
(2009) 11 CAL CK 0015
In the Calcutta High Court
Case No : Writ Petition No. 26249 (W) of 2007

Barun Kumar Malla

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-11-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 342, 504, 511

Citation : (2010) 126 FLR 184

Hon'ble Judges : G.C. Gupta, J

Bench : Single Bench

Advocate : Saptangshu Basu and K.B.S. Mahapatra, for the Appellant; Anand Bhandari, for the Respondent

Final Decision : Dismissed

Judgement

G.C. Gupta, J.—A written complaint was lodged by Smt. Manju Das, wife of Sri Fatik Das, on 24 May, 2000, in the Court of the learned Sub-Divisional Judicial Magistrate, registered as M.P. Case No. 99 of 2000, alleging that on 5 May, 2000 at about 18.30 hrs. the complainant was waylaid by the four accused persons including the writ-petitioner named therein, all belonging to the Central Industrial Security Force. The accused writ petitioner allegedly caught hold of the tuft of hair of the complainant, the accused Gokbi and Binay Kumar allegedly pulled her saree and the accused Sharma allegedly pressed her breasts while all of them in a chorus allegedly continued to abuse her in a filthy language. On 24 May, 2000 itself the learned Magistrate directed an enquiry after registration of a criminal case. An FIR on that basis was recorded by the police on 31 May, 2000 under sections 342/504/354/376 read with section 511 of the Indian Penal Code.

On 15 October, 2007 a charge-sheet was issued to the petitioner which reads as follows:

That the said No. 733220027 Inspector/ Exe B.K. Malla of CISF Unit FBP Farrakka, while performing duty at CISF Unit MAMC Durgapur allegedly involved

in a case of moral turpitude in that on 5 May 2000 at about 18.30 hrs/he along with 3 other CISF personnel namely No. 904338165 HC/ Dvr J.P. Sharma No. 892292903 Constable Bogai and No. 904470918 Constable Vinay Kumar all formerly of CISF Unit MAMC Durgapur restrained Smt. Manju Das, maidservant, Sri Fatik Das, resident of Jantantra Colony, P.S. NTSPS, Durgapur in front of quarter No. A/T-07.07 near to MC guest house in MAMC Township, while she was returning back to her house after performing her daily work from the quarter of Insp/Exe B.M. Das, of CISF Unit, MC Durgapur, misbehaved and abused her by uttering filthy languages with the intention to hurt her in a sexual way thereby tarnished the image of the force, which amounts to an act of gross misconduct, indiscipline and unbecoming of a member of Armed Force of the Union like CISF, Hence, the charge.

The petitioner was directed to file his written statement within ten days after receipt of the charge-sheet. On 2 November, 2007 the petitioner replied contending -

(a) that the memorandum of charge, issued after lapse of eight years, was liable to be quashed due to inordinate delay, since the authorities were, all along aware of the alleged misconduct and were therefore deemed to have condoned the same;

(b) the departmental proceeding should be kept in abeyance until the criminal proceedings were concluded; and

(c) that documents indicated therein should be furnished for preparing the defence.

2. On 22 November, 2007 the petitioner at the preliminary hearing pleaded not guilty and wanted to furnish his statement in writing. On 7 December, 2007 the present writ petition was filed praying principally the following reliefs:

(a) A writ in the nature of mandamus commanding the respondents to forthwith quash and set aside the purported proceedings and the purported memorandum of charges, dated 15 October, 2007, being Annexure P6.

(b) A writ of or in nature of prohibition prohibiting the respondents to proceed further in the matter.

(c) A writ of or in the nature of certiorari commanding the respondents to produce or cause of to be produced all relevant documents and papers in connection with the proceeding in general and the memorandum of charges, dated 15 October, 2007, in particular.

3. On 12 December, 2007 the authorities were granted liberty by this Court to proceed with the matter after disposing of the pending representation of the writ Petitioner. The proceeding have now been concluded but the final order has not as yet been published. In those circumstances an early hearing of the writ Petitioner was prayed for and the same was accordingly taken up for hearing.

