
(2004) 03 GAU CK 0090
In the Gauhati High Court
Case No : WP (C) No. 10522 of 2003

Bimalendu Bhagabati

APPELLANT

Vs

Assam Govt. Const. Corporation Limited and Others

RESPONDENT

Date of Decision : 26-03-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 409

Citation : (2005) 1 GLR 403 : (2004) 2 GLT 1548

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : A. Sarma and A.K. Sarma, for the Appellant; P. Borthakur and R. Mahanta, for the Respondent

Judgement

B.K. Sharma, J.—By this writ application, the petitioner who was placed under suspension pending drawl of departmental proceeding way back in 1990 has invoked the writ jurisdiction of this court assailing the legality and validity of the two departmental proceedings initiated against him.

2. Shortly stated the facts leading to the filing of the writ petition are that the petitioner while was serving as senior Assistant under the respondent corporation was placed under suspension by an order dated 25.9.1990 pending drawl of departmental proceeding. This was followed by issuance of a charge sheet dated 23.5.1991 bringing altogether three charges against the petitioner. Meanwhile a criminal proceeding was launched against the petitioner on the same set of charges. The petitioner approached this court by filing a writ petition registered and numbered as Civil Rule No. 3304/1991 making two fold prayers viz. to say that departmental proceeding till completion of the criminal proceeding and to quash the order of suspension dated 25.9.1990. This court by its judgment and order dated 6.5.1995 allowed the first prayer but the second prayer for revocation of the order of suspension was rejected with the observation that the petitioner would be entitled to approach the court for appropriate direction if the

criminal case was not disposed of expeditiously. The respondents were also directed to expedite the criminal trial. Recording the submission relating to non-payment of subsistence allowance, it was provided that such allowance should be sent to the petitioner at his home address by the end of each month positively.

3. The finding and conclusion of this court relating to the first prayer for stay of the departmental proceeding during pendency of criminal proceeding are quoted below which will have a bearing in this case. Referring to the charges levelled against the petitioner in the departmental proceeding in reference to the criminal proceeding launched against the petitioner, the court observed -

"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....."

Referring to various decisions of the Apex Court the court observed -

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

4. The criminal prosecution launched against the petitioner came to an end with the judgment and order dated 12.1.2001 passed by the Chief Judicial Magistrate, Kamrup in G.R. Case No. 4228/90 u/s 409 IPC. While acquitting the petitioner from the charge of misappropriating corporation's money for which he was charged u/s 409 IPC, the court observed as follows :

"The prosecution has not exhibited the vouchers which are very important document to prove the case. No reason has been shown. In the absence of vouchers, it is difficult to say that the amount shown in cash book deferred from the amounts shown in the voucher."

There were initial of the MD against the relevant entries in the cash books. But no where it has been observed that defect was found.

The accused has denied the allegation in his statement recorded u/s 313 Cr.PC.

PW-1 has admitted that the cash books were in the custody of office for 7/8 says (sic) before audit. The learned counsel for the accused has submitted that the cash books were not in the custody of the accused during this period."

5. After the aforesaid judgment in the criminal case acquitting the petitioner, nothing happened till 31.5.2002 when the petitioner was served with yet another charge sheet pertaining to the same charges as were levelled against him by the earlier charge sheet dated 23.5.1991 referred to above. It is not in dispute, rather fairly admitted by the learned counsel appearing for the respondents during the course of hearing of this case that the charges levelled against the petitioner in both the charge sheets and in the criminal proceedings are on the same set of facts and evidence. The charge sheets was issued without dropping

the earlier charge sheet dated 23.5.1991. The petitioner responded to the charge sheet by submitting a reply dated 28.6.2002. As per the said reply, he was not furnished with the documents and he was denied inspection of the relevant documents. He also stated that the charges levelled against him on the same set of allegations as that of the criminal proceeding cannot stand in the eye of law. He also stated in his reply that most of witnesses who had deposed in the criminal proceeding on behalf of the prosecution were also cited as witnesses in the first charge sheet dated 23.5.1991.

6. By an office order dated 3.2.2003 the respondent corporation appointed one Sri N.K. Dey, retired Director of Audit to enquire into the charges against the petitioner. By the said order one Sri R.K. Das, Office Superintendent of the Corporation was appointed as the Presenting Officer and another Sri D. Das, Accounts Officer of the Corporation was appointed as his Assistant. The Inquiring Officer so appointed was directed to submit his report within 60 days from the date of the order. As per the averment made in paragraph 16 of the writ petition, the Inquiring Officer by his letter dated 10.2.2003 requested the petitioner to appear before him on 25.2.2003 which the petitioner complied with. Further averment has been made that in the enquiry the Corporation failed to establish the charges. The Corporation by their letter dated 7.4.2003 intimated the Inquiring Officer that the time limit fixed for submission of the enquiry report had been extended for a further period of 10 days with effect from 3.4.2003 as per the request made by the Inquiring Officer. However, nothing happened thereafter.

