

26

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

ORIGINAL APPLICATION NO.365 of 2011
Cuttack, this the 13th day of August, 2013

Binayak Prasad Padhi

..... Applicant


Vs.

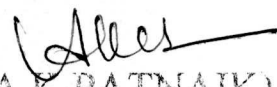
Union of India & Others

..... Respondents

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not? ✓
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not? ✓


(R.C.MISRA)
Member(Admn.)


(A.K.PATNAIK)
Member (Judl.)

27

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK**

Original Application No. 365 of 2011
Cuttack, this the 13th day of August, 2013

CORAM
THE HON'BLE MR. A.K. PATNAIK, MEMBER (JUDL.)
THE HON'BLE MR. R.C. MISRA, MEMBER (ADMN.)

.....

Shri Binayak Prasad Padhi, Aged about 58 years, Son of Late Yudhistir Padhi, a permanent resident of Gandamunda, Bhubaneswar, Dist. Khurda, PIN 751 030 at present working as Divisional Engineer, Regional Telecom Training Centre, [RTTC), BSNL, Bhubaneswar, Dist. Khurda.

..... Applicant

(By Advocate(s)-M/s. S.K. Ojha, S.K. Nayak)

-Versus-

Union of India represented through -

1. The Secretary to Government of India, Ministry of Telecommunication and Information & Technology, 1 Barakhamba Road, Sanchar Bhawan, New Delhi-110 001.
2. Bharat Sanchar Nigam Limited represented through its Chief Managing Director, Corporate Office, BSNL, Janpath, New Delhi.
3. The Director (HR), Corporate Office, BSNL, Janpath, New Delhi.
4. The Chief General Manager, BSNL, Telecom Circle, Bhubaneswar, Dist. Khurda.

Allex

5. Shri B.K.Nayak, General Manager, Consumer Fixed Access,
O/O. the CGMT, BSNL, PMG Square, Bhubaneswar, Dist.
Khurda, PIN 751 001.

..... Respondents

(By Advocate(s)- Mr.R.N.Pal)

O R D E R

A.K.PATNAIK, MEMBER (JUDL.):

The Applicant, presently working as Divisional Engineer, in Regional Telecom Training Centre, [RTTC), BSNL, located at Vani Vihar, Bhubaneswar in the District of Khurda/Odisha has filed this Original Application under section 19 of the Administrative Tribunals Act, 1985 in which he has prayed to quash the Memorandum No.2-3/OR/2009/VM-I dated 30th November, 2010 issued under Rule-36 of BSNL CDA Rules, 2006 in Annexure-A/4 and the appointment of the IO to enquire into the charges vide Memorandum No.2-3/OR/2009-VM-I dated 6th April, 2011 (Annexure-A/6) being without due application of mind and without considering his representation in its proper perspective, inter alia stating that he had floated tendered dated 19.09.2009 and 13.10.2009. After receipt of complaint, without acting upon the

Allen

29

bids received pursuant to the tenders, opinion of the CGMT, Orissa, Bhubaneswar was sought by him to the extent whether to proceed with the acceptance of the bids for execution of work or to cancel the tenders on the allegation received with regard to the alleged irregularity. The CGMT, Orissa, Bhubaneswar in letter dated 3rd February, 2010 intimated him to cancel both the tenders. Accordingly, he had cancelled the tender in February, 2010. Thereafter, he was transferred from the post of Telecom District Manager, BSNL, Bhawanipatna in the District of Kalahandi as DGM, Marketing, O/o the GMTD, BSNL, Bhubaneswar in May, 2010. Therefore, issuance of the charge sheet after long passage of time i.e. on 30th November, 2010 that at a when he is ripe for promotion to DGM on regular basis, calling upon him to explain as to why he had committed the irregularity in the tenders is nothing but flogging a dead horse for ulterior motive with a view to throttle his promotion. He was issued the charge sheet without RUDs *albeit* Rules/law clearly provides supply of RUDs along with the charge sheet to enable the delinquent to prepare and submit his defence. His contention is that as the time passesby memories of

