Disciplinary Authority and the Appellate Authority dated 24/8/2017 and 18/12/2017, respectively. The petitioner, upon amendment of the writ petition, has also prayed for reinstatement, back wages and continuity in service.

3) The memorandum of charge-sheet dated 30/4/2016 drawn up against the petitioner contained the Article of Charge, at Annexure-I thereto, wherein it was alleged as follows :

“Shri Umesh Eknath Agalawe, while working as Engineer Trainee (Purchase), PS-WR, Nagpur in 2012-13, is responsible for harassing M/s. Pressurejet Systems Ltd. (L-1 Vendor) by demanding illegal gratification for placement of Purchase Order against open tender no. 12013E (NIT no.11945 dated 25.05.2012) for procurement of five Hydraulic Pressure Test Pumps of 1000 Kg/Cm2.

By his aforesaid acts, Shri Umesh Eknath Agalawe failed to maintain absolute integrity and devotion to duty, and acted in a manner which is unbecoming of a public servant and thereby violated Rule 4(1)(i), (ii) & (iii) of the BHEL Conduct, Discipline and Appeal (CDA) Rules, 1975. He acted in a dishonest manner and committed acts subversive of discipline in violation of Company's Rules. His above acts constitute misconduct in terms of Rule 5(1), 5(20) of the BHEL CDA Rules, 1975.”

The statement of allegations at Annexure-II, insofar as the same is relevant for the purpose of decision on this writ petition, reads as follows :

“1.10.1 Shri Vishal Shah, Managing Director of M/s. Pressurejet Systems Ltd. vide letter dated nil (received on 31.07.2012) addressed to Shri Santosh Nair, AGM (Purchase), PS-WR, informed that after bid

opening Shri Umesh Eknath Agalawe approached them and asked 2% of order value and he tried to encash his position.

1.10.2 The above fact is also supported by the transcripts of the recordings of the conversation of Shri Umesh Eknath Agalawe with Shri Vishal Shah, Managing Director, M/s. Pressurejet Systems Ltd., on 23.07.2012. It is observed that there was demand of bribe by Shri Umesh Eknath Agalawe by taking the name of Committee Members and the then General Manager (P&P), PS-WR. He told Shri Vishal Shah that as per 2% the amount would be Rs.1.10 lakh. Shri Umesh Eknath Agalawe stated that “50 GM Sahib ko jayengeaur 20-20 committee members ko jayenge ..haanbeesbeeshazaar.

1.10.3 During the conversation, Shri Umesh Eknath Agalawe, Engineer Trainee, PS-WR stated that “nahinahiaapmujhe de dijiye, I will distribute them”. He also told that “aapmujhe de dijiye, main receive karloonga ... theekhai sham ko main le loonga ... mere office ke baaju main...”

2.0 From the recorded conversation between Shri Umesh Eknath Agalawe, Engineer Trainee, PS-WR and Shri Vishal Shah, Managing Director, M/s. Pressurejet Systems Ltd. on 10.07.2012 & 23.07.2012, it is established that there was demand of illegal gratification from the vendor.

2.1 The Forensic Voice Examination Report dated 07.01.2013 of CFSL, regarding the above recordings confirms that there was no form of tempering detected in the relevant audio recordings and the voice in the recording is the probable voice of Shri Umesh Eknath Agalawe, Engineer Trainee.”

The list of documents by which the charge levelled against the petitioner was sought to be established, at Annexure-III, included at serial nos.7 and 8 extracts of transcripts of the recordings of the conversation of Shri Umesh Eknath Agalawe, Engineer Trainee with the vendor representative on 10.07.2012 and 23.07.2012 (hereafter “the transcripts”, for short) and Forensic Voice Examination Report dated 07.01.2013 of the Central Forensic Science Laboratory regarding the authenticity of voice recorded during conversation (hereafter “the forensic report”, for short), respectively.

Annexure-IV was the list of witnesses, which included Shri Santosh Nair, a General Manager of BHEL as the sole prosecution witness.

