

(2014) 12 OHC CK 0060

In the Orissa High Court

Case No : Writ Petition (Civil) No. 8949 of 2005

Gobinda Mallia

APPELLANT

Vs

UCO Bank

RESPONDENT

Date of Decision : 23-12-2014

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 248(1)
Penal Code, 1860 (IPC) — Section 148, 149, 302, 506

Citation : (2015) 145 FLR 372 : (2015) LabIC 747 : (2015) 1 LLJ 395

Hon'ble Judges : Dr. B.R. Sarangi, J

Bench : Single Bench

Judgement

Dr. B.R. Sarangi, J.—The petitioner, who was working as Daftary in the opposite party-Bank, files this petition seeking to quash the order dated 25.10.2004 (Annexure-1) rejecting his representation for release of arrear salary for the period of his suspension from 26.10.1992 to 6.12.2001.

2. The factual matrix of the case, in hand, is that the petitioner entered into service under the opposite party-Bank in the year 1978. He was placed under suspension while in service by order dated 26.10.1992 vide Annexure-2 as he was arrested in connection with a criminal case and was sent to jail custody. The petitioner faced the criminal prosecution, which was ultimately ended in acquittal in the Court of learned Addl. Sessions Judge, Bhubaneswar in S.T. No. 17/18/345 of 1996/95 and S.T. No. 18/21/380 of 1996/95 vide judgment dated 31.7.2002 (Annexure-3). Against the said order of acquittal, the appeal as preferred to this Court in CRLLP No. 66 of 2003 which was also dismissed vide order dated 12.2.2004 in Annexure-4. The petitioner, who was continuing under suspension on account of delay in disposal of the criminal case was reinstated in service on 2.12.2001 vide Annexure-5. The petitioner claims that after acquittal in the criminal case the period of suspension should have been treated as duty for all purposes and benefit should be extended to him suo motu by the Bank for the period 26.10.1992 to 6.12.2001. The petitioner also made a representation for

extension of such benefits, which rejected vide order dated 25.1.2004 vide Annexure-1, against which this petition.

3. Mr. R.K. Rath, learned Senior Counsel for the petitioner strenuously urged that the reasons assigned for rejection of the representation in the impugned order in Annexure-1 that under Clause No. 19.3(C) of Bipartite Settlement, if an employee is acquitted in a criminal case on the benefit of doubt, he may be paid such portion of such pay and allowance as the Management may deem proper and the period of his absence shall not be treated as period spent on duty unless the management so directs, are not correct. He further urged that as the prosecution could not be able to prove its case "beyond all reasonable doubt", the petitioner was acquitted from all the charges, but while rejecting his representation, an erroneous interpretation has been made that the petitioner has been acquitted on "benefit of doubt". According to Mr. Rath, rejection of the representation on the ground of "benefit of doubt" is not the same as release of the petitioner "beyond all reasonable doubt". By making such wrong interpretation, benefit has been denied to the petitioner, which itself amounts to non-application of mind by the authorities. In support of his contention, he has placed reliance on the judgment of the apex Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, .

4. Mr. Somanath Mishra, learned counsel for the opposite party-Bank while supporting the stand taken in Annexure-1, states that rightly benefit has not been extended as the petitioner has been involved in a criminal case and was placed under suspension for the period from 26.10.1992 to 6.12.2001.

5. On the basis of the aforesaid pleaded facts, the only question to be considered by this Court is

"(i) Whether acquittal of the petitioner on the ground that the prosecution is not able to prove its case "beyond all reasonable doubt" can be construed as acquittal "on benefit of doubt"?

(ii) If not, to what relief can be granted?"

