
(2008) 02 GAU CK 0097
In the Gauhati High Court

Karuna Nidhan Chakma

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 12-02-2008

Acts Referred:

Arms Act, 1959 — Section 27
Constitution of India, 1950 — Article 14, 226
Penal Code, 1860 (IPC) — Section 147, 329, 353, 395, 396

Citation : (2008) 2 GLT 617

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

U.B. Saha, J.—The petitioner, a constable in 2nd Tripura Armed Forces Bn., for short TAP Bn., files the instant writ petition under Article 226 of the Constitution assailing the Memorandum dated 06.05.97, whereby and whereunder the disciplinary proceeding initiated against him for committing gross misconduct and betrayal of his fellow colleagues in connivance with extremist etc. and the order of punishment dated 24.4.2000 as well as for quashing those orders along with other prayers.

2. This Court heard Mr. N. Mazumdar, learned Counsel appearing for the petitioner and Mr. T.D. Mazumdar, learned Addl. G.A. appearing for the respondents.

3. The facts necessary for disposal of this case are as follows: When the petitioner was posted at Kalajhari DAR Camp in Raishyabari P.S. Gandhacherra, he was detailed for performing patrolling escort duty by boat on 03.10.95 from Kalajhari to Mandirghat under the command of Head Constable (HC) Phani Bhusan Sarkar along with other constables with arms. During escort duty, a group of anti social elements, who were boarded in the Boat as passengers, attacked the Boat with dreadly weapon and as a result of which one Havildar and two other constables died on the spot and he was seriously injured. On the issue

of the said incident, a police case was registered at Raishyabari P.S. vide P.S. Case No. 18/5 u/s 396/400 IPC read with Section 27 of the Arms Act and on the basis of the said police case, the petitioner was arrested along with others by the police and while he was in jail custody, the petitioner was placed under suspension w.e.f. 05.10.95 by the S.P. of Dhalai District, the respondent No. 4. On 06.05.1997 three specific charges were framed against the petitioner vide Memorandum dated 6.5.1997 and one Shri Manoranjan Deb Barma, Sub Divisional Police Officer, Dhalai Dist. Ambasa was appointed as Enquiry Officer to inquire into the charges levelled against the delinquent petitioner.

4. The trial court found that the prosecution failed to establish the charges u/s 395 and 396 IPC and 27 Arms Act and acquitted the accused petitioner of the charges levelled against him. Though the petitioner was acquitted by the Criminal Court of the charges levelled against him, the respondent No. 4 initiated the departmental proceeding on the identical set of facts for which a Criminal Case was initiated against the petitioner and acquitted him after full trial and proceeded with the departmental proceeding without providing him the subsistence allowance which he is entitled for the period of suspension. Due to non receipt of subsistence allowance, the petitioner could not join the departmental proceeding on the date fixed by the inquiring authority and the said proceeding was completed and closed up without providing any reasonable opportunity to the petitioner and after completion of the departmental proceeding, the inquiring authority, having satisfied with the charges as proved against the petitioner, recommended to the disciplinary authority for his punishment vide order dated 30.11.97. On the basis of the findings of the inquiring authority, the respondent No. 4, the disciplinary authority, passed provisional order of dismissal from service vide D.O. No. 550 dated 20.03.2000 wherein the petitioner/delinquent was given an opportunity of his personal hearing within 10 days from the date of the said order which was communicated to the petitioner through the O.C. Raishyabari P.S., Dhalai Dist. On 23.3.2000 and in the aforesaid proposed order of dismissal the petitioner was also allowed to submit his representation as well as for personal hearing within 10 days. On receipt of the proposed order of dismissal from service along with direction to representation the petitioner submitted a representation on 10.04.2000 addressing to the respondent No. 4, disciplinary authority, to the effect that the petitioner was completely innocent of the matter as mentioned in the charge sheet and he should be exonerated from the charges levelled against him and he also sought for a personal hearing.

5. The disciplinary authority, on 22.4.2000, heard the petitioner in person and thereafter on 24.4.2000 confirmed the provisional order of dismissal of the petitioner from service. On 5.10.2002 the petitioner made a prayer to the disciplinary authority to consider his case sympathetically and to reinstate him into service after declaring the order of dismissal passed by the authority stands terminated. Thereafter, the petitioner was acquitted by the Addl. District Judge, Kamalpu, North Tripura on 4.3.02 from the charges levelled against him in case

No. ST 40 (NT KMP) 2000. Thereafter, he made a prayer on 5.10.02 to the disciplinary authority, respondent No. 4, to consider his case sympathetically in view of the aforesaid order of the Addl. Sessions Judge and to re-instate him in service.

