

Calcutta High Court

Goutam Bhattacharjee vs Kolkata Municipal Corporation & ... on 31 March, 2016

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Original Side

W.P. No. 420 OF 2014

Goutam Bhattacharjee

Vs.

Kolkata Municipal Corporation & Ors.

For the petitioners:-

Mr. Sagar Bandopadhyay
Mr. N.M. Mookerji
Ms. Agnita Banerjee...Advocates

For the KMC: -

Mr. N.C. Behani
Ms. Papiya Banerjee Behani
Mr. G.C. Das,
Ms. Anuradha Sengupta..Advocates

Judgement On: -

31st March, 2016

I.P. MUKERJI, J

A point of some substance has been raised in this writ. The question is: if a departmental proceeding and a criminal proceeding on the self-same charges have been started against an employee and he is acquitted of the charge in the criminal proceeding, should he be also, as a matter of course be exonerated in the departmental proceeding and/or should the departmental proceeding be dropped?

The writ petitioner was in 1995 working as a Block Sarkar with Kolkata Municipal Corporation. He is still working with the organisation. In that year, an allegation was made against him by the Corporation that the money which was entrusted with him for payment of remuneration of lorry mazdoors was not so utilised. He did not pay the lorry mazdoors or paid them less. He mis-appropriated the remuneration fund. A first information report was lodged against him.

At the same time a departmental disciplinary proceeding was started against him. On 17th January, 1996 he was chargesheeted. He was suspended but subsequently reinstated. The criminal proceeding which was started further to the first information report resulted in the acquittal of the petitioner on 4th September, 2008 after a full-fledged trial. When this acquittal verdict was passed, the departmental proceedings were also over. As the criminal proceedings were pending, the decision in the departmental proceeding was not made. On 17th May, 2010 a final order was passed by the Joint Commissioner (G) and the Disciplinary Authority. An appeal against the said order was preferred and dismissed on 17th November, 2012 by the Municipal Commissioner and Appellate Authority. Two increments were withheld with cumulative effect.

Before proceeding to answer the question posed by this Court I would like to refer to note 1 of CMC services (Classification Control and Appeal) Regulations, 1985. It is in the following terms:

Note-1. "In all cases of fraud, embezzlement, or similar offence the disciplinary authority shall take steps to institute departmental proceeding against all the delinquents and conduct them with strict adherence to the regulations upto the point at which prosecution of any of the delinquents begins. At that stage it must be specifically considered whether further conduct of the departmental proceeding against any of the remaining delinquents is practicable, and if so, it shall continue as far as possible (which will not, as a rule, include finding and sentence). If the accused is convicted, the departmental proceedings against him shall be resumed and formally completed either by dismissing removing the person from Corporation service or by reducing him in rank on the ground of his conviction immediately without waiting for the expiry of the time for preferring an appeal against the order of conviction by the first trying court of the decision on appeal preferred before higher court against the conviction, provided there is no prohibitory order of the court to the contrary, final

action to pass orders of dismissal, etc, should proceed in accordance with the order of the court. If the accused is not convicted, the departmental proceedings against him should be dropped unless the authority competent to the disciplinary action is of opinion that the facts of the case disclosed adequate grounds for taking departmental action against him. In either case the proceedings against the remaining delinquents shall be resumed and completed as soon as possible after the termination of the proceedings in Court.

Explanation-Departmental proceedings shall not as a rule be initiated on the same charges or on charges substantially similar to those of which a Corporation employee is acquitted in consequence of or by a decision of a Court of Law. Discharge by the Court on the submission of final report by the police does not, however, amount to acquittal and there is no bar to departmental proceedings being initiated after such discharge either on the same charges or on charge substantially similar to those leading to the discharge."

Under the rule, if the accused was acquitted in a criminal proceeding on the self-same issues as in the disciplinary proceedings, the departmental proceeding would be dropped. An exception was when the authority competent to take disciplinary action was of the opinion that the facts of the case warranted departmental action against the employee.

