
(2011) 02 CAL CK 0027

In the Calcutta High Court

Case No : C.A.N. No. 6397 of 2010 in A.S.T. No. 422 of 2010

Bijay Kumar Ghosh

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 24-02-2011

Acts Referred:

Citation : (2011) 2 CHN 326

Hon'ble Judges : Prabhat Kumar Dey, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Kamalesh Bhattacharya, Rama Haider, for the Appellant; L.K. Gupta, Mahananda Roy, for the Respondent

Judgement

Amit Talukdar, J.—"... Let the proceeding which has been approved by the Board continue but no final order shall be passed in connection with the said proceeding without leave of the Court during pendency of this writ petition. In the event however, the Board on its own intends to consider the representation made by the Petitioner, the Board shall be at liberty to do so."

2. In the grillage of the aforesaid piece of the order passed in W.P. No. 21184(W) of 2009 on 14.05.2010, this appeal is founded.

3. Acting on the basis of the prayer of the Petitioner, who is currently facing a disciplinary proceeding as also awaiting trial in the Criminal Court, the Hon'ble Writ Court passed the aforesaid direction. Be it noted that the prayer of the Appellant was restricted to the issue of allowing him to resume his duties as Headmaster of the institution of Respondent No. 6.

4. Initially, a Division Bench of this Court, before which the order was carried at the instance of the writ Petitioner/Appellant, based on the principle of double jeopardy stayed the disciplinary proceeding till disposal of the appeal as his defence would be disclosed in the event the proceeding is not stayed.

5. Pending hearing of this appeal, a vacating application being CAN 6397 of 2010

was taken out by Respondent No. 7. Extensive hearing was made at the Bar, both in support and in against of the same. In the process we practically heard out the ambit of the appeal. As such, by consent of the parties we treated the same as on day's list and kept reserved the delivery of our judgment.

6. Interfaced with the vacating application, through which, we had heard out the entire appeal, we would juxtapose the submission made at the Bar in a converse position and place that of Shri Lakshmi Kumar Gupta, learned Senior Counsel for Respondent No. 7 in the main appeal and applicant in C.A.N. No. 6397 of 2010 at first. Thereafter we shall advert to Shri Bhattacharya for the Appellant.

7. Shri Lakshmi Kumar Gupta, learned Senior Counsel assisted by Shri Mahananda Roy for the applicant in C.A.N. No. 6397 of 2010 submitted that before the Writ Court the prayer of the Appellant was restricted to resumption of his duties whereas abandoning the same he has raised a new bogey of staying the proceeding. According to him, this cannot be permitted.

8. Thereafter Shri Gupta submitted that there is no need that the departmental proceeding should remain stayed pending conclusion of the criminal trial. He was of the view that this is not the law and the position which surfaced before the Division Bench, which admitted the appeal and had suspended the disciplinary proceeding, was prima facie moved by the fact that it would result in disclosure of defence in the event both the proceedings are allowed to continue simultaneously.

9. Referring to the stay petition, Shri Gupta invited our attention to page 63. He showed from the reply given by the Appellant against the chargesheet at page 64 which showed "... I do hereby give reply to the charges under strained circumstances without prejudice to in rights in the pending criminal case." According to Shri Gupta, learned Senior Counsel, already the Appellant had himself submitted before the disciplinary authorities by way of filing the said chargesheet. As such, there is no question of disclosure of defence, which would prejudice him in the pending trial.

10. Shri Gupta placed before us the decisions of Supreme Court in State of Rajasthan Vs. B.K. Meena and others, ; Kendriya Vidyalaya Sangathan and Others Vs. T. Srinivas, and The Managing Director State Bank of Hyderabad and Another Vs. P. Kata Rao, and was of the view that simply pendency of a criminal proceeding cannot impinge on the continuation of a disciplinary proceeding.

11. Shri Kamalesh Bhattacharya with Smt. Rama Halder for the Appellant at first referred to the decision of Bongaigaon Refinery and P.C. Ltd. and Others Vs. Girish Chandra Sarmah, and submitted that since the appeal is continuation of the proceedings of the Writ Court, a point can be agitated for the first time and it would not operate as an estoppel.