Allee

incidents and occurrences get blurred, recollection of an event becomes difficult and memory about an incident fades. Human memory is ephemeral issuance of charge sheet after passage of long time without RUDs and without any reason for delay he was handicapped to submit his reply. As such in his representation dated 10.01.2011 while making his preliminary objection to the said charge sheet has reserved his right to submit detailed reply after receipt of RUDs. But the Respondents, without supplying him copies of the RUDs/documents through which the prosecution/Department seek to prove the charge, without awaiting the reply and without considering the points raised by him in his representation, Respondent No.3 appointed Respondent No.5 as IO to enquire into the matter vide Memorandum dated 6th May, 2011 (Annexure-A/6). Next contention of the Applicant is that when entire action which is the subject matter of the charge sheet was taken with the prior consent and knowledge of the higher/competent Authority, roping him into the incident is intentional and deliberate. In this connection, it has been stated that any act of repository of power, whether legislative or

Alles

21

administrative or quasi judicial is open to challenge if it is so arbitrary or unreasonable that no fair minded authority could even have ever made it. The concept of equality as enshrined in Article 14 of the constitution, embraces the entire realm of state action. It would extend to an individual as well not only when he is discriminated against in the matter of exercise of right, but also in the matter of imposing liability upon him. The doctrine of equality is now turned as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a government action. The administrative action is to be just on the test of fair play and reasonableness. Therefore, the Respondents cannot be permitted to resort to selective treatment towards him while letting out the authority under whose direction action was taken by him. Hence, the Memorandum of charge issued and sought to be enquired into are not tenable being unfair, arbitrary, unreasonable, unjustified and also against the doctrine of equality. The appellant deserves to be treated equally in the matter of departmental proceedings. Having not followed the above principle, the

Alles

32

Memorandum of charges and the Memorandum in appointing the IO to proceed with the enquiry are liable to be set aside.

In specific, in so far as the allegations made in the charge sheets it has been contended by him that tender was floated on 19.09.2009. After receipt of complaint, without acting upon the bids received pursuant to the tenders, valuable opinion of the CGMT, Orissa, Bhubaneswar was sought by him. On the basis of the letter dated 3rd February, 2010 of the CGMT, Odisha, Bhubaneswar, he had cancelled the tenders in February, 2010. On securitization of the papers as some doubts were arisen, the bidders were asked to come with the original records. On verification, documents of some of the bidders were found fraud which was also confirmed by the Labour Officers, Raipur. It has been submitted by him that it is not correct that requisition was not made to SDOs. Requisition was placed to SDOs vide letter No.TDM/BPT/NMisc/9-10 dated 10.09.2009. The estimated cost of Rs.4 lacks for each zone was fixed taking into consideration that no significant work was done for last two years and that this amount was assessed taking into account previous years tender

Such

document. The work was necessitated for restoration of the damaged cables and maintenance of interrupted cables to avoid displeasure and complaints of the BSNL Telephone customers.

Thus, ~~there was~~ nothing remained to proceed against him.

In view of the above, it has been stated that as the action taken by the applicant does not come within the purview and ingredients of 'Misconduct' provided in the BSNL Conduct, Discipline and Appeal Rules, 2006 the charge sheet and the appointment of the IO to proceed with the enquiry is/are not sustainable.

2. Respondents contest the case of the Applicant stating therein that the applicant has committed serious misconduct, failed to maintain absolute integrity, exhibit lack of devotion to duty and acted in a manner unbecoming on the part of an employee of the company in gross violating the provision of Rule 4(1) (a) (b) and (c) of BSNL CDA Rules, 2006 in the matter of floating U/G cable tender and job tender on 19.9.2009 and 13.10.2009. The said irregularity/illegality was pointed by the then Ex MP of Kalahandi (Mr.Subash Chandra Nayak). Therefore, enquiry U/r.36 of the

37

BSNL CDA Rule, 2006 was stated against him. Then Mr.B.K.Nayak (GM)(CFA), O/o the CGM, BSNL, BBSR was appointed as IO by the Director HR under sub Rule 2 of Rule 26 of BSNL CDEA Rule, 2006 to enquire the charges framed against him. But the Applicant without facing the enquiry has filed the instant OA. The Applicant was served the Memorandum of Charge dated 30th November, 2010 giving him opportunity to submit his reply. As per para 3 of the said Memorandum, the applicant was required to submit his reply either admitting or denying the charges framed against him. Applicant submitted his defence on 10.1.2011 in which he has strongly denied all the charges levelled against him. As per Rule 36 (9) (a), after receipt of the Memorandum of Charge, may request to inspect RUDs on the date fixed by the IO only. In Rule 36 (3) of BSNL CDA Rule (Procedure for imposing major penalties) it has clearly been provide that it would not be necessary to show the RUDs or any other document to the delinquent before submission of his reply to the charges. However, the Disciplinary Authority considered the reply dated 10.1.2011 (Annexure-A/5) denying the charges in toto and after due