6. In reply to the aforesaid prayer dated 5.10.02, the disciplinary authority, vide its letter dated 16.11.02, informed the petitioner to the effect that his prayer could not be entertained as he was discharged from service for gross misconduct, dereliction of duty and betrayal of his fellow colleagues etc. Being aggrieved by the aforesaid order of the disciplinary authority dated 16.11.92, the petitioner has filed the writ petition (C) No. 189 of 2003 before this Court on 12.6.03 for a direction to cancel and/or to quash the disciplinary proceeding dated 06.05.1994 and order of punishment dated 24.4.2000 and to allow the petitioner full pay and allowances with retrospective effect from 5.10.95 till the date of filing the writ petition. Thereafter, after hearing the parties, this Court disposed of the said writ petition on 23.9.03 being not maintainable for not preferring the statutory appeal before approaching writ Court. The petitioner was given liberty to approach the departmental authority by way of preferring the appeal and he was also given liberty to approach this Court if he is aggrieved by the order of the said appellate authority. In view of the order of this Court, the petitioner preferred an appeal before the Dy. I.G. of Police, Northern Range, Kumarghat on 4.11.03 followed by another reminder dated 21.01.04 with a request to pass an order for re-instating him in service as he was acquitted of the charges levelled against him in the criminal case. The appellate authority on 24.03.2004 dismissed the appeal confirming the punishment of dismissal passed by the disciplinary authority. Being aggrieved, the petitioner prefers the present writ petition.

7. The respondents contested the case of the petitioner by way of filing a detailed counter affidavit denying all the allegations made by the writ petitioner in his writ petition.

8. The question involved for consideration in this case is whether the delinquent employee/petitioner, after his dismissal in a disciplinary proceeding, has the right to be set at free from the charges levelled against him in the said proceeding automatically on subsequent acquittal in a criminal case and if so whether the order of the disciplinary authority is liable to be set aside and consequent thereto the appellate order also and if so whether the delinquent petitioner will be entitled to get the pay and allowances as prayed for.

9. Mr. N. Mazumdar, learned Counsel for the petitioner challenges the findings of the inquiring authority as well as the decision of the disciplinary authority on the ground that the charges levelled against the petitioner in the criminal case and the disciplinary proceeding are based on identical and similar set of facts and the evidences are also identical, and deposed by the same witnesses and acquittal of the petitioner from criminal case subsequently also entitled him to be continued in service quashing the order of dismissal passed by the disciplinary authority. He

also submits that the whole departmental proceeding is liable to be vitiated only on the ground that while a criminal case is pending, the authority proceeded with the departmental proceeding and concluded the same awarding the punishment on the petitioner though the same is not permissible under law. In support of his aforesaid contention, he relied paragraphs 30 and 33 of the case of Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, and also contended, inter alia, that the finding of the inquiring authority suffers from doctrine of perversity, unreasonable and biasness as the same is contrary to the evidence of witnesses as recorded. He also urges that it is a case of no evidence and the inquiring authority ought to have come to a conclusion that no case is made out against the petitioner for proving the alleged misconduct.

10. Mr. N. Mazumdar, learned Counsel, further, submits that the inquiring authority did not ask the petitioner for engaging any defence assistant and as a result of which petitioner could not make out his case properly and ultimately he was prejudiced and for such act of the inquiry officer, the departmental proceeding is also liable to be vitiated. In support of his aforesaid contention he refers to the case of Bhagat Ram Vs. State of Himachal Pradesh and Others, . Alternatively it has also been argued by him that the charges for which disciplinary proceeding was initiated, show that the petitioner connived with civilian extremist and betrayed his fellow colleagues and as a result of which few of his fellow colleagues expired as they were killed by those extremists, but there is no finding in that regard in the inquiry report as to how and in what manner the petitioner connived with those civilian extremists for committing such offence/misconduct. Hence, according to him the punishment of dismissal, being major and ancillary one in nature, requires to be set aside keeping in mind the prescription of the doctrine of proportionality.

11. Per contra, Mr. T.D. Mazumdar, learned Counsel for the respondents submits that the charges levelled against the petitioner is severe in nature and the order of dismissal passed by the disciplinary authority is just and proper, being the petitioner a member of disciplinary force. It is not a fit case where the authority should show leniency.