7. While the petitioner was expecting reinstatement in service on his acquittal in the criminal case, after of 11/2 year from the date of issuance of the charge sheet dated 31.5.2002, he was served with yet another charge sheet dated 1.10.2003 bringing three charges against him. It will be pertinent to mention here that the three charges brought against the petitioner all related to the periods from 1982-90; 1983-85 and for the year 1986. Thus there was delay of about 20 years in respect of the first two charges and about 17 years in respect of the third charge. The petitioner responded to the charge sheet by submitting a reply dated 19.11.2003 specifically taking the ground of long delay towards issuance of the charge sheet. He also took the plea of vindictive attitude on the part of the respondent Corporation in keeping him under suspension for long 14 years and initiating departmental proceeding one after another. He also made a grievance relating to non-payment of subsistence allowance. In the meantime by letter dated 2.12.2003, the Inquiring Officer directed the petitioner to be present before him on 12.12.2003 for recording the statement of the petitioner. This letter was issued after more than seven months of issuance of the letter dated 7.4.2003 by which the Inquiring Officer was directed to submit his report within 10 days with effect from 4.3.2003.

8. This was followed by yet another letter dated 2.12.2003 addressed to the petitioner by Inquiry Officer directing him to appear before him on 19.12.2003. This letter was issued in reference to a letter dated 27.11.2003 addressed to the

Inquiry Officer by the Managing Director of the Corporation. The petitioner was intimated and apprised of his right of engaging a defence counsel and to produce his witnesses in support of his case. Thus the petitioner was given the opportunity to engage his defence counsel on conclusion of the case of the Disciplinary Authority. It was at that stage the petitioner approached this court by filing the writ petition praying for setting aside and quashing of both the departmental proceedings. Apart from delay towards initiation and completion of the departmental proceedings, the petitioner has also taken the plea that the charge sheet dated 31.5.2002 which is a replica of the earlier charge sheet dated 23.5.1991 could not have been issued on the same set of charge based on the same set of evidence which did not find favour in the criminal proceeding.

9. The writ petition was moved on 2.1.2004 on which date this court having regard to the interim prayer made, provided for service of notice on the respondent Corporation for their appearance on 9.1.2004. The learned counsel, appearing for the petitioner by his notice dated 7.1.2004 addressed to the Managing Director of the Corporation intimated about the order dated 2.1.2004 passed by this court and furnished a copy of the writ petition. In the said notice the next date fixed on 9.1.2004 was also indicated. However there was no appearance on behalf of the corporation on 9.1.2004 and the matter stood adjourned to 20.1.2004 on which date learned counsel for the Corporation entered appearance and prayed for a short adjournment enabling to obtain instructions. Accordingly time was granted till 23.1.2004 on which date also further time was prayed for and accordingly time was granted till 3.2.2004 on which date also matter stood adjourned to 6.2.2004. On that day also time was prayed for on behalf of the respondent Corporation which was granted till 13.2.2004. The Corporation filed their affidavit on 13.2.2004 on which date the writ petition was admitted for hearing and as agreed to by the learned counsel for the parties, the date of hearing was fixed on 18.2.2004. Thereafter the matter was heard for final disposal. The petitioner also filed an affidavit-in-reply to the affidavit-in-opposition filed by the Corporation.

10. I have heard learned counsel for the parties and have perused the materials on record. Learned counsel appearing for the respondents has also produced the records pertaining to the departmental proceedings. Mr. A. Sarma, learned counsel appearing for the petitioner strenuously argued that going by the sequence of events narrated in the writ petition, it is a clear case of victimisation of the petitioner. His basic thrust of argument is that both the proceedings initiated against the petitioner are not maintainable there being inordinate and unexplained delay towards initiation of the same. As regards the charge sheet dated 31.5.2002, Mr. Sarma submitted that the petitioner having been acquitted in the criminal proceeding based on the same set of fact and evidence, the Corporation could not have issued the same and that too without first dropping the earlier charge sheet dated 23.5.1991 containing the same charges. To buttress his argument, Mr. Sarma relied on some decisions of the Apex Court which are as follows :

1990 (Supp) SCC 738 (State of M P v. Bani Singh) ;
(1995) 2 SCC 570 (State of Punjab v. Chamanlal Goyal) ;
(1998) 4 SCC 154 (State of A P v. N. Radhakrishan);
(2002) 9 SCC 474 (State of Punjab v. Sh. K. K. Sarma).