At this stage a look at the law is very much necessary.

What is the effect of a criminal proceeding resulting in the acquittal of the accused employee? On this basis is it obligatory on the part of the disciplinary authority to exonerate the accused of the charges in the departmental proceedings? Or should the disciplinary proceeding continue with full vigour in spite of the acquittal of the accused? Should the acquittal in the criminal proceedings impel the disciplinary authority to consider whether to exonerate the accused or not?

In Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. and another reported in AIR 1999 SC 1416, cited by Mr. Bandopadhyay assisted by Mr. Mookerji the Supreme Court after examination of a number of authorities came to the conclusion that if the facts of a departmental proceeding and those of a criminal case were identical, the witnesses were the same and the recorded evidence more or less identical and the criminal case resulted in the acquittal of the accused employee, the technical rule that the burden of proof in a criminal and a civil proceeding is not the same would not apply. The employee would straightway be entitled to exoneration from the charges in the departmental proceeding. In Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd. Haldia and Others reported in (2005) 7 SCC 764, cited by Mr. Behani, learned advocate for the respondent corporation, the Supreme Court said.

"11. As far as acquittal of the appellant by a criminal court is concerned, in our opinion, the said order does not preclude the Corporation from taking an action if it is otherwise permissible. In our judgment, the law is fairly well settled. Acquittal by a criminal court would not debar an employer from exercising power in accordance with the Rules and Regulations in force. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with the service rules. In a criminal trial incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused "beyond reasonable doubt", he cannot be convicted by a court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of "preponderance of probability". Acquittal of the appellant by a Judicial Magistrate, therefore, does not ipso facto absolve him from the liability under the disciplinary jurisdiction of the

Corporation. We are, therefore, unable to uphold the contention of the appellant that since he was acquitted by a criminal court, the impugned order dismissing him from service deserves to be quashed and set aside. "

In *G.M. Tank v. State of Gujarat and Others* reported in (2006) 5 SCC 446 cited on behalf of the petitioner both *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd.* and another reported in AIR 1999 SC 1416 and *Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd. Haldia and Others* reported in (2005) 7 SCC 764 were considered. The two Judges bench departed from the ratio laid down in *Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd. Haldia and Others* reported in (2005) 7 SCC 764 by relying on the ruling of a five Judges Constitution bench of the Court in *R.P. Kapur v. Union of India* reported in (1964) 5 SCR 431. Following that decision and *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd.* and another reported in AIR 1999 SC 1416 this bench of the Supreme Court observed as follows:

"30. The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a departmental case against the appellant and the charge before the criminal court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts, namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer Mr. V.B. Raval and other departmental witnesses were the only witnesses examined by the enquiry officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed that the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand.

31. In our opinion, such facts and evidence in the departmental as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though the finding recorded in the domestic enquiry was found to be valid by the courts below, where there was an honourable acquittal of the employee during the pendency of the proceedings challenging the

dismissal, the same requires to be taken note of and the decision in Paul Anthony case will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed."

A One line pronouncement in West Bokaro Colliery (Tisco Ltd) v. Ram Pravesh Singh reported in (2008) 3 SCC 729, cited by Mr. Behani "that it has repeatedly been held by this court that the acquittal in a criminal case would not operate as a bar to drawing up of a disciplinary proceeding against delinquencies" is to be considered as laying down a very broad and general proposition of law without taking into account, the embellishment made in the law by the other judgements. A similar statement of law was made in Samar Bahadur Singh v. State of Uttar Pradesh and Others reported in (2011) 9 SCC 94 cited by Mr. Bihani. More or less the same general statement of law was made in paragraph- 16 in Noida Entrepreneurs' Assn. v. Noida and others reported in (2007) 10 SCC 385 also cited by Mr. Bihani. In Bistupada Das v. State Bank of Bikaner and Jaipur reported in 2011 (5) CHN (Cal) 14 cited by Mr. Behani the acquittal was on "technicalities". Hence departmental proceedings could continue. In Pandiyan Roadways Corpn. Ltd. v. N. Balakrishnan reported in (2007) 9 SCC 755, cited by the same learned Counsel some exceptions were carved out of the general principles of law laid down in Kapur's case and in Capt. M. Paul Anthony's case. I will read paragraph-21 of this judgement.