12. Mr. T.D. Mazumdar, while resisting the argument advanced by the learned Counsel for the petitioner, submits that the instant case is not similar as that of the case of Capt. M. Paul Anthony (supra) as the charges of the criminal case against the petitioner and the charges levelled against the petitioner in the disciplinary proceeding are totally different. According to him, the criminal court framed charges for an offence of dacoity punishable u/s 396 and also for killing Head Constable Phani Bhusan Sarkar, Constable Sanatan Paul and Constable Bimal Kanti Dey. At the time of dacoity an offence u/s 396 is committed for snatching gun from the police personnel and for using the said gun for committing murder of the above police personnel and such commission of the offence u/s 27 of the Arms Act. But, in the disciplinary proceeding the charges were for allowing the civilian to board in the escort boat despite objection made

by other police personnel and in collusion with the extremists, he allowed them to board with the escort on duty projecting those extremists were good persons, who attacked the police personnel in boat and killed and snatched away arms and ammunitions by not causing harm to the petitioner and his wife, he being connived with the extremists and 3 police personnel were killed by those extremists and one injured and thereby causing loss to the life and property of the Government and failed to maintain discipline, being a member of a disciplinary force. Therefore, it cannot be said that the evidence led in the criminal case as well as in the domestic inquiry was the one and same. While distinguishing the case of Capt. M. Paul Anthony, he submits that the facts of the M. Paul Anthony and the facts involved in this case are different in nature and in the criminal case of M. Paul Anthony (*supra*) the evidence led in the criminal case as well as in the disciplinary proceeding was one and same and evidence of both the proceedings were also same. But, in the instant case, the charges of the criminal case and the charges of the disciplinary proceeding are totally different. Hence, the case of Capt. M. Paul Anthony has no application in the instant case.

13. In the instant case, the petitioner was not allowed subsistence allowance as he did not report to the HQs after release from the custody as per specific order of the authority and in the instant case even though the petitioner was not allowed subsistence allowance, he participated in the disciplinary proceeding and at the time of recording evidence, some witnesses were also cross-examined meaning thereby that he was not prejudiced for such non payment of subsistence allowance in any way. But in the case of M. Paul Anthony, the delinquent officer did not participate in the proceeding for non payment of subsistence allowance. On this count also the case of M. Paul Anthony has no application. In support of the aforesaid contention, he relied a decision of the Supreme Court in the case of Management of Krishnakali Tea Estate Vs. Akhil Bharatiya Chah Mazdoor Sangh and Another, , particularly paragraphs 25, 26 and 27. He also resisted the contention of the petitioner, *inter alia*, that the petitioner was not asked for engaging Defence Assistant, is not a fact as the enquiry officer vide his letter dated 6.9.97 asked the petitioner whether he will engage Defence Assistant, but the petitioner by his letter informed the Enquiry Officer that he will not engage any defence assistant and he be heard in person, which will be evident from the proceeding file that the petitioner has submitted his written statement of defence dated nil which was received in the office of the Disciplinary authority on 6.8.97. Hence, the submission of the petitioner that he did not submit written statement of defence and not participated in the enquiry proceeding is out and out false. He also submits that in a criminal proceeding one person can be acquitted on the ground of preponderance of probability, but in an departmental proceeding, on the basis of the preponderance of probability, one can be punished, being the departmental proceeding is for misconduct and criminal case is for a penal offence. He also urges that writ court cannot interfere with the punishment which was imposed after a full-fledged enquiry and the charges brought forward are ordinarily examined from the standpoint of fairness

of procedures, reasonableness and finding reached in the instant case. But, material record does not show that the conclusion of the inquiring authority or its finding or the decision of the disciplinary authority is either perverse or unreasonable. Hence, there is no scope for the Court to interfere with the findings of the disciplinary proceeding and the punishment awarded by the authority consequent thereto. Writ Court can only interfere with the disciplinary proceeding, when there is no evidence in the disciplinary proceeding, but even there are some evidences against the delinquent officer and the disciplinary authority considered that those evidence are sufficient for imposing punishment to the delinquent officer to maintain discipline in the department, which cannot be interfered by the writ court by converting itself as an appellate court.

