

(1982) 06 AP CK 0012
In the Andhra Pradesh High Court
Case No : Writ Petition No. 7321 of 1981

A.P. Naidu

APPELLANT

Vs

General Manager, South Central Railway and Others

RESPONDENT

Date of Decision : 16-06-1982

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 311
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 409
Prevention of Corruption Act, 1988 — Section 5(1), 5(2)

Citation : (1982) 2 APLJ 200 : (1983) 1 LLJ 151

Hon'ble Judges : P.A. Chowdhary, J

Bench : Single Bench

Judgement

1. The petitioner is an employee of the South Central Railway working as a permanent Way Inspector Grade II. Promotion from Grade II to Grade I of a permanent Way Inspector is on the basis of his seniority-cum-suitability. The petitioner was sufficiently senior and for purpose of adjudging his suitability, the South Central Railway conducted a written test on 14.5.78 and viva voce on 14.8.78. The petitioner was successful both in the written test and viva voce examination. Yet, the petitioner was not promoted to Grade I. That was because by then a criminal case No. 39/77 was pending against the petitioner before the special Judge, S.P.E. Cases, Hyderabad. In that C.C. No. 39/77, the petitioner was charged with dishonest misappropriation of railways property worth Rs. 1,44,000 odd entrusted to him by the Railway department. The charge was framed against the petitioner in that case under S. 409 of I.P.C. and also under Ss. 5(1) and 5(2) of the Prevention of Corruption Act. The allegation against the petitioner in that case was that he misappropriated railway property entrusted to him by failing to deliver that property to the Assistant Storekeeper, Kazipet and by falsely showing in the ledger-book and other account books as having delivered that railway property to the Assistant Storekeeper, Kazipet. There was some letter of the Railway Board on the subject that directed the railway officials

to withhold promotion of a railway employee facing criminal trial or inquiry. On the basis of the above letter, the petitioner was not shown in the list of names empanelled for promotion to Grade I although the petitioner, as said above, passed the tests and was otherwise eligible for promotion to the post of Grade I permanent Way Inspector. The trial of the above C.C. No. 39/77 took about two years and ended in the petitioner's acquittal. The Criminal Court by its judgment dated 31.12.79 acquitted the petitioner. The Criminal Court in its judgment noted that the prosecution had failed to produce the ledger books, the site register and other account books which were material evidence and which were seized by the prosecution and which were in the possession of the prosecution. The Criminal Court had drawn an adverse inference against this act of suppression of material evidence by the prosecution. One of the questions which was considered in the criminal trial was the question of production of vouchers. The case of the prosecution on this aspect was that the failure of the petitioner to produce the vouchers showing the delivery of the railway property to the Assistant Storekeeper at Kazipet would support the main charge of misappropriation levelled against the petitioner. The Criminal Court noted the defence of the petitioner accused on this aspect in the following words :

"The accused categorically stated that all those accepted vouchers were sent to the D.E.N. Construction for adjustment of accounts and in the absence of the vouchers, the only available document is the site register maintained by the accused. So, admittedly, the investigating officer do not choose to verify the accepted vouchers in the office of the D.E.N. Construction, Secunderabad and the site register maintained by the accused is wantonly suppressed by the prosecution. That is why the accepted vouchers could not be traced either in the office of the accused or in the office of the A.S.K. Doubling or the D.E.N. Doubling, Kazipet. The accused also stated that he could not produce the documents, like accepted vouchers, M.A.S. Ledgers etc., when P.Ws. 1 and 2 visited his office, as the records were already seized by the C.B.I. Inspector by that time. So, the non-production of the accepted vouchers by the accused cannot be taken advantage of by the prosecution to raise an adverse presumption against him."

The judgment of the Criminal Court concluded by observing, "the suppression of the site register maintained by the accused, the M.A.S. register and the ledgers are very material to draw an adverse inference against the prosecution. Thus, the prosecution failed to prove the guilt of the accused for the offenses with which he is charged."