Alec

application of mind appointed IO to enquire into the matter. It has been stated that only on 5.12.2009 i.e. after receipt of the complaint dated 17.11.2009 and 2.12.2009 of the Ex MP of Loksabha of Kalahandi Constituency, (Shri Subash Chandra Nayak) on corrupt practice and tender fixing, Applicant sought the advice of the CGM. As per the instruction of CGM, BSNL, Odisha Circle, Bhubaneswar, Circle Vigilance Team conducted investigation and during such investigation it was found that both the tenders were on approximate instead of realistic value. The applicant regularized incomplete tender papers of some specific contractors by allowing post tender correspondence with an intention to favour specific contractor of Bhubaneswar. The practice followed by him was against the provision of NIT. During investigation the Vigilance Team also examined the applicant. As the complaint was orientated from CVO office, the IR was sent to CVO office for advice. After examining the case in detail, the Chief Vigilance Officer, BSNL Corporate Office, New Delhi advised for major penalty proceedings against the applicant and on consideration of the advice tendered by the CVO and all other




36

materials the competent authority decided to initiate major penalty charge sheet against the applicant and accordingly memorandum of charge was served on the applicant on receipt of which he submitted his reply denying the charge sheet and thereafter IO was appointed to enquire and submit the reply. It has further been stated that the applicant has referred the case to CGM, Odisha Circle only on 5.12.2009 for investigation which was intended to excuse. As the head of the SSA the applicant had independent financial powers to accept tender value of one crore rupees. The CGM Odisha Circle had no scope to know the irregularity unless and otherwise any complaint was there. Applicant sought the advice of the CGM, BSNL, BBSR only after receiving the complaint otherwise he could have been able to fulfil his mala fide intention. It has been stated that intention of tender fixing is not a simple irregularity but it is a serious misconduct causing dishonesty with the business of the company as per rule 4 & 5 (1) of BSNL CDA Rule, 206. Accordingly, Respondents have prayed for dismissal of this OA.

Ames

3. Applicant filed rejoinder in which it has been stated that in application at Annexure-A/5 he had denied the charges keeping reserve his right to submit detailed reply after receipt of the documents sought by him in the said application. As such, instead of appointing IO to proceed with the enquiry he should have been given an opportunity to submit a detailed reply to the charge sheet. Therefore, appointment of the IO before receipt of reply is not sustainable. He has also denied the stand of the Respondents that opportunity was allowed to only predefine bidders to regularize the documents and has submitted that he has allowed opportunity to the bidders was not a new thing but as a condition precedent. In this connection he has placed copy of the tender floated by the office of the CGMT, Odisha, BBSR as Annexure-A/7 for the perusal of this Tribunal. It has been reiterated that the tender was floated after prior approval of the GM, BSNL. For non supply of the RUDs proceedings are vitiated the applicant has placed reliance on the decision of the Hon'ble Apex Court in the cases of **K.Vijayalakshmi Vrs Union of India and others, 1998 SCC (L&S) 1124**. The reply furnished by the Respondents in the



38

counter is no reply to the points raised by the Applicant in the OA and can be constructed as acceptance and accordingly the charge sheet is liable to be set aside, he has placed reliance on the decision of the Hon'ble Apex Court in the case of **State of UP and another Vrs Krishna Pandey, AIR 1996 SC 1656**. Since there was delay in initiating the proceedings, the charge sheet is vitiated applicant in his rejoinder has placed reliance on the decisions of the Hon'ble Apex Court in the cases of **State of Andhra Pradesh Vrs N.Radhakrishnan, AIR 1998 SC 1833** and **K.C.Brahmachary Vrs Secretary and others, 1988 (1) (CAT) AISLJ 383**. The charge sheet does not disclose any misconduct and as such it is vague and is liable to be set aside, he has placed reliance on the decision of the Hon'ble Apex Court in the case of **DIG Vrs K.A.Swaminath, (1996) 11 SCC 498**. The Memorandum of charges being the outcome of bias and mala fide the same is liable to be set aside, he has placed reliance on the decision of the Hon'ble Apex Court in the cases of **P.V.Jagannath Rao Vrs State of Orissa, AIR 1969 SC 215** and **A.K.Kripack Vrs Union of India and others, AIR 1970 SC 150**. Memorandum of charge was

Akel

issued on the basis of the preliminary enquiry but copy of the said preliminary enquiry was not supplied to him and, therefore principles of natural justice were violated and on the ground the charge sheet is liable to be set aside he has placed reliance on the decision of the Hon'ble Apex Court in the case of **State of Karnataka Vrs Satrugna Sinha, AIR 1998 SC 3038**. Appointment of the IO without considering the reply submitted by him to the charges vitiated the charge sheet he has placed reliance on the decision of the Hon'ble Apex Court in the cases of **Union of India Vrs V.K.Khanna, AIR 201 SC 343, T.S.Shankaranarayana Vrs High Court of Judicature, (1995) SLR 713**. Accordingly, the applicant has prayed for the relief claimed in the OA.

