(1995) 05 GAU CK 0029

In the Gauhati High Court

Case No : Civil Rule No. 3304 of 1991

Bimalendu Bhagabati APPELLANT

Vs

Assam Government Construction Corporation Limited and Others RESPONDENT

Date of Decision : 02-05-1995

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (1995) 3 GLR 405

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : D.N. Choudhury, A.K. Phukan and A. Sarma, for the Appellant; A.R. Borthakur, R. Barthakur and B. Acharjee, for the Respondent

Final Decision : Allowed

Judgement

J.N. Sarma J.

1. This application under Article 226 of the Constitution of India has been filed with two fold prayers - (1) to stay the further departmental proceeding with charges under charge sheet No. AGCC/E/67/90/13 dated 23rd/24th May, 1991 till the completion of the criminal proceeding ; (2) to quash the suspension order dated 25.9.90 and to allow the Petitioner to join in service.

2. The brief facts art as follows:

The Petitioner was at the relevant time working as Cashier and he was suspended on 25.9.90 by Annexure-III to the writ application. That Annexure is quoted below:

Pending drawal of departmental proceedings and enquiry Shri Bimalendu Bhagabati, Sr. Asstt. Technical Branch, AGCC Ltd. is placed under suspension with immediate effect.

On 1.10.90 vide Annexure - V the following FIR was lodged before the officer-in-charge of Paltan Bazar Police Station, Paltan Bazar, Guwahati against the Petitioner. That FIR is quoted below:

I am directed to bring to your notice that on a routine checking for the period from 1.1.90 by our internal audit team, it is revealed that Shri Bimalendu Bhagabati, Senior Asstt. Technical Branch, AGCC Ltd. who was the Cashier at the Head Office of the AGCC committed misappropriation of the Corporation money by forging the Books of Accounts & other relevant documents when he was acting as a Cashier. As per the preliminary audit notes on account of Head Office of the AGCC, it is found that during the aforesaid period, total amount which he thus misappropriated comes to rupees 43,424/-. In view of this the Corporation had to undertake an audit of the period prior to 1.1.90 and the results of the said audit may reveal misappropriation by Shri Bimalendu Bhagabati above named of a huge amount of money of the Corporation. Shri Bhagabati above named has since been suspended with immediate effect by in order dated 25th Sept., 90 pending appropriate departmental action against him on the issue.

In view of what is stated above, you are requested to register a case against Shri Bimalendu Bhagabati above named and take appropriate action as per law against Shri Bhagabati. Since it is a serious matter involving misappropriation of public money, it will be appreciated if the appropriate actions are initiated against Shri Bhagabati immediately so that no further damage can be done by him to the Corporation.

Thanking you.

3. On 23.5.91 vide Annexure-IV the following charges were levelled against

the Petitioner:

Charge No. I : While you were as Cashier in Head Office from 6.9.82 to 31.8.90 you have misappropriated an amount of Rs. 3,85,684.90 (Rupees three lakh is eighty five thousand six hundred eighty four and paise ninety) only by manipulation of cash book, vouchers and other connected record fraudulently and deliberately during the period from 1.4.87 to 30.9.90. These were made by-

1. Changing of figures in cash book by erasing and overwriting etc.

2. Mistakes in totalling in cash books.

3. Double payments.

4. Opening and closing cash balance.

5. Cheques encashed by unauthorised persons.

Charge No. II : Non-presenting of cash book after closing at the end of the month to the disbursing officer for his cash balance verification and obtaining his initials.

Charge No. III : Misplacing/cancelling payment vouchers and other records.

4.The admitted position is that the criminal proceeding is pending. The criminal proceeding and the charges in the departmental proceeding are on the same set of facts and accordingly it is urged by Mr. A.K. Phukan, learned Counsel for the Petitioner that the departmental proceeding should be stayed till the disposal of the criminal proceeding. In this connection, Mr. Phukan places reliance in the following decisions.