12. Further Shri Bhattacharya submitted that out of some vindictive attitude of the Respondent No. 6, the entire proceeding was initiated and he has simply

been made a scapegoat and unless the disciplinary proceeding is stayed till conclusion of the trial, he would be exposed in both the fora which will result in substantial injustice.

13. Shri Bhattacharya referred to the Division Bench decision of this Court in State of West Bengal and Ors. v. Vidyasagar Pandey and Anr., reported in 2011 (1) WBLR (Cal) 337, which took note of a previous Division Bench decision in State of West Bengal and Ors. v. Sankar Ghosh and Anr. 2010 LAB IC 3791, in support of his contention that finding of the Criminal Court prevails over the disciplinary authority and as such, the latter should remain stayed till such time the criminal proceeding is concluded.

14. Referring to the decision of State of West Bengal and Ors. v. Vidyasagar Pandey and Anr. (supra) Shri Bhattacharya submitted that the proceeding before the disciplinary authority is required to be stayed till such time the trial is over.

15. He also referred to the Management Rules of the Board and according to him, in view of the Memo No. S-607 of 21.06.1982, the procedure adopted by the Managing Committee in setting up the disciplinary process was not in accordance with law.

16. Accordingly, he has prayed for allowing this appeal.

17. From a broad conspectus of the entire peripheries of this appeal in the backdrop of the vacating application, we find the Division Bench on 18.06.2010, was persuaded to grant stay of the disciplinary proceeding primarily on the ground that the defence of the Appellant would be disclosed in the event the proceeding is not stayed. In view of the position that has been reflected from the learned Senior Counsel's argument at page 63 of the stay petition, the force of the order passed by the Division Bench remains completely lost in the current fiasco. As such, while Shri Gupta, learned Senior Counsel has been successful in building a very strong case in support of his prayer for revocation of the said interim order -- he has also in the process, been able to place before us the actual legal position with regard to the continuation of the disciplinary proceeding vis-a-vis the criminal prosecution. The decision of State of Rajasthan v. B.K. Meena and Ors. (supra) relied upon by Shri Gupta, learned Senior Counsel, goes to show that there is no bar for both the proceeding to go on simultaneously.

18. The decision of Supreme Court in Kendriya Vidyalaya Sangathan and Ors. v. T. Srinivas (supra) referred to by the learned Senior Counsel on the proposition that the departmental proceeding should not be stayed as a matter of course, is apposite in the facts and circumstances of the case. We find from the ratio of the decision of the Apex Court in State Bank of Hyderabad and Anr. v. P. Kata Rao (supra) that the Apex Court had held that departmental inquiry and a criminal proceeding are quite distinct in nature and cannot be taken as complimentary to each other even though they may not be mutually exclusive.

19. After we have read the aforesaid decisions, we are of the view that there is

hardly any scope for interference in this appeal and the arguments advanced by Shri Bhattacharya on the question of duality of proceedings rendering disclosure of defence can hardly have any appeal.

20. In the light of the aforesaid three decisions in 1) State of Rajasthan v. B.K. Meena and Ors. (supra), 2) Kendriya Vidyalaya Sangathan and Ors. v. T. Srinivas (supra) and 3) State Bank of Hyderabad and Anr. v. P. Kata Rao (supra) we are of the opinion that apart from the fact that already reply to the show cause having been filed by the Appellant, the question of disclosure of defence not only is not a pertinent factor but in juncting the disciplinary proceeding to continue further so as to stave of the danger of inculcating himself in the criminal prosecution, is of no consequence.

21. Since this question as to whether the disciplinary proceeding should be permitted to continue parallelly with the criminal prosecution arises on and often; it would be profitable to discuss the law governing the field threadbare.

22. The Supreme Court in State Bank of India and Others Vs. R.B. Sharma, had already held as a basic principle that both the proceeding, department wise and also before the Criminal Court, is liable to proceed CHN 2011 (2) 2/22 simultaneously since the purposes thereof are two different and distinct aspect. Their Lordships in paragraph 8 of the said decision had held:

... 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 proceeding are and completed as expeditiously as possible.