4) It is noted that on the self-same allegations, prosecution was launched against the petitioner and currently he is facing trial before the Special CBI Court at Mirzapur, District Ahmedabad. The charge-sheet having been issued at a point of time when criminal proceedings were pending against the petitioner, he had moved a writ petition (W.P. No.4806/2016) before this Court questioning initiation of the disciplinary proceeding. The grievance raised in such writ petition was that compelling the petitioner to participate in the disciplinary proceeding would result in disclosure of his defence in the criminal proceeding and thereby

he would be prejudiced at the trial. We have noted that no interim order was passed on the writ petition and during its pendency, the Enquiry Officer appointed by the Disciplinary Authority proceeded to conclude the enquiry. Having been informed that the enquiry stood concluded, a coordinate Bench of this Court by its order dated 31/7/2017 disposed of the said writ petition keeping all points open. However, liberty was granted to the petitioner to challenge the order of BHEL, if the same were adverse to his interest.

5) In the enquiry that was conducted, BHEL produced the said Shri Santosh Nair as the sole prosecution witness. The deposition of the sole prosecution witness is available at page 6 of the pursis filed by the petitioner. We have perused the deposition of Shri Nair in between the lines. Only 8 (eight) questions were put to Shri Nair by the Presenting Officer, mostly regarding the procedure for handling tenders. There is nothing in such deposition that would even remotely suggest that the petitioner was guilty of any misconduct. Further, the complaint of Shri Vishal Shah, Managing Director of Pressurejet Systems Ltd. received by BHEL on 31/07/2012, which is the genesis of the disciplinary proceeding, was not produced. It does not also appear that the Presenting Officer placed before the Enquiry Officer the extracts of the transcripts as well as the forensic report for being led in evidence. In such view of the matter, the contents of the three most vital documents were not proved by Shri Nair. It appears to us from the materials

on record that the Enquiry Officer had fixed a couple of dates for holding enquiry, whereupon the petitioner had prayed for adjournments ~ the first time on the ground that he was awaiting the decision of this Court on the interim prayer made in W.P. No.4806/2016 and next, on the ground that he was required to attend the Special CBI Court at Ahmadabad and for such purpose, he had even obtained leave from his superior. Despite such prayer being made, the Enquiry Officer declined it and proceeded to hold the enquiry in the absence of the petitioner. Be that as it may, since the sole prosecution witness did not give any evidence worthy of nailing the petitioner and also that the complaint, the extracts of the transcripts and the forensic report had not been proved by any witness, presence of the petitioner at the enquiry may not have been of any significance.

6) Although the Presenting Officer did not rely on the complaint, the extracts of the transcripts and the forensic report and, therefore, the sole prosecution witness did not have the occasion to prove its contents, most surprisingly, the Enquiry Officer considered such documents in his report dated 5/6/2017. It would be useful to reproduce hereinbelow excerpts from such report of the Enquiry Officer :

“4. ASSESSMENT AND ANALYSIS OF EVIDENCE

As per the transcript (Ex.S.7) recorded on 23.07.2012 detailed below CO had talked to the vendor representative Mr. Vishal regarding the money transaction.

*** *** ***

From the above, it is obvious that CO was demanding illegal gratification and there is no need to prove this. CO was processing the tender file; there was proposal by the tender committee for placement of Purchase Order, which was being delayed and in the meantime, pressure was being put on vendor for giving illegal gratification in the garb of negotiation; and as per transcript the demand was put in clear cut terms.

The CO has brought some defence documents, namely, some telephone records, organization chart, purchase policy, delegation of power, etc. Some more documents were asked by CO like email records, visitor passes, previous tender file etc. some of which are not available and some were not found relevant. Although every document will have some information, but none of the documents can rationalize the illegal demand made by CO and so is the case with all the defence documents.

Thus, the charge against CO of being responsible for harassing M/s. Pressurejet Systems Ltd. (L-1 Vendor) by demanding illegal gratification for placement of Purchase Order against open tender no.12013E (NIT no.11945 dated 25.05.2012) stands proved.

5. FINDINGS

On the basis of documentary and oral evidence adduced during inquiry and as analyzed above, the findings are as under:

Article of Charge : Held as 'Proved'.

It is acceptance of such report of the Enquiry Officer that resulted in removal of the petitioner from service.

7) The question that we are tasked to decide is, whether on facts and in the circumstances, there was legal evidence adduced in the enquiry for being acted upon against the petitioner, and if not, whether such an enquiry can be said to be fair and reasonable.