14. Mr. T.D. Mazumdar contended that the instant case is not the case of no evidence, hence, court should not interfere with the decision of the disciplinary proceeding when the delinquent petitioner is a police personnel and a member of the disciplinary force. He also contended that bare perusal of the proceeding file, it would appear that it is not a case of no evidence but of some evidence and in that case, the power of writ court to interfere with the punishment imposed is almost restricted. In support of his aforesaid contention, he relied on the decision of the Apex Court in the case of Union of India (UOI) and Others Vs. Narain Singh, . He finally submits that the petitioner did not raise any question regarding payment of subsistence allowance during the pendency of the disciplinary proceeding and until the issuance of the provisional order of dismissal passed by the disciplinary authority and since he did not raise the plea of non payment of subsistence allowance before the inquiring authority, he had has no right to raise the same after completion of inquiry before the disciplinary authority and on other subsequent stage as the same is hit by principles of waiver.

15. For better appreciation of the points involved, it is necessary to reproduce the Article of charges of the departmental proceeding and also the charges framed by the trial court in the criminal case as under:

Annexure-1

Statement of articles of charge framed against C/4774 (now C/3633) Karuna Nidhan Chakma of DAR Dhalai vide Departmental proceeding No. 4/97.

Article-I

C/4774 Karuna Nidhan Chakma (Now C/3633) of DAR Dhalai is charged for gross misconduct in that on 03.10.95, while he was detailed for escort duty in board in Dumbur Reservoir alongwith H/C (AB) Phani Bhusan Sarkar, C/4705 Sanatan Paul, C/.3174 Bimal Kanti Dey and C/8472 Arun Deb Barma (Now C/3646 (Staff)), he allowed Civilians to board in the escort boat exclusively meant for security personnel despite the objections of the accompanying staff putting the lives and security of said police personnel in danger.

Article-II

C/4774 Karuna Nidhan Chakma of DAR is charged for gross misconduct and dereliction in duty in that on 03.01.95 he connived with extremists and allowed them to board in the escort boat, despite the objections of his accompanying staff saying that they were known to him and were good persons for which said extremists in Civil dress attacked the police personnel in the boat thereby killing 03(three) of them namely (1) HC (AB) Phani Bhusan Sarkar (2) C/4705 Sanatan Paul (3) C/3174 Bimal Kanti Dey and injuring another constable C/4872 (Now C/3646) Arun Deb Barma and also looted away their arms and ammunitions. Due to his connivance, the extremists did not cause any harm to him and allowed him to go safely.

Article-III

C/4774 Karuna Nidhan Chakma of DAR Dhalai is charged for gross misconduct and betrayal in that, on 03.10.95 he connived with the extremists who killed 03(three) police personnel and injured one and also looted away arms and ammunitions, thereby causing loss of lives and Govt. properties.

CHARGE

Firstly--That you along with others on 3.10.95 at about 1430 hrs. at Bholangbasha, under PS. Raishyabari, District-Dhalai committed dacoity on the boat by snatching a gun from the police personnel and that boat and as such you thereby committed an offence punishable u/s 395 of the IPC and within my cognizance.

Secondly--That you along with others on the same date, time and place committed dacoity and that in commission of such dacoity you murdered H.C. Phani Bhusan Sarkar, Constable Sonatan Paul and Constable Bimal Kanti Dey with gun and you thereby committed an offence punishable u/s 396 I.P.C. and within my cognizance.

Thirdly--That all of you on the same date, time and place committed dacoity on the body of the police personnel and snatched one gun from the police personnel and you illegally used the said gun for committing murder of the above police.

16. This Court has given anxious consideration to the submission of the learned Counsel of the parties as well as to the contentions raised in the pleadings and more so in the departmental proceeding file, which was placed by Mr. T.D. Mazumdar, learned Addl. G.A. for examining the points involved in the matter. Let this Court now proceed to examine the first point raised by the learned Counsel for the petitioner, Mr. N. Mazumdar, who, inter alia, submitted that whether the disciplinary proceeding and the criminal case can be continued simultaneously when the facts of the criminal case and the disciplinary proceeding are identical. From the charge of the criminal case and the disciplinary proceeding as stated supra, it is seen that both the charges are different in nature--one is relating to dacoity with murder, a penal offence, and

the another is for indiscipline/misconduct for conniving with the civilian extremist and for violation of the instruction though the charges were framed relating to action in the same incident or otherwise. Since we cannot say that the two charges are the outcome of the same offence and the evidences recorded in different proceedings are same and one. It is no longer *res integra* that there is difference between the nature of the disciplinary proceeding and the criminal proceeding. A Division Bench of this Court in *Safiqul Haque Mazwnder, Petitioner v. Union of India and Ors.* 2006 (4) GLT 614, held that in a disciplinary proceeding the disciplinary authority considered whether the delinquent was negligent to his official duty or not and in a criminal proceeding the Court decides whether the accused committed the penal offence or not. It is also settled now that both the criminal case and the disciplinary proceeding can run simultaneously. The aforementioned views of the Division Bench of this Court also get supports from para 15 of the decision of Apex Court in the case of *Indian Overseas Bank, Anna Salai v. P. Ganeshan* reported in AIR 2007 SCW 7553. Para 15 of the said judgment is reproduced hereunder:

15. Legal position operating in the field is no longer *res integra*. A departmental proceedings pending a criminal proceedings does not warrant an automatic stay. The superior courts before exercising its discretionary jurisdiction in this regard must take into consideration the fact as to whether the charges as to also the evidence in both the proceedings are common and as to whether any complicated question of law is involved in the matter.