4. Sri Saptangshu Basu, learned advocate appearing on behalf of the petitioner advanced the following submissions:

(a) The alleged misconduct appearing from the charge-sheet is the same which is the basis of the criminal proceeding pending against the petitioner. According to him, so long as the criminal proceedings are not concluded, initiation of a departmental proceeding is not permissible in law. He in support of his submission relied on a judgment of this Court in the case of Badal Pal v. Union of India and others 2003 (5) L.L.N. 254 (SNOC), wherein the following view was taken:

Therefore, so long the petitioner has not faced trial before the criminal Court leading to conviction, the supervisory officer could not even consider whether any action should be taken against the petitioner in terms of section 8 of the Act.

I am, therefore, of the view that once a cognizable offence is alleged to have been committed by a member of the force against the wife of another member of the force in the official quarter, the respondents by virtue of the power conferred under sections 11 and 12 of the Act can at the most arrest and search such employee but thereafter he is required to be handover to the police for trial and if the employee is convicted in the long run, such fact can afford a ground of dismissal on the ground that he becomes unfit for discharge of his duty.

I thus find that on the face of materials on record the respondents/authorities totally acted without jurisdiction in probing the allegation of "abduction with the intention of committing sexual intercourse with the wife of another member of the force" which is not connected with the petitioner's duties enumerated in section 10 of the Act. The order passed by the respondents authorities being without jurisdiction I set aside the order of dismissal and direct the respondent to reinstate him within a month with full benefits of the service. Therefore, this is a case where there is no necessity of giving direction for filing affidavits and this case is disposed on the pure question of law mentioned above.

5. Sri Basu added that the judgment in the case of Badal Pal 2003 (5) L.L.N. 254 (SNOC), (vide supra) was noticed by Division Bench in the case of G.D. Pal v. Union of India and others 2009 (2) C.H.N. 769, and no dissenting note was struck...

(b) The second point urged by Sri Basu was that the departmental proceeding started after 7 years of the alleged incident is grossly belated and should be quashed on the ground of delay alone. He in support of his submission relied on a judgment of the Apex Court in the case of The State of Madhya Pradesh Vs. Bani Singh and another, .

6. Sri Bhandari learned advocate appearing for the respondent authority submitted that the judgment in the case of Badal Pal 2003 (5) LLN 254 (SNOC), (vide supra), has no manner of application to the facts and circumstances of this case. In the case of Badal Pali the alleged misconduct was not committed by the

member of the force while he was on duty whereas the alleged misconduct in the present case was committed, by the petitioner during his duty hours while he was on active duty. The fact that the petitioner was on duty at the relevant time has also been admitted in Para & of the petition. He also relied on a judgment in the case of Commissioner of Police Delhi v. N. Singh 2006 (109) FLR 852 , for the proposition that the standard of proof applicable to the proceedings in Court at a trial for a criminal offence and that before the domestic tribunal are different. As regards the submission concerning delay the case of the respondents is that "the petitioner who was functioning at the material point of time as the In-Charge of Crime and Intelligence Wing of CISF Unit, MAMC Durgapur, was in close touch with the then Deputy Commandant, CISF Unit MAMC, Durgapur, who seems to have given such protective coverage to the petitioner while writing to the police station which also contributed to the delay in initiation of departmental proceedings against the petitioner."

(a) The first question which falls for a decision is the jurisdiction of the authority to initiate the disciplinary proceedings during the pendency of the criminal proceedings in the appropriate Court of law.