2. Now, the petitioner after his acquittal asked the South Central Railway on 1.2.80 for his promotion to Grade I post which was withheld from him in the year 1978 on the ground of the pendency of the abovementioned criminal case. But the South Central Railway gave him another charge memo. The South Central Railway instead of hastening to repair the damage already done to the petitioner for over a period of one year, decided upon launching a fresh departmental

inquiry more or less on the same subject matter which formed the substance of the criminal trial. On 4.8.80, the South Central Railway charged the petitioner with the lack of integrity in failing to obtain receipts from the Head Clerk and Assistant Storekeeper, Kazipet for the railway property dispatched to the Assistant Storekeeper (Doubling), Kazipet and asked him this time to face a departmental inquiry. The Charge reads thus :

"That the said Sri A. P. Naidu, while functioning as permanent Way Inspector (Doubling), Kazipet, South Central Railway, during the year 1972 sent various stores materials as shown in Statement enclosed, to Sri C. J. Augustus, Head Clerk-cum-Asst. Storekeeper (Doubling), Kazipet and failed to ensure receipt of the acknowledged vouchers from the said Sri C. J. Augustus and further he sent the transfer vouchers to Augustus with undue delay.

The said Sri A. P. Naidu, by his above act exhibited lack of integrity and conduct. He as a Government (servant) has violated R. 3 of the Railway Service (Conduct) Rules 1966."

3. The petitioner filed this writ petition challenging the authority of the South Central Railway to hold the present departmental inquiry on the basis of the above charge memo dated 4.8.80.

4. The main contention of the petitioner was that after he was acquitted in the criminal trial the railway authorities had forfeited their right to proceed against him substantially on the basis of the same facts and on the basis of the same allegations for which he was tried earlier before the Criminal Court and acquitted. He also contended that in any case his promotion to Grade I post of permanent Way Inspector should not be withheld.

5. On the other hand, the contention of the South Central Railway was that the acquittal of the petitioner by the criminal Court would not debar the South Central Railway from concluding the present departmental inquiry, and that withholding the petitioner's promotion for the present pending the departmental inquiry would be in order and legal according to the abovementioned letter of the Railway Board.

6. The petitioner was working as a permanent Way Inspector Grade II when he was entrusted, according to the prosecution, with the railway property. It was undoubtedly part of his legal duty to deliver those materials belonging to the Railway to the Assistant Storekeeper, Kazipet. According to the South Central Railway, the petitioner had failed to discharge his duty by failing to deliver the railway property to the Assistant Storekeeper, Kazipet. In the Criminal case No. 39/77 the South Central Railway had charged the petitioner for not delivering those railway materials to the Assistant Storekeeper, Kazipet. In support of this charge one of the circumstances which was relied upon by the South Central Railway in the above criminal case was the failure of the accused to produce the accepted vouchers. The defence of the accused-petitioner in that criminal case was that he had obtained the vouchers, but they were seized along with the

ledgers and other account books by the railway authorities. The criminal Court which believed that the railway authorities has seized those material documents held that the prosecution deliberately withheld their production before the criminal Court. Drawing an adverse inference on that basis the criminal Court concluded its judgment in these words :

"So summing-up of the entire evidence adduced on behalf of the prosecution it can be held that the prosecution failed to establish the ingredients of the offence of criminal misappropriation and simply because the accepted vouchers could not be traced in the concerned offices, it cannot be said that the accused was responsible for these materials, which are said to have been dispatched from his office to the Assistant Storekeeper (Doubling), Kazipet. The Suppression of the said register maintained by the accused, the M.A.S. Register and the ledgers and very material to draw an adverse inference against the prosecution. Thus the prosecution failed to prove the guilt of the accused for the offence with which he is charged."