"21. There are evidently two lines of decisions of this Court operating in the field. One being the cases which would come within the purview of Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. and G.M. Tank v. State of Gujarat. However, the second line of decisions show that an honourable acquittal in the criminal case itself may not be held to be determinative in respect of order of punishment meted out to the delinquent officer, inter alia, when: (i) the order of acquittal has not been passed on the same set of facts or same set of evidence; (ii) the effect of difference in the standard of proof in a criminal trial and disciplinary proceeding has not been considered (see Commr. Of Police v. Narender Singh), or; where the delinquent officer was charged with something more than the subject-matter of the criminal case and/or covered by a decision of the civil court (see G. M. Tank , Jasbir Singh v. Punjab & Sind Bank and Noida Entrepreneurs' Assn. v. Noida, para 18)."

In Airports Authority of India & Ors. v. Pradip Kumar Banerjee & ors. reported in 2007 (3) CHN 77 also cited by Mr. Behani a division bench of this court headed by Chief Justice S. S. Nijjar, in the facts and circumstances of that case that the acquittal of the accused employee was not honourable and that the acquittal was on the basis of insufficient evidence and not "no evidence" ruled in favour of continuance of departmental proceedings. In Roop Singh Negi v. Punjab National Bank and Others reported in (2009) 2 SCC 570, cited on behalf of the petitioner, even a finding of fact, by the court in identical circumstances was binding on the disciplinary authority. A division bench of our court in State of West Bengal & ors. v. Vidyasagar Pandey & Anr. reported in 2011 (1) CHN (Cal) 84, considered G.M. Tank v. State of Gujarat and others reported in (2006) 5 SCC 446 and Roop Singh Negi v. Punjab National Bank and Others reported in 2009 (2) SCC 570 Justice Chattopadhyay remarked as follows:

"15. Since both the criminal and departmental proceedings initiated against the respondent No. 1 are based on the identical charge arising out of the same set of facts, the findings of the learned Magistrate in respect of the said charge must prevail upon the disciplinary authority as the findings of the judicial authority should prevail upon the findings of the disciplinary authority on a particular issue.

18. In the case of G.M. Tank vs. State of Gujarat & Ors. reported in (2006) 5 SCC 446, Hon'ble Supreme Court observed: "20.....The appellant has been honourably acquitted by the competent court on the same set of facts, evidence and witness and, therefore, the dismissal order based on the same set of facts and evidence on the departmental side is liable to be set aside in the interest of justice."

19. Since the Constable concerned namely, the respondent No. 1 was not held guilty in the criminal case by the learned Magistrate while adjudicating the identical charge arising out of the same set of facts, the learned Tribunal refused to uphold the decision 11 of the disciplinary authority as well as the appellate authority in respect of the said respondent No. 1.

20. Upon considering the materials and evidence on record and also considering the principles already settled by the Supreme Court the learned Tribunal directed the disciplinary authority to reinstate the said respondent No. 1 in service. We do not find any illegality and/or infirmity in the aforesaid decision of the learned Tribunal. The learned Tribunal, in our opinion, has considered all the issues raised before it and decided the same strictly in accordance with law. Therefore, we find no reason to interfere with the impugned judgment and order passed by the learned Tribunal."