4. We have heard Mr.S.K.Ojha, Learned Counsel appearing for the Applicant and Mr.R.N.Pal, Learned panel Counsel for the BSNL and perused the records.

5. Mr.Ojha, Learned Counsel for the Applicant, in course of hearing, mainly confined and focused his submission that exercise of power is not bona fide being without due application of

Alor

40

mind to the Rules and various judge made laws as it is settled law that procedure lapses cannot be countenanced misconduct. Therefore, allowing the IO to proceed with the enquiry means to allow the disciplinary proceedings to hang on the head of the applicant like Damocles sword thereby throttling his promotional avenues. For alleged procedural irregularity initiation of major punishment speaks something other than the actual cause for initiating the disciplinary proceedings. It has been stated that misconduct implies a wrongful intention but not a mere mistake on the decision. While dealing with the issue, the Hon'ble Apex Court has indicated that lack of efficiency failure to attain the highest standard of administrative ability while holding a high post would not itself constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. The charge sheet does not disclose that the applicant had intentionally or deliberately indulged himself any wrongful act and as such issuance of charge sheet is illegal. By taking us through the document placed at Annexure-A/7 to the

Alles

rejoinder, it has been stated that the CGMT, BSNL, Odisha, BBSR had cancelled the tender made during financial year 2008-09 and directed for initiating tendering process afresh and the tender notice be floated after vetting from the office of the CGMT, BSNL, BBSR. The word vetting means 'examine' or 'apprise'. Accordingly, before floating the tender, applicant sent the papers to CGMT, Odisha, BBSR for vetting after which floated the tender. Since vetting does not imply approval, there was no necessary to get the approval before floating the tender. However, before or after floating the tender no adverse remark or fault was pointed out by the authority in course of vetting. Secondly on some vague allegation raised by one corrupt politician with some evil intention, the matter was referred to HQ for decision and thereafter, the tender was cancelled. Even as per the report of the Vigilance Team, no financial loss caused to the Department. Other persons against whom allegations were levelled on the subject matter had not been questioned but the applicant has been singled out obviously with oblique motive. Further, Mr. Ojha by taking us through some of the averments made in the counter it has been

Alled

contended that there can be no doubt that the disciplinary proceedings were initiated against the applicant on the basis of the direction issued by the CVO, BSNL, New Delhi. When rule expressly empowers the Disciplinary Authority to initiate proceedings after due application of mind for any alleged omission and commission against employee and in the instant case initiation of major disciplinary proceedings on the dictation of the CVO, BSNL, BBSR, without application of independent mind by the disciplinary authority, hence, Hence, the Memorandums under Annexure-A/1 & A/3 are liable to be set aside. In this connection he has placed reliance on the decision of the Hon'ble Apex Court in the cases of **Union of India and others Vrs B.N.Jha, 2003 (1) SCSLJ 335 (paras 22 & 37)** and **Chairman Cum Managing Director, Coal India Limited and Others Vrs Ananta Saha and Others, (2011) 1 SCC (L&S) 750 (para 30 & 31)**.

Per contra, Mr. R.N.Pal, Learned Panel Counsel for the BSNL strongly and stoutly denied the arguments advanced by Mr.Ojha by arguing that mere issuance of charge sheet or appointment of the IO to enquire and submit the report does not

Alles

43

mean that the applicant is held guilty to the charges. By issuing charge sheet, the applicant was allowed opportunity to state his case and when the reply submitted by the applicant was not found satisfactory to allow further opportunity the disciplinary authority appointed IO to enquire and submit report. During enquiry the applicant would be allowed all reasonable opportunity to defend his case and, therefore, he was in no way prejudiced either by issuance of the charge sheet or appointment of the IO. Next contention of Mr.Pal is that charge sheet has not been issued based on the direction/advice/suggestion of the CVC, BSNL, BBSR. The neither CVC advice cannot be said to be external dictation nor can it be said that merely because CVC advised charge sheet was issued to the Applicant. After receipt of the advice of the CVC, the competent authority has examined the matter with reference to the materials available on record and thereafter issued the charge sheet. Similarly on receipt of the reply the DA applied his mind and appointed the IO to allow further opportunity to the applicant to prove his innocence. Mr.Pal has also denied the allegation of mala fide as alleged by the applicant. He has also while

