

(2009) 03 DEL CK 0019

In the Delhi High Court

Case No : Writ Petition (C) No. 2940 of 1995

Peoples Union For Civil Liberties

APPELLANT

Vs

Dr. M. Khalilullah and Others

RESPONDENT

Date of Decision : 03-03-2009

Acts Referred:

Citation : (2009) 121 FLR 865 : (2009) 4 LLJ 904 : (2010) 3 SLJ 159

Hon'ble Judges : A.P. Shah, C.J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Prashant Bhushan, Rohit Kumar Singh and Sumeet Sharma, for the Appellant; Salman Khurshid L.R. Singh, Imtiaz Ahmed and Naghma Imtiaz, for the Respondent

Judgement

Sanjiv Khanna, J.—Peoples Union for Civil Liberties has filed the present Public Interest Writ Petition seeking issue of Mandamus to direct Union of India, respondent No. 2, to initiate disciplinary proceedings against Dr. M. Khalilullah, respondent No. 1.

2. This is the second round of litigation as a public interest writ petition filed by the petitioner praying for similar reliefs. The petitioner had earlier filed Writ Petition Civil No. 3032/1994, which was disposed of by judgment dated 26th May, 1995 reported in 1995 III AD (Delhi) 173. The relief prayed for in that petition and directions issued by the Court have been referred to in detail in subsequent portion of this judgment. However, at this stage, it will be suffice to notice that in the said judgment the Court had interdicted respondent No. 1, Dr. M. Khalilullah from functioning as a Director of G.B. Pant Hospital. Union of India was also called upon to take a decision whether or not to initiate disciplinary action against respondent No. 1, Dr. M. Khalilullah and decide whether it would be necessary or desirable to place him under suspension.

3. Dr. M. Khalilullah, respondent No. 1 had filed a SLP before the Supreme Court, which was disposed of on 5th June, 1995 upholding the directions given by the High Court that the respondent No. 2 Union of India should consider and decide

in accordance with law whether it was necessary to initiate disciplinary proceeding against respondent No. 1, Dr. M. Khalilullah but without being influenced by any of the observations made by the High Court. The Supreme Court noticed that while the said Writ Petition was pending before the High Court, the matter was entrusted and was pending investigation by Central Bureau of Investigation. Learned Counsel appearing for respondent No. 1, Dr. M. Khalilullah had stated before the Supreme Court that Dr. M. Khalilullah would proceed on leave till 15th June, 1995 to enable the Government to take an independent decision. However, in case Union of India decided not to initiate disciplinary proceedings against respondent No. 1, Dr. M. Khalilullah the direction to interdict him from functioning as a Director should not be given effect to and in case disciplinary proceedings were decided to be initiated, the interdiction direction would take effect from 15th June, 1995.

4. Mr. M.S. Dayal, Secretary, Ministry of Health & Family Welfare, Union of India filed an affidavit before the Supreme Court on or about 14th June, 1995 stating inter alia that disciplinary authority had come to the conclusion on the basis of the existing material, that no case for disciplinary proceedings against respondent No. 1, Dr. M. Khalilullah was made out or was sustainable.

5. On 31st July, 1995 the Supreme Court recorded that the Special Writ Petition already stands disposed of in terms of earlier order dated 5th June, 1995 and that an affidavit had been filed that the matter had been considered by the disciplinary authority and a decision was taken, hence no orders were necessary.

6. Noticing the orders dated 5th June, 1995 and 31st July, 1995, this Court had dismissed this Writ Petition vide order dated 3rd January, 1996 holding inter alia that it was not possible to grant the reliefs prayed for. However, this order was set aside by Supreme Court by order dated 30th September, 1996 holding that High Court had proceeded under a misapprehension that by the order dated 31st July, 1995 the Supreme Court had approved the decision of the disciplinary authority not to initiate disciplinary proceedings against the respondent No. 1, Dr. M. Khalilullah. Supreme Court set aside the order dated 3rd January, 1996 and directed that the Writ Petition Civil No. 2940/1995 be remitted to the High Court for consideration on merits. Another contention raised before the Supreme Court was that Dr. M. Khalilullah, respondent No. 1 had retired from service on 30th June, 1996 and alleged misconduct related to years 1989-91 and under the rules no disciplinary proceedings could be initiated after more than four years. The Supreme Court observed that this question/issue could be raised before the High Court, who would deal with the same on merits.