1. Kusheshwar Dubey Vs. Bharat Coking Coal Ltd. and Others, where in Supreme Court in paras 6 and 7 has laid clown the law as follows:

The view expressed in the three cases of this Court seem to support the position that while there be no legal bar for simultaneous proceedings being taken, yet there me be cases where a would be appropriate to defer disciplinary proceedings awaiting disposal of the criminal case. In the latter class of cases it would be open to the delinquent-employee to seek such an order of stay or injunction from the court. Whether in the facts and circumstances of a particular case there should or should not be such simultaneity of the proceedings would then receive judicial consideration and the court will decide in the given circumstances of a particular case as to whether the disciplinary proceedings should be interdicted pending criminal trial. As we have already stated that it is neither possible nor advisable to evolve a hard and fast, straight-jacket formula valid for all cases and of general application without regard to the particularities of the individual situation. For the disposal of the present case, we do not think it necessary to say anything more, particularly when we do not intend to lay down am general guideline.

In the instant case, the criminal action and the disciplinary proceedings are grounded upon the same set of facts. We are of the view that the disciplinary proceedings should have been stayed and the High Court was not right in interfering with the trial court''s order of injunction which had been affirmed in appeal.

2. Sulekh Chand and Salek Chand Vs. Commissioner of Police and Others, where the Supreme Court pointed out as follows:

Once the acquittal was on merits the necessary consequence would be that the delinquent is entitled to reinstatement as if there is no blot on his service and the need for the departmental enquiry is obviated. The materials on the basis of which his promotion was denied was the sole ground of the prosecution u/s 5(2) and that ground when did not subsist, the same would not furnish the basis for DPC to overlook his promotion. Moreover, since the departmental enquiry was itself dropped the very foundation on which the DPC had proceeded is clearly illegal. The Appellant is entitled to the promotion with effect from the date his immediate junior was promoted with all consequential benefits.

5. Mr. Phukan on the basis of the law laid down in these two decisions urged that the departmental proceedings against the Petitioner should be stayed inasmuch as if the departmental proceeding is allowed, the Petitioner will be prejudiced in

the criminal trial.

6. On the other hand, Mr. Borthakur, learned Counsel appearing for the Respondents submits that the principle of natural justice does not require mat an employer must wait for the decision at least of the criminal court before taking action against an employee. This aspect to the matter was considered by the Supreme Court in Tata Oil Mills Co. Ltd. Vs. Its Workmen, and relying on the earlier decision in The Delhi Cloth and General Mills Ltd. Vs. Kushal Bhan, . Both the cases are relied on the decision in Kusheshwar Dubey Vs. Bharat Coking Coal Ltd. and Others, and the Supreme Court laid down the law as follows:

...If the case is of a grave nature or involves questions of fact or law, which are not simple, it would be advisable for the employer to await the decision of the trial court, so that the defence of the employee in the criminal case may not be prejudiced....

7. The reason behind this principle is that a man is not expected to be prejudiced by disclosing his defence before the domestic enquiry.

8. This being the position and as I find that the criminal case and the'' departmental enquiry are based on the same set of facts, I direct that the disciplinary proceeding as against the Petitioner shall stand suspended till the completion of the criminal case.

9. The next question is whether the suspension order passed against the Petitioner as far back as on 25.9.90 should be quashed. In this connection Mr. Phukan places before me the following decision:

1. State of Orissa Vs. Bimal Kumar Mohanty, wherein the Supreme Court in para 12 after considering its earlier decision laid down the law as follows:

Normally when an appointing authority or the disciplinary authority seeks to suspend an employee, pending inquiry or contemplated inquiry or pending investigation into grave charges of misconduct, or defalcation of funds or serious acts of omission and commission, the order of suspension would he passed after taking into consideration the gravity of the misconduct sought to be enquired into or investigated and the nature of the evidence placed before the appointing authority and on application of the mind by disciplinary authority. Appointing authority or disciplinary authority should consider the above aspects and decide whether it is expedient to keep an employee under suspension pending aforesaid act ion. It would not be as an administrative routine or an automatic order to suspend an employee. It would be on consideration of the gravity of the alleged misconduct or the nature of the allegations imputed to the delinquent employee. The Court or the Tribunal must consider each case on its own facts and no general law could be laid down in that behalf. Suspension is not a punishment but is only way of forbidding or disabling an employee to discharge the duties of office or post held by him. In other words it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending enquiry without any impediment or to prevent an opportunity to the delinquent having had the opportunity in office to impede the progress of the investigation or enquiry etc. Each case must be considered depending on the nature of the allegations, gravity of the situation and the indelible impact it creates on the service for the continuance of the delinquent employee in service pending enquiry or contemplated enquiry or investigation. It would be Anr. thing if the action is actuated by mala fide, arbitrary or for ulterior purpose. The suspension must be a step in aid to the ultimate result of the investigation or enquiry. The authority also should keep in mind public interest of the impact of the delinquent''s continuance in office while facing departmental enquiry or trial of the criminal charge.