17. The Apex Court had the scope also to examine the same question in the case of *Senior Superintendent of Post Offices, Pathananthitta and Ors. Appellants v. A. Gopalan Respondent* reported in AIR 1999 SC 1514 wherein the disciplinary proceeding was initiated against the respondent/delinquent employee of the aforesaid case on two charges of misconduct, inter alia, firstly for withdrawal of Rs. 8000/- without the knowledge of the depositor and secondly he failed to account for the amounts of Rs. 379/- and Rs. 799/- realized by him as customs duty respectively. After proper enquiry the respondent was dismissed from service and on an appeal the penalty was reduced to compulsory retirement by the appellate authority. The respondent was also prosecuted in a Criminal Court in respect of offence u/s 407, 467 and 477(A) IPC. As it has been disclosed in the first charge regarding withdrawal of Rs. 8000/- the Magistrate, after trial, acquitted him of the criminal case and on acquittal the petitioner preferred appeal before the High Court and the High Court affirmed the order of acquittal. The delinquent officer approached the Central Administrative Tribunal by filing an application and the Tribunal in its judgment held that after the acquittal of the respondent by the criminal court, which was affirmed in appeal by the High Court, a punishment should not be imposed in the departmental proceedings based on the finding relating to the first charge regarding withdrawal of Rs. 8,000/- and the same has to be set aside. And regarding the second charge the Tribunal held that the question of punishment has to be reviewed because the punishment was related to two charges and since the finding on the more serious

of the charges has been set aside as unsustainable, the order to the extent of imposing the punishment could not be sustained. The Tribunal, therefore, allowed the application and set aside the order of punishment with the direction that the appellate authority will consider the question of punishment afresh and pass appropriate order. Against the said judgment of the Tribunal, appeal was preferred before the apex Court. The apex Court in *Senior Superintendent of Post Offices (supra)* while considering the case of *Nelson Motis Vs. Union of India* and another, stated that the said decision does not lend support to the submission of Shri Nair, learned Counsel of the respondent as in that case the Court rejected the contention that the disciplinary proceeding would not be continued in the face of the acquittal in the criminal case and has held that nature and scope of criminal case are very different from those of the departmental proceedings and order of acquittal, therefore, cannot conclude the departmental proceedings. The Apex Court also held that this is so because in a criminal case the charge has to be proved by the standard of proof beyond reasonable doubt while in departmental proceedings the standard of proof for proving the charge is preponderance of probabilities. The Tribunal was, therefore, in error in holding that in view of the acquittal of the respondent by the Criminal Court on the charge relating to withdrawal of Rs. 8,000/- the finding on the first charge in the departmental proceedings cannot be upheld and must be set aside. The Tribunal was also not right in taking the view that even though the second charge of misappropriation of sum of Rs. 379/- and Rs. 799/- realized as customs duty was established, the punishment of compulsory retirement that was imposed on the respondent could not be sustained. Having regard to the fact that the second charge related to misappropriation of funds for which the punishment of compulsory retirement could be imposed. The Tribunal, in exercise of its jurisdiction, could not direct the appellate authority to review the penalty imposed on the respondent and ultimately the Apex Court unable to uphold the judgment of the Tribunal, allowed the appeal preferred by the Senior Superintendents of Post Offices.

(emphasis supplied).

18. In the case of *Lalit Popli Vs. Canara Bank and Others*, the Apex Court in para 16 of the judgment held thus:

16. It is fairly well settled that the approach and objective in criminal proceedings and the disciplinary proceedings are altogether distinct and different. In the disciplinary proceedings the preliminary question is whether the employee is guilty of such conduct as would merit action against him, whereas in criminal proceedings the question is whether the offences registered against him are established and if established what sentence should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial are conceptually different. (See *State of Rajasthan v. B.K. Meena*). In case of disciplinary enquiry the technical rules of evidence have no application. The doctrine of "proof beyond doubt" has no application. Preponderance of

probabilities and some material on record are necessary to arrive at the conclusion whether or not the delinquent has committed misconduct.