7. It has already transpired that the alleged incident happened when the petitioner was on active duty. In other words, during his duty hours he allegedly in the aforesaid misconduct. There is no denial of the fact that the judgment in the case of Badal Pal (vide supra), cited by Sri Basu, was rendered in a case where the act of kidnapping, abduction, etc., took place while the member of the force was not on duty. I therefore accept the submission of Sri Bhandari that the judgment in the case of Badal Pal (vide supra), rendered on its own fact can have no manner of application to the facts and circumstances of the case. The mere fact that the said judgment was noticed by a Division Bench and was not differed from does not make any difference. As a proposition of law it is difficult to accept that the writ-petitioner, acting as a Sub-inspector of the Central Industrial Security Force, is not amenable to the disciplinary jurisdiction of the employer for an alleged attempt to sexually exploit the prosecutrix. This question is no longer *res Integra*. It has authoritatively been laid down by various judgments of this Court and the Supreme Court that the jurisdiction of the employer to proceed departmentally against the delinquent is altogether independent of the jurisdiction exercised by the Courts of law for the purpose of prosecuting and punishing the offender. Reference in this regard may be made to the judgment in the case of Probodh Kumar Bhowmick v. University of Calcutta and others 1994 (2) CLJ 456, wherein the following view was taken:

"In absence of any provision of statute, an employer in my opinion, has an inherent right to initiate a disciplinary proceeding as against its employees. It is beyond anybody's comprehension that although an employee might have committed a serious misconduct like defalcation, theft, misbehavior with a lady or similar other matter, he cannot be punished. Recently this Court has come across a case when a reader of the University has been punished for sexually

exploiting a lady research student. Misconduct is a generic term of which the instances of misconduct as may be specified by the employer are their species. Misconduct in its generic sense has been defined by various High Courts and Supreme Court from time to time as would appear from the discussions made hereinafter.

Misconduct, inter alia, envisages breach of discipline, although it would not be possible to lay down exhaustively as to what would constitute conduct (sic misconduct) and indiscipline, which, however, is wide enough to include wrongful omission or commission whether done or omitted to be done intentionally or unintentionally. It means, improper behavior; intentional wrong doing or deliberate violation of a rule of standard or behaviour:

Misconduct is a transgression of some established and definite rule of action, where no discretion is left except what necessary may demand, it is a violation of definite law, a forbidden act. It differs from carelessness. Misconduct even if it is an offence under the Indian Penal Code is equally misconduct."

In absence of any rule governing the procedure in such a matter, in my considered view, the employer can take recourse to his general inherent power to proceed against a teacher on the basis of well-known and settled grounds of misconduct. In such an event neither any case of conflict with the prescribed procedure nor perishing with the sword" would arise as no procedural sword has been taken out by the employer."

8. A disciplinary proceeding is primarily concerned to find out the suitability of the delinquent for continuing in the service whereas a Court of law trying an alleged offence is concerned with the question whether the accused is guilty of the offence allegedly committed by him and the appropriate punishment in order that the debt incurred to the society by the offence committed by the accused is repaid. Reference in this regard may be made to the judgment in the case of Depot Manager, Andhra Pradesh State Road Transport Corporation v. Md. Yusuf Miya and others 1997 (77) FLR 9, wherein the following view was quoted from an earlier judgment:

"... The approach and the objective in the criminal proceedings and the disciplinary proceedings is altogether distinct and different. In the disciplinary proceedings, the question is whether the respondent is guilty of such conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal proceedings the question is whether the offences registered against him under the Prevention of Corruption Act (and the Indian Penal Code, if any) are established and, if established what sentence should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial in both the cases are entirely distinct and different..."

9. The same view was reiterated in the case of NOIDA Entrepreneurs Association v. NOIDA and others 2007 (4) LLN 205 : 2007 (112) FLR 1139 (SC), wherein

Their Lordships held as follows, in Paras. 11 to 16, at pages 209 to 211:

"11... The conceptual difference between a departmental enquiry and criminal proceedings has not been kept in view. Even orders passed by the executive have to be tested on the touchstone of reasonableness. (See *Tata Cellular Vs. Union of India*, , and *Teri Oat Estates (Private), Teri Oat Estates (P) Ltd. Vs. U.T., Chandigarh and Others*, The conceptual difference between departmental proceedings and criminal proceedings have been highlighted by this Court in several cases. Reference may be made to *Kendriya Vidyalaya Sangathan and Others Vs. T. Srinivas*, , *Hindustan Petroleum Corporation Ltd. and Others Vs. Sarvesh Berry*,), and *Uttaranchal Road Transport Corporation and others v. Mansaram Nainwal* 2004 (4) LLN 71.