7. It should be noted that here we are not so much concerned with the merits of the judgment of the criminal Court as with the question whether the present departmental inquiry was not substantially on the same basis as the criminal trial. What is really material for us to note in the judgment of the criminal Court was the fact that that judgment was not appealed against and that was not base upon any technical rules peculiar to a criminal trial. That judgment was clearly based upon the failure of the prosecution to produce material evidence in its possession. Drawing of an adverse inference on the ground that the party having custody of material documents had deliberately suppressed them is a rule of evidence common both to a criminal trial and a civil case. Illustration (g) to S. 114 of our Evidence Act reads thus :

"that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it."

Section 114(g) of the Evidence Act is based on the common experience of humanity that a party suppresses evidence in its possession only when that evidence if produced would go against that party. The criminal Court, therefore, had applied that statutory presumption had drawn an adverse inference against the prosecution. The prosecution by not filing any appeal had accepted the judgment of the criminal Court. It must therefore be held that the petitioner's acquittal in the criminal Court was based not on any technical rule which was peculiar to a criminal Court. On the other hand, it should be held that the petitioner's acquittal was based on a view taken by the criminal Court on the merits of the matter which is common to the trial of all disputes. In other words, the petitioner's acquittal was nothing less and nothing else than honourable. What is more, the judgment of criminal Court clearly implicated the South Central Railway with moral if not legal responsibility for falsely charging the petitioner before the criminal Court. The criminal Court implied that if the prosecution had not withheld the evidence in its possession, the prosecution case

would have been demonstrated to be false. The order of the acquittal passed by the criminal Court had thus exonerated the petitioner of charge of misappropriation. It should be noted that the present departmental charge merely picks up one small bit of the facts and the circumstances of the criminal trial. The failure of the petitioner to deliver vouchers did figure in the criminal trial. But the south Central Railway was then trying to use that circumstance against the petitioner to sustain its main charge of criminal misappropriation. Now the same circumstance is sought to be used for the purpose of showing lack of integrity in not obtaining vouchers for goods delivered to the Assistant Storekeeper, Kazipet.

8. The question that arises is whether in the face of the above judgment of the criminal Court it is open for the South Central Railway to initiate this departmental inquiry. The law on the subject is evolving and is, by no measure, clear or certain. But it appears that a part of this uncertainty in law is caused by not examining the reason behind the usual statement that criminal Court judgment does not bind a civil Court. It is usually so, because the purpose of a criminal trial is to bring home the guilt to the accused and the standard of proof is higher and burden of proof is different. But where the criminal Court record a finding on merits on a standard proof no higher than in a civil case and on the basis of burden of proof no different from a civil case there is no reason except blind adherence that warrants the following of that rule that refuses to accord finality to findings in a criminal trial.

9. Kumarayya, J., ruled in the State of Andhra Pradesh v. K. H. Khan (1967) 2 Ap WR 121 and Chandra Reddy, C.J., and Srinivasachari, J., held in P. Sesha Reddy v. Excise Superintendent (1959) 2 AnWR 426, that the verdict in a criminal case would not constitute a bar for a departmental inquiry. Those judgments were based upon an assumption that the criminal verdict was not grounded on the merits of the case but was founded on the technicalities peculiar to a criminal trial. Those judgments could not, therefore, be an authority for the proposition that a subsequent departmental inquiry would still be lawful even where a criminal Court had exonerated an employee on merits by holding on the basis of the evidence that he was not guilty of any offence. In any case, the clear pronouncement of the Supreme Court in R.P. Kapur Vs. Union of India (UOI) and Another, would debar the department from proceeding against a civil servant departmentally after the civil servant was acquitted in a criminal trial on merits. In the above case the Supreme Court ruled "Even in case of acquittal proceedings may follow where the acquittal is other than honourable." The Supreme Court did imply in this case that where acquittal is honourable initiation of departmental proceedings would be dishonourable and such a course would not be open to the employer. In view of the above observations in Kapur's case (supra) the contrary view earlier taken by the Supreme Court can no longer be taken as representing the correct view of the law on the topic.