19. This Court has no quarrel that the proposition laid down by the Apex Court in Capt. M. Paul Anthony (supra), but the said case has no application in the instant case as in that case the evidence led in the criminal case as well as in the domestic enquiry/disciplinary proceeding was one and same. A criminal court having acquitted the workmen on the very same evidence, the Apex Court came to the conclusion that the finding to the contrary on the very same evidence by the domestic enquiry would be unjust and unfair, rather oppressive. But, in the instant case, the evidences are different. The evidence in the criminal case was for establishing the penal offence of dacoity with murder punishable u/s 395, 396 IPC and the offence u/s 27 of the Arms Act and in disciplinary proceeding relating to connivance of the delinquent officer with the civilian extremist, i.e. to prove the misconduct. The case of M. Paul Anthony (supra) also came up before the Apex Court for consideration in the case of Management of Krishnakali Tea Estate Vs. Akhil Bharatiya Chah Mazdoor Sangh and Another, their lordships of the Supreme Court in paras 25, 26 and 27 discussed the ratio of the case of M. Paul Anthony in details, which is relied by Mr. T.D. Mazumder, learned Addl. GA. in support of his submission that in the case of M. Paul Anthony (supra) the evidence in both the criminal and departmental proceeding was same and one, which is absent in the instant case and also in that case the delinquent officer did not participate in the proceeding for non payment of subsistence allowance, but in the case at hand the delinquent employee/petitioner took part in the departmental proceeding even on non payment of subsistence allowance and he raised his voice for subsistence allowance only when the provisional order of dismissal was passed. For better appreciation said paragraphs 25, 26 and 27 are reproduced hereunder:

25. The next contention addressed on behalf of the respondents is that the Labour Court ought not to have brushed aside the finding of the criminal court which according to the learned single Judge "honourably" acquitted the accused workmen of the offence before it. We have been taken through the said judgment of the criminal court and we must record that there was such "honourable" acquittal by the criminal court. The acquittal by the criminal court was based on the fact that the prosecution did not produce sufficient material to establish its charge which is clear from the following observations found in the judgment of the criminal court.

Absolutely in the evidence on record of the prosecution witness, I have found nothing against the accused persons. The prosecution totally fails to prove the charges under Sections 147, 353, 329 IPC.

26. Learned counsel for the respondents in regard to the above contention relied on a judgment of this Court in the case of Capt. M. Paul Anthony. In our opinion, even that case would not support the respondents herein because in the said case the evidence led in the criminal case as well as in the domestic enquiry was

one and the same and the criminal case having acquitted the workmen on the very same evidence, this Court came to the conclusion that the finding to the contrary on the very same evidence by the domestic enquiry would be unjust, unfair and rather oppressive. It is to be noted that in that case the finding by the Tribunal was arrived at in an ex parte departmental proceeding. In the case in hand, we have noticed that before the Labour Court the evidence led by the management was different from that led by the prosecution in the criminal case and the materials before the criminal court and the Labour Court were entirely different. Therefore, it was open to the Labour Court to have come to an independent conclusion dehors the finding of the criminal court. But at this stage, it should not be noted that it is not as if the Labour Court in the instant case was totally oblivious of the proceedings before the criminal court. The Labour Court has in fact perused the order of the Judicial Magistrate and the exhibits produced therein and come to an independent conclusion that the order of the criminal court has no bearing on the proceedings before it: which finding of the Labour Court, in our opinion, is justified. It may be some use to us to refer at this stage to a judgment of this Court in the case of State of Rajasthan wherein it is held thus:

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

27. From the above, it is seen that the approach and the objectives of the criminal proceedings and the disciplinary proceedings are altogether distinct and different. The observations therein indicate that the Labour Court is not bound by the findings of the criminal court.

20. In the case of Divisional Controller, G.S.R.T.C. v. Kadarbhai J. Suthar AIR 2007 SCW 1331, the Apex Court also considered a similar situation like the case in hand, particularly in para 6 of the said decision. Para 6 of the said decision is quoted hereunder:

6...mere acquittal in a criminal case does not have the effect of nullifying the decision taken in the departmental proceedings. They operate in different areas of considerations. This position was recently highlighted by a three-Judge Bench of this Court in Noida Entrepreneurs' Association v. Noida and Ors. (W.P. (C) No. 150 of 1997 with W.P. (C) No. 529 of 1998 decided on 15.1.2007).