11. On the other hand Mr. P. Barthakur, learned senior counsel appearing for the respondent Corporation submitted that there was nothing wrong towards initiation of the proceeding against the petitioner. As regards the charge sheet dated 31.5.2002, he submitted that as soon as the criminal proceeding came to an end, the departmental proceeding was initiated against the petitioner. Referring to the aforementioned judgment of this court passed in Civil Rule No. 3304/1991 Mr. Barthakur submitted that the Corporation had no option than to wait till completion of the criminal proceeding". As regards the delay attributed towards initiation of the proceeding, he submitted that there was no delay in respect of the proceeding initiated vide charge sheet dated 31.5.2002. He explained that the charge sheet dated 1.10.2003 could not be issued earlier inasmuch as an FIR was lodged on 7.12.1994 relating to the same very incident and the Corporation in its wisdom decided not to proceed against the petitioner by taking any departmental action in view of lodging of such an FIR. However, when nothing came out of the said FIR, the Corporation decided to proceed against the petitioner by taking disciplinary action. Reacting to the argument made on behalf of the petitioner that the charge sheet dated 31.5.2002 on the same set of charge and evidence as that of the criminal proceeding could not have been issued, Mr. Barthakur submitted that there was no bar on the part of the Disciplinary Authority to initiate departmental proceeding more so when the acquittal of the petitioner was on benefit of doubt. He referred to the following decisions to bring home his arguments.

State of Punjab and Others Vs. Chaman Lal Goyal, ;

State of Andhra Pradesh Vs. N. Radhakishan, ;

Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, ;

State of AP v. K. Allabakash ;

Chairman and Managing Director, United Commercial Bank and Others Vs. P.C. Kakkar,

2002 (1) GLT 660 (SBI v. Dr. Prasana Agarwal).

12. Facts are more or less admitted almost 14 years have gone by since the petitioner was placed under suspension. This was followed by launching the criminal and departmental proceeding against the petitioner on the same set of charge based on same set of evidence which fact has been fairly admitted by the learned counsel appearing for the respondents. This court in its judgment and order dated 6.6.1995 passed the writ proceeding i.e. Civil Rule No. 3304/1991

initiated by the petitioner also noticed that both the proceedings were based on same set of fact and evidence. The criminal proceeding came to an end on 12.1.2001 with the acquittal of the petitioner from the charge. As noticed above, the learned CJM although has used the expression "benefit of doubt" towards acquittal of the petitioner, referred to various documents exhibited on behalf of the Corporation and recorded that there were endorsements of the Managing Director against the relevant entries in the books of accounts relating to which guilt was attributed to the petitioner. The Statement of the prosecution witness to the effect that the cash books were not in custody of the petitioner has also been recorded. It has also been recorded that the other witnesses did not support the PW- 1 in the criminal proceeding. It is in this context the expression "benefit of doubt" will have to be understood.

13. The first charge sheet was issued to the petitioner way back in 1991 and the fresh charge sheet dated 31.5.2002 was issued on the same set of allegations which were also based on same set of charge and evidence as that of the criminal proceeding. The criminal case against the petitioner came to an end with the passing of the judgment on 12.1.2001 and it took more than 14 months to issue the charge sheet dated 31.5.2002. The Corporation also did not revoke the order of suspension dated 25.9.1990 and the petitioner even after acquittal in the criminal proceeding continued to remain under suspension. This factor coupled with the issuance of the new charge sheet dated 1.10.2003 relating to the alleged incidents of 17 to 20 years back raised a serious doubt in respect of bonafide exercise of power by the Corporation. The records produced on behalf of the Corporation pertaining to the two proceedings initiated against the petitioner also does not bear good faith, administrative fairness and transparency in the matter. As noticed above, the writ petition was filed and moved on 22.12.2003 and 2.1.2004 respectively assailing the legality and validity of the two proceedings. Copy of the writ petition was directed to be served on the Corporation which the petitioner did on 7.1.2004. Such a course of action was adopted for the benefit of the Corporation by way of providing an opportunity of being heard in the matter of interim prayer made for stay of both the proceedings. Although there was no stay order relating to the proceedings, but the Corporation was aware about the writ proceeding atleast on 7.1.2004 when the copy of the writ petition was served. Appearance on behalf of the Corporation was made by the learned counsel and several adjournment were prayed for which were duly granted and it was only on 13.2.2004 the respondent Corporation filed their affidavit-in-opposition. However, during this period the Corporation proceeded with the enquiry proceedings ex-parte against the petitioner. In all fairness, the Disciplinary Authority and for that matter of Inquiring Officer ought not to have proceeded with the enquiry proceedings although strictly speaking there was no bar to proceed with the same. However, the conduct of the Corporation will have to be judged on the touch-tone of administrative fairness, reasonableness and transparency more particularly having regard to the attending facts and circumstances involved in this case. The

Inquiring Officer proceeded with the first enquiry on 9.1.2004 i.e., after entertaining the writ petition on 2.1.2004 and serving a copy of the writ petition on 7.1.2001. The minutes of the proceedings dated 9.1.2004 do not through any light as to whether the proceeding was concluded and as to what for the petitioner was not afforded with another opportunity.