Therefore, the law on the subject is this. If the alleged facts on which a criminal proceeding has been started are the same as those on the basis of which a departmental disciplinary proceeding is also commenced, the evidence in the criminal proceeding and in the disciplinary proceeding is more or less the same and the criminal proceeding is terminated by an honourable acquittal of the accused employee, then the departmental proceedings cannot be continued. The employee has to be exonerated. In this case, there is no dispute whatsoever that the facts which gave rise to departmental proceedings were the same as those which gave rise to the criminal proceeding against the accused employee. The charges which were framed in the criminal trial arose out of those facts. The evidence which was led in the criminal court was substantially the same as that which was before the disciplinary authority. The learned Judge First Special Court, Alipore came to inter alia the following findings.

"My eyes struck to page-4 of his cross-examination when this witness deposed that it was not possible for him to say as to the exact amount of misappropriated money out of the total disbursement. The said witness proceeded further to say that the clerical staff by rotation usually pay and disburse the money to the Majdoor. On scrutiny of his examination in chief it appears that the said witness candidly deposed that no one of his office staff raised any complaint to him against the accused persons.

Witness No. 2, 4 & 7 have not supported the prosecution story that they got less amount as arrear. They were the best person to say as to whether less amount was paid. Moreover, PW-2 deposed in his cross examination that he got the entire arrear payment and he failed to show who made the payment.

PW-3 is the formal witness being the s/o accused Dulal Chand Kayal and this son allegedly went to Lal Bazar to deposit some money and on oath he deposed that he paid to the IO Rs. 10000/- on 16.3. 1995 as per seizure list but this witness has not supported the prosecution story regarding the recovery of Rs. 4350/- from the house of Dulal Chand Kayal when this witness deposed that the said amount was seized from his raid repairing shop and not from the residence of his father. This witness was not declared hostile by the prosecution.

This was all regarding substantive evidence. The evidence of the second I.O. cannot improve the prosecution story when the prosecution has failed to make out any case through substantive evidence.

Thus I am at one that the Ld. Prosecutor and the Defence that the prosecution has failed to prove the charge against the accused persons and they are fit to be acquitted and I do that u/s 248 (1) of the Cr.P.C. Simply because some money was seized from the accused persons or that some documents was recovered from their houses are not enough to show that the prosecution has been able to prove the charge against accused persons.

Hence, it is ordered That the accused persons as noted in the heading of the judgement are found not guilty in respect of the charge punishable u/s 409, 120B, 420 & 468 of the I.P.C. They are acquitted therefrom u/s 248 (1) of the Cr.P.C."

It is quite plain that on the self-same facts, after consideration of the same evidence, as in the departmental proceeding, in detail, the learned Judge came to the finding that the prosecution had failed to prove its case. In my opinion, the acquittal of the accused was honourable. Therefore, the disciplinary authority, before which the proceeding had been concluded, had the duty to exonerate the petitioner. Even if I consider the argument that the departmental rules gave power to the disciplinary authority to consider whether to proceed with the disciplinary proceedings, it could only proceed with it following the dicta of the Supreme Court. Otherwise, this part of the rule would be against the law of our land. Therefore, the consideration which the disciplinary authority had to take into account was whether the facts which constituted the criminal case were identical to those which constituted the departmental proceedings, the evidence was the same and the accused had been acquitted honourably.

Instead of making the above analysis, the disciplinary authority had proceeded on the basis that there was a difference in the standard of proof in a civil and criminal case and so punishment should be imposed on the petitioner.

From the terse reasons that have been given by the disciplinary authority it appears that apart from the above elementary principle of criminal law it considered nothing. It has to be presumed that it had nothing to consider because it would not be able to show that the facts involved in the disciplinary authority were different or that the evidence was not the same or that the acquittal was not honourable. The order of the appellate authority dated 17th November, 2012 suffers from the same vice. For all those reasons the order of the disciplinary authority dated 8th May, 2010 and that of the appellate authority on 17th November, 2012 are set aside.

This writ application is allowed. Consequential reliefs may follow. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I.P. MUKERJI, J.)