21. This Court is unable to accept the contention of Mr. N. Mazumder that the

petitioner is prejudiced as he was not allowed to engage defence assistant according to his choice by the inquiring authority and for which he also could not properly participate in the proceeding and so far non participation of the delinquent officer in the enquiry for not providing him defence assistant is not acceptable, as it appears from the proceeding file that the inquiring authority vide his letter dated 06.09.97 directed the delinquent petitioner to report to him and to ascertain whether he will engage defence assistant for and on behalf of him and/or to hear him in person, which was also received by the petitioner on the same date and in reply to the same the petitioner vide his letter dated--nil--stated, inter alia, that he is not willing to engage any defence assistant and hear in person. This Court is also of considered view that the case of Bhagat Ram (supra) would not help the petitioner as the facts of that case is different from the case in hand. As it is settled by this time that one additional or different fact makes a world of difference between the conclusions in two different cases even when the principles are applied in each case of similar facts.(See The Regional Manager and Another Vs. Pawan Kumar Dubey,).

22. This Court further is to note that the petitioner was not allowed the subsistence allowance as he did not report to the HQs after his release from the jail custody as per direction of the authority mentioned in the suspension order. For mere non payment of subsistence allowance to the petitioner the departmental proceeding would not have been vitiated as the petitioner has already participated in the proceeding and also he is not prejudiced for such non payment of subsistence allowance. Had he been prejudiced, he would not have participated in the departmental proceeding. Hence, the case of M. Paul Anthony (supra) has no application so far the case of the petitioner is concerned.

23. It is also settled by this time that power of the writ court is very much limited so far the disciplinary proceeding is concerned and writ court does not have the power to reexamine or re-appreciate the evidence led before the enquiring authority/officer for the simple reason that the writ court cannot convert itself as an appellate court while exercising its discretionary power under Article 226 of the Constitution, and in the instant case the petitioner even has not annexed the order of suspension wherein the petitioner was directed to report at the HQs after release from custody though the suspension order was received by him and the same was also annexed by the State respondent as Annexure-R/2 in their counter affidavit filed in the earlier writ petition. The writ Court can interfere with the departmental proceeding when there are some procedural defects in the departmental proceeding like when the proceeding is initiated by the authority without jurisdiction or the finding of the inquiring authority is perverse and without any evidence but the instant case is neither an ex party one nor a case of no evidence and also there is no jurisdictional error and the charges in the criminal case and the disciplinary proceeding are also not same and one as discussed in the foregoing paragraphs. Hence, it would not be proper for this Court to interfere with the order of dismissal passed by the disciplinary authority and affirmed by the appellate authority in view of the

decision of the Apex Court in the case of B.C. Chaturvedi Vs. Union of India and others, wherein their lordships held that:

Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof fact or evidence as defined therein, apply to disciplinary proceeding. When the Authority accepts that evidence and conclusion receives support therefrom the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held that the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

24. Now, the question remains is only whether the punishment imposed by the disciplinary authority is proportionate or not. A Division Bench of this Court, in the case of Dharamraj Kumar Singh v. Union of India and Ors. reported in 2007 L.I.C., 2680, discussed regarding proportionality. Relevant portion of para 24 is quoted below:

24. The proportionality in accordance with law, had also been discussed by the Apex Court in the case of Om Kumar v. Union of India (2001) 2 SCC 386, particularly in paragraphs 27, 28, 37, 39, 67, 69 and 71 of the said judgment, which is reproduced herein under:

27. The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of "proportionality" to legislative action since 1950, as stated in detail below.

28. By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least- restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

* * * 37. The development of the principle of "strict scrutiny" or "proportionality" in administrative law in England is, however, recent. Administrative action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of "strict scrutiny". In the case of these freedoms, Wednesbury principles are no longer applied. The courts in England could not expressly apply proportionality in the absence of the convention but tried to safeguard the rights zealously by treating the said rights as basic to the common law and the courts then applied the strict scrutiny test. In the Spy catcher case Attorney General v. Guardian Newspapers Ltd. (No. 2) (AC atpp. 283-284), Lord Goff stated that there was no inconsistency between the convention and the common law. In Derbyshire County Council v. Times Newspapers Ltd. Lord Keith treated freedom of expression as part of common law. Recently, in R. v. Secy, of State of Home Dept., exp Simms the right of prisoner to grant an interview to a journalist was upheld treating the right as part of the common law. Lord Hob house held that the policy of the administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re-emphasised in R.V. Lord Saville, exp. ALL ER(870, 872) CA. In all these cases, the English courts applied the "strict scrutiny" test rather than describe the test as one of "proportionality". But, in any event, in respect of these rights "Wednesbury" rule has ceased to apply.