6. The admitted fact is that the petitioner was working as Daftary in the opposite party-Bank. While he was in service, on the basis of written report lodged by one Gandu Mallia to the effect that his younger brother, Tuli Mallia on 8.9.1992 at 12.30 A.M. came out from their house for urination. In the meanwhile, near the entrance of the house, Kanhu Mallia, Japu Mallia, Rama Mallia, Jagannath Mallia, Nakua Mallia, were present near the place. Kanhu Mallia was armed with a revolver, Japu Mallia, Jagannath Mallia and Nakua Mallia were armed with swords and Rama Mallia was armed with bhujali. They came near the house of the informant and abused Tulu mallia saying "he has become much senior". Kanhu Mallia aimed at Tulu and fired one round from his revolver and Tulu Mallia sustained bullet injury on his chest and fell down shouting "Marigali, Marigali" (in oriya). The informant could not dare to face the accused persons. Pratap Mallia, Tulu Das, Rama Das, Raju Mallia and Kalu Mallia, who were present nearby, came

running to the place of occurrence and the accused persons ran away towards their houses. At the time of leaving Kanhu Mallia was shouting let Tulu Mallia get his consequence, as Tulu booked Kanhu in N.S.A. Kanhu Mallia further uttered that he would take away lives of Naba Mallia and Haladhar Mallia. Immediately after this, the informant accompanied by Santosh Mallia went in a scooter to the police station and lodged the report. On the basis of such report, the case was registered, investigation was conducted and charge-sheet was submitted for the offence under Sections 148/ 302 & 506, IPC and under Section 27 of the Arms Act read with Section 149, IPC against the accused persons.

7. Pursuant to such information, the petitioner was arrested by the police and in consequence thereof, the petitioner was placed under suspension by the opposite party-Bank on 26.10.1992 and remained under suspension till he was acquitted vide judgment dated 31.7.2002 passed by the learned Addl. Sessions Judge, Bhubaneswar. While acquitting the petitioner under Section 248(1), Cr.P.C., the learned Addl. Sessions Judge has observed as follows:

"x x xx Hence, it is concluded that the prosecution has not been able to prove its case beyond all reasonable doubt."

8. Against the order of acquittal, though appeal was preferred bearing CRLLP No. 66 of 2003, the same was rejected vide order dated 12.2.2004. After acquittal on 31.7.2002 the petitioner made a representation for release of his arrear salary for the period of his suspension, i.e., from 26.10.1992 to 6.12.2001, but the same has been rejected stating that the petitioner has been acquitted "on benefit of doubt". Acquittal by a Court on the ground that the prosecution has not been able not prove its case "beyond all reasonable doubt" is not the same as the reasons assigned by the authorities that acquittal "on benefit of doubt". The trial Court in paragraph 10 of the judgment observed as follows:

"So, from the entire scrutiny of evidence of occurrence witness and the I.O., the spot where the deceased died, is not definite. Chance of seeing the firing as claimed by the occurrence witness is also not free from doubt, as there are discrepancies in their evidence regarding the presence of neighbouring persons and the neighbouring persons claimed by the same of them have also not been examined by the prosecution. P.W. 11 has not stated to have seen P.W. 10. P.W. 11 has categorically stated P.W. 12 & 15 came to spot, but P.W. 11 did not see them prior to occurrence. P.W. 10 has not stated to have seen P.W. 11 at the spot. In addition to it, the informant and I.O. and other witnesses have clearly stated that it was raining at the time of occurrence, prior to occurrence and after the occurrence. If it is true, then the identification of persons by occurrence witness without presence of electric light appears to be improbable. The informant and other P.Ws. have stated that the deceased, at the time of occurrence, came out of his house for urination. The time was 12.30 A.M. night. There is no explanations from the side of the prosecution as to why the deceased preferred to come out of his house, for urination instead of doing urination in his inner courtyard of his house, when it was raining. There is also no explanation of

evidence from prosecution side that the accused persons made conspiracy prior to occurrence to kill Tulu Mallia. It appears improbable as to how the accused persons knew that in the dead of the night Tulu Mallia would come out of his house for urination, when it was raining so that the accused persons would get the chance to kill him. On this aspect, the evidence of doctor (P.W. 14) is that the bladder of the deceased was empty. Admitted fact is that firing was done prior to urination. If the bladder was empty, there was no chance of Tulu Mallia to go for urination. Santosh Mallia is one of the most material witnesses of this case along with other material witnesses. His name has been stated by most of the occurrence witnesses that Santosh Mallia was present at the spot at the time occurrence. The informant and other witnesses have stated the Santosh Mallia accompanied the informant to the P.S. at the time of lodging report and his name also finds place in the F.I.R. Even then he has not been examined by the prosecution. Under such circumstances, though the four occurrence witnesses P.Ws. 10, 11, 12 and 15 have stated to have seen accused Kanhu Mallia to have fired the revolver on the chest of the deceased, it is difficult to rely on their version.