8) Shri Ghate, learned Advocate for the petitioner, has cited before us two decisions of the Supreme Court, viz. (i) **Roop Singh Negi vs. Punjab National Bank and others**, reported in (2009) 2 SCC 570, and **State of Uttar Pradesh and others vs. Saroj Kumar Sinha**, reported in (2010) 2 SCC 772, to contend that in the absence of the Presenting Officer tendering in evidence through the prosecution witness the three vital documents and no witness having proved the same, the Enquiry Officer acted illegally and in brazen violation of due process in holding the petitioner guilty of the charge based on two of such documents.

9) Paragraph 14 of the decision in **Roop Singh Negi** (supra) reads as follows :

“14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry Officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating Officer against all the accused by itself could not be treated to be evidence

in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

[emphasis supplied]

The law laid down in paragraph 28 of the decision in **Saroj Kumar Sinha** (supra) is not too different from the law laid down in **Roop Singh Negi** (supra). It has been held in paragraph 28 as follows :

“28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined, the documents have not been proved and could not have been taken into consideration to conclude that the charges have been proved against the respondents.”

[emphasis supplied]

10) Reacting to the aforesaid decisions, Shri Thakur, learned Advocate for the respondent no.1, has contended that in a domestic enquiry, the provisions of the Evidence Act are not applicable and, therefore, omission to prove the contents of

the extracts of the transcripts and the forensic report cannot be held to be fatal. In support of his submission that the Evidence Act is not applicable, the standard of proof in criminal proceedings and disciplinary proceedings are not the same, there is no bar in proceeding departmentally despite pendency of criminal proceedings arising out of the same facts and that power of interference with an order of penalty passed by the disciplinary authority after a duly constituted enquiry is limited, reliance has been placed by him on a host of decisions of the Supreme Court. Such decisions are :

- 1) **NareishbhaiBhagubhai and others vs. Union of India and others**, reported in (2019) 15 SCC 1;
- 2) **Union of India and others vs. Alok Kumar**, reported in(2010) 5 SCC 349;
- 3) **Pravin Kumar vs. Union of India and others**, reported in (2020) 9 SCC 471;
- 4) **Vijay Kumar Nigam (dead) through L.Rs. vs. State of Madhya Pradesh andothers**, reported in(1996) 11 SCC 599;
- 5) **Cholan Roadways Ltd. vs. G. Thirugnanasambandam**, reported in (2005) 3 SCC 241;
- 6) **Shashi Bhushan Prasad vs. Inspector General, Central Industrial Security Force and others**, reported in(2019) 7 SCC 797;
- 7) **State of Bihar and others vs. Phulpari Kumari**, reported in(2020) 2 SCC 130; and

- 8) **State Bank of India and others vs. Neelam Nag and another**, reported in (2016) 9 SCC 491.

11) Although there is no dispute with regard to the proposition of law that the strict rules of the Evidence Act do not apply to domestic enquiries, it is not the law that the substantive rules, which would form part of principles of natural justice, can be ignored and done away with. It is now well known that documents do not prove themselves. Principles of natural justice demand that the charged officer must know which document the prosecution would lead in evidence against him. There is no law on the basis whereof an Enquiry Officer can proceed on the basis of documents forming part of the charge-sheet but which are not led in evidence before him by the prosecution and, thus, are not relied on. We have ascertained from Shri Thakur that the extracts of the transcripts as well as the forensic report were evidence before the Special Court where the petitioner is facing trial. It, therefore, stands to reason that such evidence had been collected during investigation by the Investigating Officer against the accused/petitioner and was listed in Annexure-III to the memorandum of charge-sheet; but as cautioned in **Roop Singh Negi** (supra), such documents by themselves could not have been treated to be evidence in the disciplinary proceeding without any witness being examined to prove such documents. In **Roop Singh Negi** (supra), the management witness tendered the documents without proving its contents but the Court took exception to such procedure. The case before us is still worse. None tendered the