23. Reference made by Shri Bhattacharya on the decision of State of West Bengal and Ors. v. Vidyasagar Pandey and Anr. (supra), which derived sustenance from the decision of State of West Bengal and Ors. v. Sankar Ghosh and Anr. (supra) have been taken note of by us in its proper perspective. In our considered view, the ratio laid down in the said Division Bench decision in State of West Bengal and Ors. v. Sankar Ghosh and Anr. (supra) whose offspring was the decision of State of West Bengal and Ors. v. Vidyasagar Pandey and Anr. (supra) cannot be said to be a correct exposition of the legal position. Firstly, the decision of State of West Bengal and Ors. v. Sankar Ghosh and Anr. (supra) was on a completely different sphere. The Division Bench in the said case was dealing with the effect of acquittal of the Appellant with regard to its bearing on the disciplinary authority. Whereas in the present case the proceedings of G.R. Case No. 401 of 2009 is awaiting supply of copy before the learned Chief Judicial Magistrate, Paschim Medinipur. The last date was fixed on 11.02.11 for that purpose. As such, it can be easily gathered the trial has not yet began although the report in final form was laid down before the Court more than a year ago

(24.12.2009). On the contrary, the disciplinary proceeding has already gathered some momentum, which we have seen from the materials.

24. In our understanding of the position in *State of West Bengal and Ors. v. Vidyasagar Pandey and Anr. (supra)*, we find the same is quite contrary to the law governing the field emanating from the various Supreme Court decisions, which we will discuss.

25. In the decision of *The State of Punjab and Others Vs. Prem Sarup*, at paragraph 12, Supreme Court has held that option remains before the employer to initiate a departmental proceeding despite the fact that the delinquent officers on similar charges have been acquitted.

26. Similarly, in the decision of *General Manager, UCO Bank and Another Vs. M. Venuranganath*, paragraph 6, that acquittal in a criminal case has nothing to do with departmental proceedings and law is clearly well-settled. Notwithstanding acquittal in a criminal case, departmental proceedings can be initiated and or continued. It also held in paragraph 8 of the said decision that the sphere of criminal proceeding and departmental proceeding are completely different and there cannot be an embargo of a person being proceeded departmentally although he has been exonerated before the trial.

27. In the decision of *Union of India (UOI) and Others Vs. Naman Singh Sekhawat*, , a similar view was expressed by Their Lordships.

28. This view is reinforced in the decision of *South Bengal State Transport Corpn. Vs. Swapan Kumar Mitra and Others*, ; *Commissioner of Police, New Delhi Vs. Narender Singh*, *Suresh Pathrella Vs. Oriental Bank of Commerce*, and *Southern Railway Officers Assn. and Another Vs. Union of India (UOI) and Others*,

29. The Supreme Court also in *Indian Overseas Bank, Annasalai and Anr. v. P. Ganesan and Ors.*, reported in 2008(1) SCC 650, has categorically held that a departmental proceeding pending criminal proceeding does not warrant an automatic stay.

30. In all the line of decision Their Lordships has never laid down a cut and dried formula, on the contrary, Their Lordships have emphasised on a case to case evaluation. In other words, wide discretion remains. At once the question would arise how to exercise it.

31. As a fall out of our appreciation of the entire situation in the light of the decisions, which we have quoted in the foregoing paragraphs, we would hasten to add that none of the decisions rendered by the Division Bench in *State of West Bengal and Ors. v. Sankar Ghosh and Anr. (supra)* and *State of West Bengal and Ors. v. Vidyasagar Pandey and Anr. (supra)* can be said to be of any binding precedent upon us.