Further in paragraph 16, the trial Court has observed as follows:

"In the result, the accused persons are found not guilty of the offence u/s. 148 I.P.C. and they all are acquitted of the said charges 248(1) Cr.P.C. and set at liberty."

9. In *Sharad Biridhichand Sarda* (supra), the apex Court while analyzing "benefit of doubt" has held as follows:

"Normally, this Court does not interfere with the concurrent findings of fact of the Courts below, in the absence of very special circumstances or gross errors of law committed by the High Court. But where the High Court ignores or overlooks the crying circumstances and proved facts, violates and misapplies the well established principles of criminal jurisprudence of decisions rendered by this Court on appreciation of circumstantial, evidence and refuses to give benefit of doubt to the accused despite facts apparent on the face of the record, or on its own findings or tries to gloss over them without giving any reasonable explanation or commits errors of law apparent on the face of the record which results in serious and substantial miscarriage of justice to the accused, it is the duty of this Court to step in and correct the legally erroneous decision of the High Court."

10. On consideration of the evidence available on record, if the evidence raises a reasonable doubt in the mind of the Court regarding the participation in the crime by the accused, that doubt must be resolved in his favour. The apex Court in *Himachal Pradesh Administration Vs. Om Prakash*, while considering "benefit of doubt" observed as follows:

"The benefit of doubt to which the accused is entitled is reasonable doubt- the doubt which rational thinking men will reasonably, honestly and conscientiously

entertain and not the doubt of a timid mind which fights shy- though unwittingly it may be -or is afraid of the logical consequences, if that benefit was not given. Or as one great Judge said it is " not the doubt of a vacillating mind that has no moral courage to decide but shelters itself in a vain and idle scepticism."

Similar view has also been taken by the apex Court in State of U.P. Vs. Iftikhar Khan and Others, .

"Beyond all reasonable doubt" has been explained in Blacks" Law Dictionary at page 1272 to mean,

"the doubt that prevent one from being firmly convinced of a defendant?s guilty, or the belief that there is a real possibility that a defendant is not guilty".

In Wharton"s Criminal Evidence (at p. 31, Vol. 1 of the 12th Edn.) "reasonable doubt" has been explained to mean,

"the doubt not merely possible doubt, because everything relating to human affairs and depending upon normal evidence is open to some possible or imaginary doubt."

As per the Law of Criminal Evidence, at page 34, Vol. 1, 5th Edn. "reasonable doubt" means

"the doubt to be reasonable must be such a one as honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is heard by the jurors, there remains in the minds a conviction of the guilty of the accused, then there is no room for a reasonable doubt."

11. The apex Court in K. Gopal Reddy Vs. State of Andhra Pradesh, held that "reasonable doubt", does not mean some light, airy, insubstantial doubt that may flit through the minds of any of us about almost anything at some time or other; it does not mean a doubt begotten by sympathy out of reluctance to convict; it means a real doubt, a doubt founded upon reasons.

12. Similarly, the apex Court in Assistant Collector of Central Excise, Calicut Vs. V.P. Sayed Mohammed, , has held that if a reasonable doubt arises in the mind of the court after taking into consideration the entire material before it regarding the complicity of the accused, the benefit of such doubt should be given to the accused but the reasonable doubt should be real and substantial one and a well founded actual doubt arising out of the evidence existing after consideration of all the evidence. Hence a mere whim or a surmise or suspicion furnishes an insufficient foundation upon which to raise a reasonable doubt, and so a vague conjecture, whimsical or vague doubt, a capricious and speculative doubt, an

arbitrary, imaginary, fanciful, uncertain, chimerical, trivial, indefinite or a mere possible doubt is not a reasonable doubt. Neither is a desire for more evidence of guilt, a capricious doubt or misgiving suggested by an ingenious counsel or arising from a merciful disposition or kindly feeling towards a prisoner, or from sympathy for him or his family.