documents even. Insofar as the decision in **Saroj Kumar Sinha** (supra) is concerned, it is found that no oral evidence was led and, therefore, the documents had not been proved. In such circumstance, the Court held that the same could not have been taken into consideration to conclude that the charges were proved. In the present case, as observed before, the documents in question were not even put to the sole prosecution witness for being brought on record in a legal manner and, therefore, it is akin to 'no evidence' being led in support of the charge. We reiterate, the sole prosecution witness Shri Nair was not shown the extracts of the transcripts and the forensic report and, therefore, neither did he have the occasion to prove the contents of the same nor did BHEL produce the person who certified the transcripts and the author of the forensic report to prove its contents. Even the complainant was not produced as a witness. A disciplinary proceeding by its very nature is quasi-judicial in nature and, thus, it was obligatory for the prosecution to prove the charge against the petitioner by bringing the documents on record in a legal manner and by proving its contents. It is open to the Court to examine the evidence to see if there is legal evidence to sustain the conclusion that the charge is proved. In this case, there is no legal evidence on which the conclusion could have been based by the Enquiry Officer. In our view, this is a glaring error in the conduct of the enquiry rendering the ultimate decision, that the charge levelled against the petitioner stood proved, vulnerable.

12) The Supreme Court in **Nand Kishore Prasad vs. The State of Bihar and others**, reported in AIR 1978 SC 1277 has made it abundantly clear that disciplinary proceedings before domestic tribunals being of quasi-judicial character, the minimum requirement of the rules of natural justice is that the tribunal should arrive at its conclusion on the basis of some evidence, i.e., evidential material which with some degree of definiteness points to the guilt of the delinquent in respect of the charge against him. Here, although the charge-sheet listed a particular witness who would depose as the prosecution witness and also listed certain documents which were to be used as evidence to drive home the charge against the petitioner, the prosecution witness did not at all support the charge of misconduct committed by the petitioner and the documentary evidence was not brought on record before the Enquiry Officer in a legal manner and, therefore, this is a case of 'no evidence' before the Enquiry Officer to hold the petitioner guilty; yet, the Enquiry Officer on his own placed reliance on the two documents referred to above despite the Presenting Officer not relying on the same and proceeded to nail the petitioner. In our view, this is a mockery of the procedure relating to conduct of domestic enquiry and, therefore, the finding reached by the Enquiry Officer of the charge against the petitioner having been proved is indefensible. We also draw guidance from the decision in **Phulpari Kumari** (supra), cited by Shri Thakur, in this regard.

13) We are also of the considered opinion that the Disciplinary Authority and the Appellate Authority failed to take into consideration such glaring errors that had crept in, in the enquiry, and proceeded to remove the petitioner from service/ upheld the order of removal, illegally and unreasonably.

14) This is apart from the fact that the Enquiry Officer proceeded against the petitioner *ex-parte*, without justification. As it is, the memorandum of charge-sheet was issued in respect of an act of commission that had occurred 4 (four) years back. The petitioner had obtained leave to attend court proceedings in Ahmedabad and this was cited as a ground for postponing the enquiry a second time. The manner in which the Enquiry Officer dealt with the prayer of the petitioner left a lot to be desired. The heavens were not going to fall if postponement, as prayed were granted. This is one other reason for which the enquiry could be held to have been vitiated although, as observed earlier, not much of a difference would have been made if the enquiry were conducted in the presence of the petitioner.

15) In such view of the matter, we have no other option but to hold that the enquiry held against the petitioner was not fair and reasonable and that the order of removal, passed in pursuance thereof, deserves to be set aside. It is ordered accordingly. We direct reinstatement of the petitioner with 50% back wages,

payable within one month. We also grant liberty to BHEL to proceed against the petitioner afresh by appointing an Enquiry Officer, other than the one who conducted the enquiry earlier. Till such time the enquiry is completed, BHEL shall be at liberty to decide whether to allow the petitioner to resume duty or to keep him under suspension pending enquiry. We hope and trust that once a new Enquiry Officer is appointed and the petitioner is put on notice, he shall cooperate with the Enquiry Officer for expeditious completion thereof. It would be desirable if the enquiry is completed within six months from the date of first hearing. Needless to observe, the petitioner shall be entitled to fair, reasonable and adequate opportunity of defence. In the event, upon a fresh enquiry being conducted, the petitioner is not found guilty of the charge, he shall be entitled to full salary for the period he has been/would be kept out of service by BHEL. This order shall, however, not affect the criminal trial in any manner.

16) Rule is made absolute on the above terms. There shall be no order as to costs.

(PUSHPA V. GANEDIWALA, J.)

(CHIEF JUSTICE)

khj

**Kamal
Jeswani** Digitally signed
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