14. During the course of hearing Mr. P. Borthakur, learned senior counsel appearing for the respondents submitted that the enquiry in respect of the first proceeding has come to an end and possibly the enquiry report has also been furnished to the petitioner and he would be receiving the same, if not already received. Thus, during the pendency of the writ petition when the copy of the writ petition was directed to be served on the Corporation in view of the interim prayer, the Disciplinary Authority hurriedly proceeded with the matter. What they could not do from the date of the issuance of the charge sheet, they could do it from the date of serving of the copy of the writ petition on 07.01.2004 till taking up the matter for hearing on 13.02.2004. The enquiry report was prepared on 12.01.2004 in respect of the first charge sheet and the enquiry report in respect of the second charge sheet was prepared on 23.02.2004. The hearing on the writ petition continued from 13.02.2004 to 01.03.2004 and the respondents produced their records on 10.03.2004. The conduct of the respondent in this writ proceeding from the date of furnishing the copy of the writ petition on 07.01.2004 has already been reflected above, it gives an irresistible impression that the respondent Corporation proceeded with the departmental proceeding with the sole purpose of bringing the same to an end before this Court could consider the prayer for interim relief. At least the Corporation knew that the writ proceeding has been initiated and notice was directed to be served on them on 07.01.2004 for the purpose of considering the submission on the part of the Corporation. But, the Corporation hurriedly concluded the departmental proceeding. Thus, at the time of final hearing of the writ petition it was submitted on behalf of the Corporation that the proceedings having been completed, the final orders are required to be passed and the writ petition has become infructuous.

15. It is in the above back drop a decision is required to be arrived at as to whether the proceedings purportedly completed are sustainable or not.

16. The first proceeding was initiated by issuing the charge sheet on 23.05.1991. The Corporation also lodged an FIR with the Police relating to the same very allegation which eventually culminated to GR case No. 4228/90. In between the Civil Rule No. 3304/91 was filed by the petitioner assailing the legality and validity of departmental proceeding. The writ petition was disposed of by the Judgment & Order dated 06.06.1995 providing that the departmental proceeding would remain suspended during the pendency of the criminal proceeding. The Court had noticed that both the proceedings were based on the same set of charge and evidence. After acquittal of the petitioner in the criminal proceeding, the respondents did not do anything in the matter for about 14 months.

However, they issued a fresh charge sheet on 31.05.2002 which is the replica of earlier charge sheet dated 23.05.1991 with the minor variation of names of witness. The Corporation did not reinstate the petitioner in service even after his acquittal in the criminal case. There was no proceeding against him during the aforesaid period of 14 months and yet he was continued under suspension. This does not reflect the bonafide exercise of power on the part of the Corporation. It gives an impression that the Corporation was hell bound to keep the petitioner away from office. In the process it also ignored the observations made by this Court in the earlier writ proceeding involved in Civil Rule No. 3304/91. The Corporation also did not cancel the earlier charge sheet dated 23.05.1991. Thus, it has become a case of issuance of a charge sheet in 2002 relating to the alleged incidents which took place more than 12 to 15 years back. It is in this background the case laws cited by the learned counsel for the parties will have to be considered.

17. In the case of Bani Singh (supra) the Apex Court held the initiation of proceeding in 1987 i.e., after 12 years relating to certain irregularities purportedly committed by the incumbent in the years 1975-77 as invalid. In the case of Chaman Lal Goyal (supra) the Apex Court observed that the disciplinary proceeding must be conducted soon after the irregularities are detected or soon after discovering the irregularities. That cannot be initiated after lapse of considerable time. It further observed that it would not be fair to the delinquent Officer and such delay also makes the task more difficult and not in the interest of administration. In the aforesaid case Apex Court observed as follows :

"The principles to be borne in mind in this behalf have been set out by a Constitution Bench of this Court in A.R. Antulay v. R. S. Nayak. Though the said case pertained to criminal prosecution, the principles enunciated therein are broadly applicable to a plea of delay in taking the disciplinary proceedings as well. In paragraph 86 of the judgment, this Court mentioned the proportions emerging from the several decisions considered therein and observed that "ultimately the court has to balance and weigh the several relevant factors - balancing test or balancing process - and determine in each case whether the right to speedy trial has been denied in a given case". It has also been held that, ordinarily speeding, where the court comes to the conclusion that right to speedy trial of the accused has been infringed, the charges, or the conviction, as the case may be, will be quashed. At the same time, it has been observed that that is not the only course open to the court and that in a given case, the nature of the offence and other circumstances may be such that quashing of the proceedings may not be in the interest of justice. In such a case, it has been observed, it is open to the court to make such other appropriate order as it finds just and equitable in the circumstance of the case."