13. In State of U.P. Vs. Krishna Gopal and Another, , the apex Court has held as follows:

"Doubts would be called reasonable if they are free from a zest for abstract speculation. To constitute "reasonable doubt", it must be free from an over-emotional response. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense."

14. In view of the aforesaid analogy mentioned above, acquittal made "beyond all reasonable doubt" stands completely in a different footing than that of acquittal "on benefit of doubt", rather acquittal made "beyond all reasonable doubt" can be construed clean acquittal by the Court. But so far as benefit of doubt is concerned, it may not be construed to be clean acquittal, rather on probability of events, the accused has been acquitted on benefit of doubt.

15. The reason assigned by the authorities that the petitioner has been acquitted "on benefit of doubt" is only a misinterpretation of "acquittal beyond all reasonable doubt."

16. Applying the same principle to the case in hand, since the petitioner has been acquitted on the ground that the prosecution has not been able to prove its case "beyond all reasonable doubt", it now mean clean acquittal of the petitioner.

17. Clause 19(3)(c) of the modified/consolidated circular dated 10.4.2002 reads as follows:

"19.3(c)- If he be acquitted, it shall be open to the management to proceed against him under the provisions set out below in clauses 19.11 and 19.12 infra relating to discharges. However, in the event of the management deciding after enquiry not to continue him in service, he shall be liable only for termination of service with three months' pay and allowances in lieu of notice. And he shall be deemed to have been on duty during the period of suspension, if any and shall be entitled to the full pay and allowances minus such subsistence allowance as he has drawn and to all other privileges for the period of suspension provided that if he be acquitted by being given the benefit of doubt he may be paid such portion of such pay and allowances as the management may deem proper, and the period of his absence shall not be treated as a period spent on duty unless the management so directs."

18. On perusal of the aforementioned provision, if the delinquent is acquitted, he shall be deemed to have been in duty during the period of suspension if any and shall be entitled to full pay and allowances minus subsistence allowance as has been drawn and to all other privileges for the period of suspension provided that

if he be acquitted by being given the benefit of doubt, he may be paid such portion of such pay and allowances as the management may deem proper and the period of his absence shall not be treated as period spent on duty unless the management so directs. Applying the same to the present context, since the petitioner has been acquitted as the prosecution has not been able to prove its case beyond all reasonable doubt, the petitioner should have been deemed to have been on duty during the period of suspension and he is entitled to full pay and allowances minus the subsistence allowance as has been drawn and all other privileges for the period of suspension. But the opposite party-Bank while rejecting the representation of the petitioner has misconstrued the same by equating "beyond all reasonable doubt" with "acquittal on benefit of doubt". The reasons assigned in the impugned order are totally contrary to law decided by the apex Court as discussed above.

19. In view of the aforesaid facts and circumstances and the law decided, since acquittal has been made beyond all reasonable doubt as the prosecution has not been able to prove its case, the same cannot be equated with acquittal on benefit of doubt. Accordingly, the order dated 25.10.2004 vide Annexure-1 is quashed. In consequence thereof, the petitioner is entitled to get full pay and allowances minus the substance allowance already drawn and to all other privileges for the period of suspension, i.e. 26.10.1992 to 6.12.2001 treating the same as if he was deemed to have been in duty in view of clause 19.3(c) of the modified version of Bipartite Settlement of the Bank. Accordingly, the opposite parties are directed to pay the dues admissible to the petitioner in terms of Clause 19.3(c) of the Bipartite Settlement within a period of three months from the date of communication of this order.

20. The writ petition is thus allowed. No order as to costs.