38. However, the principle of "strict scrunity" or "proportionality" and primary review came to be explained in R.V. Secy, of State for the Home Deptt., exp Brind. That case related to directions given by the Home Secretary under the Broadcasting Act, 1981 requiring BBC and IBA to refrain from broadcasting certain matters through persons who represented organisations which were proscribed under legislation concerning the prevention of terrorism. The extent of prohibition was linked with the direct statement made by the members of the organisations. It did not however, for example, preclude the broadcasting by such persons through the medium of a film, provided there was a "voice-over" account, paraphrasing what they said. The applicant's claim was based directly

on the European Convention of Human Rights. Lord Bridge noticed that the convention rights were not still expressly engrafted into English law but stated that freedom of expression was basic to the common law and that, even in the absence of the Convention, English courts could go into the question (see pp. 748-49)

Whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations.

And that the courts were

Not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and nothing less than an important public interest will be sufficient to justify it.

Lord Templeman also said in the above case that the courts could go into the question whether a reasonable minister could reasonably have concluded that the interference with this freedom was justifiable. He said that "in terms of the Convention" any such interference must be both necessary and proportionate (ibid. pp. 750-51).

39. In a famous passage, the seeds of the principle of primary and secondary review by courts were planted in the administrative law by Lord Bridge in the *Brind* case 11. Where convention rights were in question the courts could exercise a right of primary review. However, the courts would exercise a right of secondary review based only on *Wednesbury* principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:

The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment.

* * * 67. But where an administrative action is challenged as "arbitrary" under Article 14 on the basis of *Royappa* (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the *Wednesbury* test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it

is to be treated as arbitrary. In *GB. Mahajan v. Jalgaon Municipal Council* (SCC at p. 111). Venkatachaliah, J. (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the standpoint of *Wednesbury* rules. In *Tata Cellular v. Union of India* (SCC at pp. 679-80), *Indian Express Newspapers Bombay (P) Ltd. v. Union of India* (SCC at p. 691), *Supreme Court Employees' Welfare Assn. v. Union of India* (SCC at p. 241) and *U.P. Financial Corpn. v. Gem Cap (India) (P) Ltd.* (SCC at p. 307) while judging whether the administrative action is "arbitrary" under Article 14 (i.e. otherwise than being discriminatory), this Court has confined itself to a *Wednesbury* review always.

* * * 69. The principles explained in the last proceeding paragraph, in respect of Article 14 are now to Be applied here where the question of "arbitrariness" of the order of punishment is questioned under Article 14.

* * * 71. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to *Wednesbury* principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that *Wednesbury* principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment.

25. In *Dharamraj Kumar Singh* (supra) it is held that discipline in the force is the sine quo non and if the member of such disciplined force becomes indisciplined like the delinquent petitioner/appellant, consequence will be nothing but nullification of the force, which is recognized by virtue of its discipline. In the case of *Union of India v. Narain Singh* (supra) the Apex Court also observed that in so far as punishment imposed on the member of a disciplined force is concerned, power of writ court to interfere with such punishment is severally restricted and ought to be rightly exercised. By now it is well settled principles of law that judicial review is not against the decision, rather against the decision making process and it is also the duty of the charged employee to maintain the position of trust, honesty and integrity for which he was employed and when the said honesty, integrity and trust are in question in a disciplinary proceeding, he cannot expect that the disciplinary authority will not take any action against him. In the instant case, the petitioner fails to prove the allegations of perversity and biasness though he tried to assert the same. This Court is of opinion that whenever the disciplinary authority found any indisciplined in the disciplinary force that has to be checked with iron hand so that for one person the entire force should not be demoralized. The aforesaid views of this Court get supports from

the decision of the Apex Court in the case of Regional Manager, U.R.S.R.T.C. v. Hoti Lal reported in AIR 2003 SCW 801, wherein their lordships observed as under:

14. If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptionable. Judged in that background, conclusions of the Division Bench of the High Court do not appear to be proper. We set aside the same and restore order of learned Single Judge upholding the order of dismissal.

But, at the same time the authority also, in the name of discipline, should not harass the employees unnecessarily when no case is made out against them. with the above observations and discussions, this writ petition is dismissed, being devoid of merit. No order as to costs.