18. In the case of N. Radhakrishnan (supra), the respondent therein who was applicant before the Tribunal was issued with charge sheet on 31.07.1995. The charge sheet was issued relating to incidents in the years 1978-79 and 1984 on

the basis of which the applicant was issued with a memo in the year 1987. Two factors found favour with the decision of the Tribunal towards quashing the charge sheet. The charge sheet was issued in 1995 without cancelling the earlier charge sheet of 1987 and that there was inordinate delay towards issuance of the 1995 charge sheet. The Apex Court while holding that if a fresh memo is issued on the same charge against the delinquent Officer, it cannot be said that any prejudice has been caused to him. However, at the same time, it observed that the delinquent can always challenge the second memo and, rather, even the first one on the ground of delay. In that case, the second charge of 1995 was issued under a new set of rules which itself permitted issuance of a fresh charge sheet in lieu of earlier charge sheet issued under the old rules. As regards the delay in initiating the- proceeding, the Apex Court held that Tribunal was justified in quashing the charge memo of 1995. In that case also the Apex Court referring to the case of Chaman Lal Goyal (supra), observed as follows:

"19. It is not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances of that case. The essence of matter is that the court has to take into consideration all the relevant factors and to balance and weight them to determine if it is in the interest of clean and bones administration that the disciplinary proceedings should be allowed to terminate after delay particularly when the delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether the delay has vitiated the disciplinary proceedings the court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the fact of it. It could also be seen as to how must the disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take their course as per relevant rules but then delay defeats justice. Delay cause prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse considerations.

20. In the present case we find that without any reference to records merely on the report of the Director General, Anti-Corruption Bureau, charges were framed against the respondent and ten others, all in verbatim and without particularising the role played by each of the officer charged. There were four charges against

the respondent. With three of them he was not concerned. He offered explanation regarding the fourth charge but the disciplinary authority did not examine the same nor did it choose to appoint any Enquiry Officer even assuming that action was validly being initiated under the 1991 Rules. There is no explanation whatsoever for delay in conducting the enquiry proceedings all these years. The case depended on records of the Department only and the Director General, Anti-Corruption Bureau had pointed out no witness had been examined before he gave his report. The Enquiry Officers who had been appointed one after the other had just to examine the records to see if the alleged deviations and constructions were illegal and unauthorised and then as to who was responsible for condoning or approving the same against the bye-laws. It is nobody's case that the respondent at any stage tried to obstruct or delay the enquiry proceedings. The Tribunal rightly did not accept the explanations of the State as to why delay occurred. In fact there was hardly any explanation worth consideration. In the circumstances the Tribunal was justified in quashing the change memo dated 31.07.1995 and directing the State to promote the respondent as per recommendation of the DPC ignoring memos dated 27.10.1995 and 01.06.1996. The Tribunal rightly did not quash these two latter memos."

19. In the case of K.K. Sarma (supra) it was held that non-payment of subsistence allowance would tantamount to denial of reasonable opportunity to the delinquent to defend himself in the enquiry proceeding. This case was specifically referred to by the learned counsel for the petitioner on the basis of the pleaded case that he has not been paid his subsistence allowance in spite of the positive directions of the Court in earlier writ proceeding to pay monthly subsistence allowance without fail.

20. The learned counsel for the respondents also relied on two decisions i.e., Chamanlal Goyal and N. Radhakrish on which reliance has been placed by the learned counsel for the petitioner. These two decisions have been referred to buttress the argument that there is no hard and fast rule to quash the departmental proceeding merely on the ground of delay and each case will have to be decided on its own merit. In the case of Allabakash (supra), the Apex Court held that the acquittal of the respondents therein by the criminal court would not be a bar in initiation of disciplinary proceeding. The Apex Court was constrained to hold so in view of the fact that all material witnesses for proving the prosecution case in the criminal trial had turned hostile. In the case P. C. Kakkar (supra), the Apex Court reiterated the scope of judicial review in disciplinary proceeding and awarding of punishment pursuant thereto. Placing reliance on these decisions, the learned counsel appearing for the respondent Corporation submitted that mere acquittal in the criminal case would not debar the authority to proceed against the delinquent by way of initiating departmental proceeding. In this case the Apex Court held that acquittal in the criminal case is not determinative of the commission of misconduct or otherwise, and it is open to the authorities to proceed with the disciplinary proceeding, notwithstanding

acquittal in the criminal case. The Apex Court observed "it per se would not entitle and imply the claim of immunity from the proceeding. At the most the factum of acquittal may be a circumstance to be considered while awarding punishment. It would take up the facts of each case and even that action for universal application".