10. A Division Bench of the Madras High Court in Shaik Kasim Vs. The

Superintendent of Post Offices, Chingleput Dn. and Another, took a similar view. The Delhi High Court in *Kundanlal v. Delhi Administration* (1976) 1 SLR. 133 : (1976 Lab. I.C. 811) following the judgment of the Supreme Court in *Kapur's* case (*supra*) and the Division Bench of the Madras High Court in *Shaik Kasim v. Superintendent of Post-offices* (*supra*) held that a departmental inquiry would be incompetent against a civil servant on the basis of the same allegations on which he had been acquitted by a criminal Court.

11. The real question that, therefore, arises is whether the present charge is the same or at least substantially the same as the charge which the petitioner was tried by the Criminal Court. Regarding the obtaining of the vouchers the petitioner's defence before the criminal Court was that the vouchers were among the documents seized and suppressed by the South Central Railway. It appears to me that the trend of the judgment of the criminal Court was to hold that the South Central Railway responsible for withholding of both the account books and those vouchers. If that were to be so, the present departmental charge would be substantially the small as the criminal charge. It would, for that reason be unfair and incompetent for the South Central Railway one to charge the petitioner for failure to obtain the vouchers. For that reason alone the present departmental inquiry is liable to be declared invalid.

12. But even otherwise, it would to be open to the South Central Railway now to frame the present charge by picking one fact out of the bundle of facts earlier tried by the criminal Court.

13. The question whether the present charge in departmental inquiry was substantially the same as the earlier charge before the criminal Court may possibly give rise to differing answers. But that the present inquiry initiated after the criminal trial was vindictive and therefor, arbitrary cannot admit of much doubt. The basis of the earlier charge was that the petitioner was guilty of misappropriating the railway property entrusted to him. That Charge implied that the petitioner never delivered the goods to the Assistant Storekeeper at Kazipet. If so, the petitioner could never have obtained the vouchers from the Assistant Storekeeper. All this was tried and found to be unsubstantiated. Now in the departmental inquiry the South Central Railway charged the petitioner for entirely a different thing on a basis wholly contrary to the basis of the earlier criminal charge. Now the basis of the present charge was that the petitioner delivered to the Assistant Storekeeper, Kazipet the goods trusted to him but failed to obtain vouchers. These fundamentally convicting positions taken by the department can only be understood and explained on the basis that the South Central Railway wanted to punish the petitioner by fair or foul means. That mental attitude was clearly the essence of vindictiveness. In my opinion, it is not open for public authority to act vindictively, because such an action would be arbitrary. The classic example of exercise of authority from which the South Central Railway could have derived support and inspiration for this vicious conduct was from that of the wicked wolf in the Aesop's Fables which killed the

innocent lamb by falsely charging the lamb with the responsibility of dirtying its drinking water, if not by the lamb itself, at least by its grandfather. Clearly, those who exercise the powers of a modern Welfare State should above all be fair and just and should never be Wolfish and oppressive towards those subject to their authority. Such an oppressive conduct would be arbitrary. A conduct of a public official that is wholly unreasonable would be hit by Art. 14 of the Constitution, particularly as that Article is applied to the protection of what is called the new property right of employment. As first held by the Supreme Court in *Royappa's* case [1974 II L.L.J. 172] and reiterated in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, and *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, . Article 14 strikes at arbitrary actions of the State. For that purpose the Court treats all State actions wholly unreasonable and unjust as arbitrary. The Supreme Court observed :

"That Art. 14 strikes at arbitrariness in State action and since the principle of reasonableness and rationality, which is legally well as philosophically an essential element of equality or non-arbitrariness, is projected by this article, it must characterize every governmental action, whether it be under the authority of law or in exercise of executive power without making of law." In this case, the South Central Railway picks up a fact tried earlier for the purpose of levelling altogether a different and inconsistent charge. Following those decisions, I hold the framing of the present charge is arbitrary. Accordingly, I set aside the departmental inquiry on the ground that it was arbitrary and oppressive.