and on the facts of that case, the Supreme Court found that as serious allegations of misconduct were alleged against the Respondents, the quashing of the order of suspension by the Tribunal was not justified. The next case relied on is 1993 (1) GLR 207 Jahirul Haque Choudhary v. State of Assam and Ors. where in para 3 the Single Judge of this Court laid down the law as follows:

Considering over-all aspects of the matter, I am of the view that no official should ordinarily be kept under suspension for a period of more than three months, barring exceptional cases; and that for quick disposal of such cases the charge-sheet should be served on the official in case of departmental proceedings, or, investigation should be completed in the case of criminal prosecution, ordinarily within six months save in rare or unusual cases. In those rare or unusual cases, where there is no possibility to adhere to the above time limits as the cases are likely to be delayed, the competent authority should examine for revocation of suspension orders from time to time On reinstatement of the Government Officer, if there is risk of evidence of the departmental case being tempered with, a departmental proceeding being hampered, the officer should be transferred to any other place where no such risk exists.

and in that particular case it was found that the Petitioner was placed under suspension on 5.3.88 and no material was placed before this court, to substantiate the continuation of the suspension order and accordingly the order of suspension was quashed.

10. Mr. Phukan submits that in this case the order of suspension against the Petitioner was passed in a most mechanical manner without application of mind. He further submits that the order of suspension is mala fide and it was passed in order to shield, protect somebody else and in this connection he points out to the audit observation that the officer numbering 4(four) named in the audit report were responsible for misappropriation of Rs. 3,93,836. 20 P.

11. On the other hand, Mr. Borthakur submits that as in the Supreme Court in State of Orissa Vs. Bimal Kumar Mohanty, in the instant case also the audit

report had made serious allegations against the delinquent and the amount involved is a huge one, and in exercise of the power under Article 226 of the Constitution this order should not be quashed. He further submits that if the order of suspension is quashed and the Petitioner is allowed to continue in service it would create adverse impact on the other employees and shall demoralise them. He submits that the allegations of mala fide are absolutely frivolous. Regarding allegations of mala fide let us have a look at the writ application. The allegations of mala fide are made out in paras 25, 29 and 30. They are quoted as follows:

It is a clear case of victimisation of the Petitioner because the Respondent wanted to shield some other officers involved in the said crime by making him scape goat by fixing the liability on the Petitioner on the hypothetical assumption that he is the drawing and disbursing officer of Respondent No. 1.

The impugned order of suspension as well as charges and statements of allegations are liable to be quashed as being violative of the aforesaid circulars issued by the State Govt.

That the Respondents has issued the impugned charge sheet to the Petitioner mala fide and illegally just to cover up their laches and irregularity.

12. Bare perusal of these statements will show that the allegations of mala fide as required to be established have not been established in this case and accordingly the allegations of mala fide falls through. If that being the position, the question of quashing the order of suspension does not arise inasmuch as the court can exercise this power only if the action is actuated by mala fide, arbitrary or (sic) purpose. I do not find that the order of suspension is actuated by mala fide arbitrary or for ulterior purpose. So, this prayer stands rejected. But in spite of that, I give the liberty to the Petitioner to approach again for an appropriate direction if the criminal case is not disposed of expeditiously. The authority shall also do the needful to expedite the criminal trial.

13. At the fag end of the case, Mr. Phukan submits that he has not been paid the subsistance allowance regularly. It is disputed by Mr. Borthakur.

14. Be that as it may, I direct the authority shall go on paying the subsistance allowance to the Petitioner in accordance with law at the end of each month by way of crossed cheque/crossed demand draft of a nationalised Bank drawn in the name of the Petitioner and it shall be sent at his home address by the end of each month positively so that no complaint on this count may be made. This is necessary so that the Petitioner may not face undue hardship as complained by him. It shall be the responsibility of Respondent No. 2 to comply with this direction.

Writ application accordingly stands disposed of as indicated above.