21. The last case relied on behalf of the respondent Corporation is that of Dr. Prasana Agawal (supra). A Division Bench of this Court having regard to the continuation of the departmental proceeding after exoneration of the incumbent in the criminal proceeding, found the continuation of suspension of the delinquent justified. Noticing the factum of acquittal of the delinquent in the criminal proceeding in which no evidence was recorded, the Division Bench held that continuation of departmental proceeding in such circumstances would be justified.

22. In the case of Capt M. Paul Antony v. Bharat Gold Mines as reported in (1999) 3 SCC 678, the Apex Court after noticing that the criminal case as also the departmental proceeding were based on identical set of facts and on the same very witness were examined both in the criminal case and the departmental proceeding, held to be unjust, unfair and rather oppressive to allow the findings recorded in the departmental proceedings. The observations made by the Apex Court in paragraph 34 & 35 of the Judgment are quoted below :

"34. There is another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were based on identical set of facts, namely, "the raid conducted at the appellant's residence and recovery of incriminating articles therefrom". The findings recorded by the Enquiry Officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by the police officers and panch witnesses, who had raised the house of the appellant and had effected recovery. They were the only witnesses examined by the Enquiry Officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the "raid and recovery" at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand.

35. Since the facts and evidence in both the proceedings, namely, the departmental proceedings, and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instant case."

23. The petitioner was first issued with the charge sheet dated 23.05.1991. Relating to the same very charge, the criminal proceeding was initiated against the petitioner which position has been fairly admitted by the learned counsel appearing for the respondents. In both the cases identical facts, same set of charge and same set of witnesses were involved. It is in this background, it is to be considered as to whether the respondent Corporation could have proceeded against the petitioner on the same set of charge and that too by issuing a fresh charge sheet dated 31.05.2002 without dropping the first charge sheet dated 23.5.1991. The Apex Court in the case of N. Radhakrishnan (supra) did not find any fault with the issuance of the second charge sheet on the same set of allegations as that of earlier charge sheet without dropping the same. However, in that case the circumstances were different. The first charge sheet was issued under the old rules of 1963, but the new charge sheet was issued under the new set of rules of 1991 which also provided continuation of enquiry proceeding issued under 1963 rules. Be that as it may, the Apex Court in that case made a significant observation to the effect that the delinquent can always challenge the second memo and, rather, even the first one on the ground of delay. In the instant case first charge sheet was issued on 23.05.1991 relating to the alleged incident of 10 years back from the date of beginning of the period during which the petitioner allegedly committed the offence.

The respondent Corporation abandoned the said charge sheet, however, without passing any order. They issued the fresh charge sheet on 31.05.2002 after nearly about 20 years of the alleged offence and 14 months from the date of acquittal of the petitioner by the criminal court on the same set of charge and evidence. During this period of 14 months also the petitioner continued under suspension. It is under these circumstances the charge sheet dated 31.05.2002 applying the principle of viability and permissibility of issuance of the same relating to an incident of around 20 years back will have to be judged. The explanation furnished by the respondent Corporation towards such delay is that the departmental proceeding initiated by charge sheet dated 23.05.1991 was stayed by this Court in Civil Rule No. 3304/91 and was directed not to be proceeded with by passing the judgment and order dated 06.06.1995. Thus they could not proceed with the departmental proceeding. However, there is no cogent explanation as to why they could not proceed with the proceeding initiated by the charge sheet dated 23.05.1991 even after acquittal of the petitioner in the aforesaid criminal proceeding by judgment dated 12.01.2001 and as to what made them to wait till 31.05.2002 when the fresh charge sheet was issued without cancelling the earlier one dated 23.05.1991. Although the justification was sought to be made with some delay occurred in the process of obtaining the records from the Criminal Court, but there is no plausible explanation towards delay. In the process the petitioner has been continued under suspension from 1990 till date. Thus, the prime and precious 14 years of his service life was taken away by the Corporation by continuing the petitioner under suspension.