14. It is not out of place to mention that a Constitutional Court like a High Court is charged with the responsibility to administer justice in the State. Now this responsibility extends to do justice not merely between citizen and citizen but also between citizen and the State. Commensurate with this responsibility, Constitution by its own provisions conferred ample and inalienable powers on the High court to administer justice. These powers to the extent they are conferred by the Constitution cannot be taken away by law. The High Court thus exercises its powers to do justice deriving its authority directly from the Constitution just as the Parliament derives its authority to make law from the Constitution. In other words, its power to administer justice is not derived through the mediacy of law made by Parliament, but is derived immediately from the text of the Constitution itself. It is for that reason that the Supreme Court described the High Court Judges in *Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another*, as holding constitutional positions. In this respect the position of the English judges differs from their Indian counterparts. In England the Judges occupy, in the eye of law, no higher status than that of a civil servant (see the famous controversy between Prof. Holdsworth and Prof. E. C. S. Wade). The English Judges are, therefore, clearly debarred from going beyond the expressed will of the parliament. But here in our country, the Judges of the Constitutional Court occupying Constitutional positions and saddled, not merely legally but more fundamentally, constitutionally, with the responsibility to administer justice have

the primary duty to administer justice. They cannot, therefore, permit any act of injustice to be purported by any State organ, no matter whether such an act of injustice is permitted or forbidden by ordinary law. This is also the meaning of Kasturi Lal's case (supra). As I have already held that the departmental inquiry is, oppressive and arbitrary and unjust. I set it aside.

15. In my opinion, the withholding of the petitioner's promotion as Way Inspector Grade I, pending the finalisation of the departmental inquiry is clearly unsupportable. The petitioner by passing his examination in 1979 had become eligible about three years back to be promoted as Way Inspector Grade I. But his promotion had then been withheld on the ground of the pendency of the criminal case. Now his promotion was further being postponed on the ground that there was a pendency of departmental investigation. This Court repeatedly held that such acts of the department to be illegal. My brother Ramachandra Rao, J., held in *B. George v. I. G. of Police* (1973) 2 SL.R. 131 following a judgment of this Court in *W.P. No. 496/70* that withholding of promotion on the ground of pendency of a departmental inquiry would amount to inflicting punishment and that would be contrary to Art. 16 of the Constitution. That was a service case of the State employee. But in principle that makes no difference. Lakshmaiah, J., in a judgment reported in *K. Somaiah v. Zonal Manager* (1979) 1 SL.R. 50, dealt with a postal employee's case in these words :

"When disciplinary proceedings are initiated and when they are yet to be completed there is no knowing whether the petitioner can be found to be guilty of the charges that may be framed against him and he cannot before then be punished through either withholding of his promotion or by non-consideration of his case of promotion. In either case, it amounts to imposition of the Punishment, violating both the letter and spirit of Art. 311 of the Constitution of India. Therefore, the pendency or contemplated initiation of the disciplinary proceedings against a person must be considered to have absolutely no impact upon his right for being considered for promotion."

These judgments of this court show that the South Central Railway cannot withhold the petitioner's promotion on the ground that a departmental inquiry is contemplated or pending.

16. Sri Suruyanarayana Murthy, the learned counsel appearing for the Railways, cited a Railway Board's letter justifying the withholding of promotion pending departmental inquiry. As I am holding, following Ramachandra Rao, J., that the withholding of promotion on the ground of pendency of departmental inquiry would amount to violation of Art. 16 of the Constitution, I disregard the letter of the Railway Board. Accordingly, I direct the South Central Railway to promote the petitioner to the post of permanent Way Inspector, Grade I, with retrospective effect from 23.8.78. There shall be a writ in the terms indicated above. The writ petition is allowed with costs. Advocate's fee Rs. 250.