32. In the cusp of the decision of *State of West Bengal and Ors. v. Vidyasagar Pandey and Anr. (supra)*, which took note of the earlier decision of this Court in

State of West Bengal and Ors. v. Sankar Ghosh and Anr. (supra), both were relating to continuation of departmental proceeding where order of acquittal was recorded. None of those two decisions took into account the ratio of the decisions of Supreme Court in General Manager, UCO Bank and Anr. v. M. Venu Ranganath (supra), Suresh Pathrella v. Oriental Bank of Commerce (supra), Commissioner of Police, New Delhi v. Narender Singh (supra), South Bengal State Transport Corporation v. Sapan Kumar Mitra and Ors. (supra) and State Bank of Hyderabad and Anr. v. P. Kata Pao (supra).

33. At once we would be confronted with the question that since the preceding Division Bench decision operating in the field bind us as a successor Division Bench of co-equal strength, should we abide by the same ? and follow the doctrine of stare decisis ? Or revisit the same ?

34. The binding precedence of a Division Bench decision is required to be followed not only by the Single Judge but also by us in a coordinate Division Bench. This is the rule of stare decisis. But there are some exceptions. Those are doctrine of per incuriam and sub silentio. In the decision of State of West Bengal and Ors. v. Vidyasagar Pandey and Anr. (supra) the Division Bench of this Court was in total oblivion of the aforesaid legal proposition, which we have noted from our foray of the aforesaid decisions of the Supreme Court governing the field.

35. In Municipal Corporation of Delhi Vs. Gurnam Kaur, a Three-Judge Bench of Supreme Court speaking through Sen, J. while quoting Professor P.J. Fitzgerald, Editor, Salmond on Jurisprudence, 12th edn. held;".... Precedents sub silentio and without argument are of no moment."

It further held:

A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.

36. Similarly, the Supreme Court in M/s. A-One Granites Vs. State of U.P. and Others, , relying on its earlier decisions in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, and Arnit Das Vs. State of Bihar, has held that where a point, "having not been referred to, much less considered by this Court in the earlier appeals; it cannot be said that the point is concluded by the same and no longer res Integra and accordingly this Court is called upon to decide the same."

37. Since the decision of *State of West Bengal and Ors. v. Vidyasagar Pandey and Anr.* (supra) passes in complete sub silentio of the aforesaid propositions laid down by the Supreme Court, it would be a case of exception to the doctrine of precedents and would have no binding force upon us.

38. We would be required to take a short break from the main issue and harp on the sidelines of the premises of Shri Gupta's objection that although before the learned Trial Court simply prayer was made for allowing the Appellant to join his duty but subsequently in appeal stage, he has changed his stance--in our opinion need not detain us any further in view of the decision of Supreme Court in *Bongaigaon Refinery and Petrochemicals Ltd. and Ors. v. Girish Chandra Sarma* (supra) relied upon by Shri Bhattacharya. More so this not being of any primordial consideration.

39. After all, what was the issue. The Hon''ble Trial Judge, on the basis of the prayer in the writ petition directed the disciplinary proceeding to continue but the final order would not be passed without the Court's leave. Obviously, the Appellant had a cause of action in the fashion, which we have seen before the Court of appeal and the objection of Shri Gupta, learned Senior Counsel cannot be sustained in this regard.

40. Now, the question remains, the original writ is pending hearing before the Hon''ble Trial Judge. Directions for exchange of affidavits have been passed and the matter is slated for hearing. Since there is already a direction that the results of the proceeding will not be published awaiting conclusion of the writ proceeding this Court would be of the view that now the writ may kindly be disposed of by His Lordship subject to his convenience and the business of the Court permit it. and as already the show cause has been filed much before the interim order was passed: by the. Division: Bench on the premises that the Appellant ran the risk of disclosure of his defence before the Criminal Court, cannot be a valid ground existing at the present juncture.

41. Accordingly, the interim order passed by the Division Bench on 18.06.2010 is lifted.

42. Let the entire matter now be relegated to the place of its origin from where it made an upward journey in appeal.

43. Be it noted that we have not entered into the merits of the case in whatsoever fashion. Any discussion on the case would be deemed to be for the purpose of proper disposal of the appeal in the context of the decision arrived at and cannot be construed as expression of opinion on the merit of the case of the Appellant.

44. Appeal accordingly disposed of.

45. There will be no order as to costs.

P.K. Dey, J.

46. I agree.