24. Coming to the last charge sheet issued to the petitioner 01.10.2003, as

already noticed above, relates to certain alleged incidents took place as far back as 1.7 to 20 years. There is no explanation for such delay. Only explanation given in the affidavit is that an FIR was lodged with the Police on 07.12.1994 and the Corporation was under the impression that law would take its own course. After lodging the FIR on 07.12.1994 the Corporation for the first time made an enquiry on 13.11.2000. It allegedly wanted to know the case number etc. from the Police. However, the same was not forthcoming. A further stand has been taken in the affidavit that in view of the judgment dated 06.06.1995 passed by this Court in Civil Rule No. 3304/91 providing that the disciplinary proceeding should be kept in abeyance till pendency of the criminal proceeding, the Corporation thought it prudent not to proceed with departmental enquiry against the petitioner with the lodging of the FIR on 07.12.1994. Such an explanation is not at all tenable. It is not the case of initiation of any departmental proceeding in lieu of criminal proceeding. Even if the lodging of the FIR dated 07.12.1994 is held to be correct, there is no explanation as to why such a course of action was adopted in 1994 after delay of 8 to 12 years from the alleged occurrence. There is also no explanation as to why the Corporation was content with the filing of the FIR in 1994 and did not make any enquiry as to what happened with the said FIR. It is under these circumstances the decisions of the Apex Court as noticed above vide Chamanlal Goyal, N. Radhakrishnan, Bani Singh, Paul Anthony, P.C. Kakkar etc. came into play. The delay involved in this case is too long and non-explaining. If the proceeding initiated by the new charge sheet dated 01.10.2003 is allowed to stand, the delay towards issuance of the same would necessarily cause prejudice to the petitioner and the enquiry is to be interdicted.

25. I have carefully considered the relevant factors and on balancing of the same in over all consideration of the circumstances involved in this case, I am of the considered opinion that the proceedings initiated against the petitioner are grossly delayed. The plea of delay has been specifically raised by the petitioner. It would not be far to allow the proceeding to proceed. The petitioner who is under suspension for long 14 years and even after acquittal in the criminal case has not been reinstated in his service and who has been issued with a fresh charge sheet after 14 months of his acquittal without first reinstating him in service and again issued with another charge sheet on 01.10.2003 would necessarily feel biasness, malafide and colourable exercise of power and misuse of power by the respondent Corporation. The test of bias is whether reasonable man, fully apprised of all facts and circumstances would feel the serious apprehension of bias. The test is not whether in fact, the bias has affected the decision. It is in this sense, it is often said that justice not only been done, but must also appear to be done. In the instant case, the series of events which took place in the long period of 14 years during which the petitioner continued under suspension lead to irresistible conclusion that such action on the part of the respondent Corporation was not bonafide and was not based on principles of administrative fair play, transparency and natural justice.

26. The quell any doubt in my mind I have gone through the records pertaining

to the enquiry proceedings. As noticed above, the proceedings initiated against the petitioner by a charge sheet dated 31.05.2002 was hurriedly concluded after filing of the writ petition and issuance of order. By letter dated 07.04.2003, the authorities of the Corporation directed the Enquiry Officer to furnish the enquiry report within 10 days with effect from 03.04.2003. However, he could not do so, but he could do so immediately after filing the writ petition and issuance of the order as noticed above. The records produced by the respondent Corporation clearly revealed that the allegations against the petitioner are on the same set of fact, documents, evidence and witness. As noticed above, the respondent Corporation could not establish the charge against the petitioner in the criminal proceeding and the same very plea as was taken by the petitioner in the criminal proceeding that he had discharged his duties as a Cashier and the accounts prepared by him were duly enclosed and certified by none other than the Managing Director of the Corporation which were also routed through the officers of the accounts department was reiterated in the departmental proceeding. The minutes of the proceeding do not reflect any misappropriation of money by the petitioner. The only guilt attributed and purportedly established, against the petitioner was that there was some erasion and over writing in the accounts of the Corporation on the part of the petitioner which by itself cannot constitute any misappropriation on his part more so when the accounts submitted and routed through the officers of the accounts department were eventually endorsed and certified by none other than the Managing Director of the Corporation. If any allegation of misappropriation is to be levelled, I have failed to understand as to why the petitioner alone should be picked up leaving aside the other officers of the accounts department and the Managing Director of the Corporation.

27. There is another aspect of the mater. The records pertaining to the proceedings revealed that at the last stage of the enquiry proceeding was ex parte without recording the statement of the petitioner or asking for his defence, if any. The last proceeding dated 09.01.2004 also does not reflect as to whether the proceeding was concluded or not. The enquiry report was hurriedly prepared on 12.01.2004 holding the petitioner guilty of the charges. On perusal of the evidence on record and the said enquiry report, in my considered opinion the findings recorded by the Enquiry Officer are perverse and based on no evidence / insufficiency of evidence. The Apex Court in the case of Sher Bahadur v. Union of India as reported in AIR 2002 SC 3030 dealing with the expression "insufficiency" observed as follows :