12. The purpose of departmental enquiry and of prosecution are two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public duty, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Indian Evidence Act, 1872 (in short the Evidence Act). Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position... Under these circumstances, what is required to be seen is whether the departmental enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances.

13. A three-Judge Bench of this Court in *Depot Manager, Andhra Pradesh State Road Transport Corporation v. Mohd. Yousuf Miya and others* 1997 (77) FLR 9 , (vide supra), analysed the legal position in great detail on the above lines.

14. The aforesaid position was also noted in *State of Rajasthan Vs. B.K. Meena and others*, .

15. There can be no straitjacket formula as to in which case the departmental proceedings are to be stayed. There may be cases where the trial of the case gets prolonged by the dilatory method adopted by delinquent official. He cannot be permitted to on one hand prolong criminal case and at the same time contend that the departmental proceedings should be stayed on the ground that the criminal case is pending.

16. In Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, , this Court indicated some of the fact situations which would govern the question whether departmental proceedings should be kept in abeyance during pendency of a criminal case. In Para.22, at pages 647 and 648, conclusion which are deducible from various decisions were summarised. They are as follows:

"(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated question of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, So that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest." "

10. On the top of that the rules do not prohibit departmental proceeding in such a case. Therefore the discretion of the authority to proceed cannot be taken away by Court.

11. I therefore am unable to accept first contention of Sri Basu which is consequently rejected.

12. The second submission as regards delay is also, according to me without any merit. The submission of the Counsel which is also the pleading in the petition

that the alleged misconduct if any is deemed to have been condoned because no proceedings were drawn up during the period of 7 years is replied by the respondent by stating that the Deputy Commandant under whom the petitioner was working provided the petitioner with a protective umbrella which has contributed to the delay. This allegation of the respondent authority finds some support from a letter, dated 6 June 2000, addressed by the said Deputy Commandant to the officer-in-charge of the concerned police station intimating him that the accused persons were innocent and the proceeding should be dropped. A copy of that letter is part of Annexure P5 to the writ petition. I should however not be understood to have expressed any definite opinion as regards any protective umbrella allegedly provided by the Deputy Commandant to the petitioner nor should I be understood to have expressed any opinion as regards the truth of the contents of that letter. Whether the contents of that letter, dated 6 June 2000, including the opinion expressed therein are correct have to be gone into in accordance with law. I am at this stage only concerned with the question of delay. I find that a plausible explanation has been offered by the respondent authority. In the petition I did not find any allegation as regards any prejudice suffered by the petitioner arising out of delay in initiation of the departmental proceeding, nor was any submission with regard there to advanced by the learned advocate. As a proposition of law it cannot be said that mere delay would offend the provisions of Arts. 14 and 21 of the Constitution of India. If any authority is needed reference may be made to the judgment in the case of B.C. Chaturvedi 1996 (72) FLR 316 , wherein Their Lordships held that "delay by itself cannot be regarded to have violated Article 14 or 21 of the Constitution of India." The judgment in the case of The State of Madhya Pradesh Vs. Bani Singh and another, was against an order of the Tribunal which had quashed the charge because of the long delay of more than 12 years. The Supreme Court did not interfere. The reason which weighed with Their Lordships was that there was no explanation for the inordinate delay which is not the case before me. Therefore that judgment Cannot have any application to the facts and circumstances of this case. Both the points urged by Sri Basu have thus been disposed of.

13. The petition in the result fails and is dismissed.

Parties shall bear their own costs.

Urgent xerox certified copy of this judgment, be delivered to the learned advocates for the parties, if applied for, upon compliance of all formalities.

Writ petition dismissed.