Alex

distinguishing the decisions relied on by the Mr.Ojha, has contended that as per the decisions of the Hon'ble Apex Court rendered in very many cases cautioned quashing of the charge sheet by the Courts/Tribunal on the ground as in the instant case and accordingly prayed for dismissal of this OA.

6. After giving in-depth consideration to the rioted contentions advanced by the respective parties, perused the decisions relied on by Mr.Ojha. Even after repeated and adequate opportunities Mr.Ojha, could not be able to produce any evidence in support of his contention that the tenders were floated only after the approval of the CGMT, BSNL, BBSR. Therefore, we are not convinced that any such approval was obtained by the applicant.

7. It is trite law that charge sheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings, is vague, indefinite and ambiguous or there has been inordinate delay which is not the case of the Applicant in the instant OA. The point of delay as raised is not such abnormal so as

Alles

to enable this Tribunal to quash the charge sheet. It is also trite law that the Tribunal cannot go into the merit of the charge or possibly be developed into the justifiability of the charges at the stage of initiating a disciplinary ^{Proceedings} by issuing charge sheet. None of the above conditions fulfils in the instant case. In this connection reliance has been placed on the decision of the Hon'ble Apex Court in the case of **Union of India and Govind Manish** dated 7.2.2011 in Civil Appeal No.1442 of 2011 (arising out of SLP (C) No.11378 of 2010).

8. Similarly, it is well settled law that a mere allegation of malice is not enough. The party making such allegations is under the legal obligation to place specific materials before the court to substantiate the said allegation. The issue of "malus animus" was considered by the Apex Court in **Tara Chand Khatri v Municipal Corporation of Delhi & Ors**, AIR 1977 SC 567 wherein it was held that the court would be justified in refusing to carry on an investigation into the allegation of mala fides, if necessary particulars of the charge making out a prima facie case are not given in the writ petition and the burden of establishing

Allee

mb
mala fide lies very heavily on the person who alleges it and that there must be sufficient material to establish malus animus. No such material has been produced by the applicant enabling this Tribunal to come to the conclusion that the charge sheet is an outcome of malice.

9. The decisions of the Hon'ble Apex Court especially in the cases of **B.N.Jha & Ananta Sha** (supra) have no application to the instant case as in those decisions the proceedings were initiated against the applicants therein on the dictation of higher authority of the Department. In the instant case CVC is an advisory body of the Department. Consultation of CVC is provided in such matter in the Rules. Therefore, the stand that as the proceedings have been initiated on the direction of CVC the same is liable to be quashed is of no help in the instant case.

10. As regards the arguments that the charge does not come within the meaning of misconduct, we may state that the word 'misconduct' is not capable of precise definition. It receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act

Alor

complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject-matter and the context wherein the terms occurs, having regard to the scope of the statute and the public purpose it seeks to serve. Hence none of the above points have any bearing so as to quash the instant charge sheet in the instant case.


11. It is to be noted that the applicant would get ample opportunities in course of enquiry to prove his innocence. He was/is also free to raise all the points now raised in the enquiry before the IO. As per the Rules he can also seek production and perusal of such of the documents which are materials and vital to the issues. However, the applicant has submitted application denying the allegations levelled in the charge sheet. He has not specifically explained as to how those documents are relevant and non-supply of which how he has been prejudiced. In view of the above we are least impressed to interfere for non-supply of documents for submission of his show cause reply.


Alles

48

12. In view of the discussions made above, while holding that the applicant is not entitled to any of the reliefs claimed in this OA, we direct that as considerable time has already elapsed in conclusion of the disciplinary proceedings initiated against the applicant due to the continuance of the stay order granted by this Tribunal, the Respondents are hereby directed to complete the proceedings in all respects at an early date preferably within a period of 180 days from the date of receipt of copy of this order provided the applicant cooperates in the matter.

13. In the result, with the aforesaid observation and direction this OA stands disposed of by leaving the parties to bear their own costs.


(R.C.MISRA)
Member (Admn.)


(A.K.PATNAIK)
Member (Judl.)