"It may be observed that the expression "sufficiency of evidence" postulates existence of some evidence which links the charged officer with the misconduct alleged against him. Evidence, however, voluminous it may be, which is neither relevant in a broad sense nor establishes any nexus between the alleged misconduct and the charged officer, is no evidence in law. The mere fact that the Enquiry Officer has noted in his report, "in view of oral, documentary and circumstantial evidence as adduced in the enquiry", would act \n principle satisfy the rule of sufficiency of evidence. Though, the disciplinary authority cited

one witnesses Shri R.A. Vashist, Ex. Civ./N. Rly. New Delhi, in support of the charges, he was not examined. Regarding documentary evidence, Ex. P-I, referred to in the enquiry report and adverted to by the High Court, is the order of appointment of the appellant which is a neutral fact. The Enquiry Officer examined the charged officer but nothing is elicited to connect him with the charge. The statement of the appellant recorded by the Enquiry Officer shows no more than his working earlier to his re-engagement during the period between May 1978 and November 1979 in different phases. Indeed, his statement was not relied upon by the Enquiry Officer. The finding of the Enquiry Officer that in view of the oral, documentary and circumstantial evidence, the charge against the appellant for securing the fraudulent appointment letter duly signed by the said APO (Const.) was proved, is, in the light of the above discussion, erroneous. In our view, this is clearly a case of finding the appellant guilty of charge without having any evidence to link the appellant with the alleged misconduct. The High Court did not consider this aspect in its proper perspective as such the judgment and order of the High Court and the order of the disciplinary authority, under challenge, cannot be sustained, they are accordingly set aside."

28. In the instant case also I do not find any evidence against the petitioner so as to hold the petitioner guilty of the charges. It appears that the very same materials were placed before the Criminal Court for which the petitioner was found not guilty of the charges. However, on the same very materials the Enquiry Officer has held the petitioner guilty of the charges. It is under these circumstances the legality and validity of the first proceeding against the petitioner will have to be judged. Considering the fact that the enquiry in respect of the first proceeding initiated vide charge sheet dated 31.5.2002 has come to an end with the submission of the enquiry report, I would not like to interfere with the same at this stage and instead issue a direction to the disciplinary authority towards consideration of the enquiry report and representation if any to be submitted by the petitioner. This course of action I have adopted in tune with the observations made by the Apex Court in the case of P. C. Kakkar to the effect that the factum of acquittal in criminal case will have a bearing towards awarding punishment:

(a) The disciplinary authority will first bear in mind that the petitioner has been acquitted in the criminal case on the same set of charge and same set of evidence and shall take into account the law laid down in Paul Anthony's case (supra).

(b) There has been inordinate delay towards initiation of proceeding against the petitioner with the issuance of charge sheet dated 31.05.2002.

(c) Whether charge sheet could have been issued against the petitioner without cancelling the earlier charge sheet dated 25.03.1991 which was issued on the same set of allegations.

(d) The disciplinary authority will also bear in mind towards taking further action

on the basis of the enquiry report as to whether the evidence on record could be said to have established guilt on the part of the petitioner in so far as the same relates to misappropriation of money.

29. The entire exercise shall be carried out keeping in mind and consistently with the observations made above on evaluation of the records pertaining to the said disciplinary proceeding.

30. As regards the proceeding initiated against the petitioner with the issuance of the charge sheet dated 01.10.2003 and having regard to the attending circumstances involved in the case I am constrained to hold that the same is liable to be set aside and quashed only on the ground of inordinate and unexplained delay on the part of the respondent Corporation. Such a charge sheet could not have been issued against the petitioner after about 17 to 20 years of alleged occurrence. The explanation furnished by the respondent Corporation in respect of the delay is not at all acceptable. The conduct of the respondent Corporation as noticed above, gives an impression that they are hell bound to victimise the petitioner and this is precisely the reason as to why he has been kept under suspension for the last 14 years. With the setting aside and quashing of the charge sheet dated 01.10.2003, the order of suspension dated 25.09.1990 also stands set aside and quashed and the petitioner shall stand reinstated in his service from today.

31. As regard the grievance made regarding non receipt of subsistence allowance, it has been brought on record by the learned counsel for the respondents that except for about 8 months the petitioner has been paid subsistence allowance and there was some delay towards payment of subsistence allowance due to the financial crisis in which the Corporation is presently on. In such a situation, I am not inclined to hold any adverse view of the matter against the Corporation. However, he should be paid his arrear subsistence allowance forthwith. As regards back wages payable to the petitioner for the period he remained under suspension, same shall be decided with the passing of the final order by the disciplinary authority on the basis of the enquiry proceeding initiated and purportedly completed in respect of the charge sheet dated 31.05.2002. As ordered above, the respondent Corporation shall take a decision consistently with the findings and observations made above.

32. The writ petition stands allowed to the extent indicated above. There shall be no order as to cost.