7. The allegations against Dr. M. Khalilullah, respondent No. 1 pertain to purchase of equipments and material during the period 1988-89 till 1990-91 of about Rupees 40 crores. The Department of Revenue Intelligence had conducted searches in October, 1990 and some equipments and documents were seized. Allegation was that equipments worth crores of Rupees were imported duty free and thereafter allowed to remain with the suppliers to be sold to private parties.

Some equipments were purchased at exorbitant prices. It may be relevant to note that action under the Customs Act, 1962 was initiated and penalties have been imposed on the suppliers, private parties, where some machines were found to be installed and G.B Pant hospital and some of their officers. No penalty was imposed on Dr. M Khalilullah, respondent No. 1. Central Bureau of Investigation has also filed charge sheet in three separate cases for unauthorized and illegal purchase of medical equipments on the basis of false proprietary articles certificate, under Sections 420 and 120B IPC as well as under provisions of Prevention of Corruption Act, 1988. In these cases Mr. P.K. Banerjee, Ex Store Officer, G.B. Pant Hospital and one Dr. O.P.Jain, Ex Medical Superintendent along with suppliers and others have been implicated. The said cases are still pending. Mr. P.K. Banerjee had expired on 19th March, 1999 and the cases against him, therefore, have abated. No case has been filed against Dr. M. Khalilullah, respondent No. 1. He is not an accused in any of three criminal cases.

8. Learned Counsel appearing for the petitioner has questioned and challenged averments made in the affidavit of Mr. M.S. Dayal that the available papers do not show involvement of Dr. M. Khalilullah, respondent No. 1 in the financial purchases, irregularities and fraud. He has submitted that the said finding is perverse and contrary to the findings recorded in the judgment dated 26th May, 1995 disposing of Writ Petition Civil No. 3032/1994. He has quoted several portions of the judgment in support of his contention that the statement made by Mr. M.S. Dayal in his affidavit that the four committees constituted to look into the aspects of purchases and assessing the role of persons involved, had exonerated and not impeached or indicted Dr. M. Khalilullah, respondent No. 1.

9. We do not think that it will be appropriate and correct to rely upon the findings and observations made in the judgment dated 26th may, 1995 disposing of the Writ Petition Civil No. 3032/1994 against Dr. M. Khalilullah the respondent No. 1 in view of the order dated 5th June 1995 passed by the Supreme Court directing that the disciplinary authority would examine the matter, whether or not disciplinary proceedings should be initiated without being influenced by the findings and observations recorded by the High Court. This Court can, however, independently examine this aspect within four corners of the powers of judicial review, and decide whether or not any direction/mandamus as prayed for should be issued. It may be, however, relevant to refer to the prayers made in the Writ Petition Civil No. 3032/1994, which are reproduced below:

(a) Direct the respondent to suspend respondent No. 2.

(b) Direct the respondent No. 1 to register a regular criminal case against the respondent No. 2 under the Prevention of Corruption Act for his culpability in the matter relating to the controversial purchases.

(c) Direct the authorities to recover from respondent No. 2 public money wasted on account of the culpable acts of respondent No. 2 from him, and

(d) Pass any other order which this Court may deem fit and proper in the

circumstances of the case.

10. While referring to the said prayers, the Division Bench while disposing of Writ Petition Civil No. 3032/1994 had observed as follows:

20. Out of the prayers in the writ petition, prayer (b) for a direction to respondent No. 1 to register a regular criminal case against the respondent No. 2 under the Prevention of Corruption Act cannot be considered at this stage. The question of registering such a criminal case has to be considered not by this Court but by the investigating agency in the light of the investigation. The C.B.I. has only taken over the investigation and they have hardly commenced investigation. Hence prayer (b) is premature and is only to be rejected. Prayer (c) for a direction to the authorities to recover from Respondent No. 2 the public money wasted on account his culpable acts is misconceived. The question of recovery can arise only after fixing the responsibility and liability in accordance with law. Responsibility and liability can be fixed only in the investigation by C.B.I. or in appropriate departmental proceedings and not in this writ petition. Therefore prayer (c) also is liable to be rejected. Thus we are left with only prayer (a) for a direction to the respondent to suspend respondent No. 2 and prayer (d) for any other order which this Court may deem fit and proper in the circumstances of the case.

21. Constitution of prayer (a) mentioned above will call for judicial review of:

(i) The failure of the Central Government (respondent No. 3) to exercise its power to suspend respondent No. 2;

(ii) The refusal of respondent No. 1 to exercise its power to recommend suspension; and

(iii) The decision of the Lt. Governor rejecting the Health Secretary's suggestion to suspend respondent No. 2 and the Chief Secretary's suggestion to transfer respondent No. 2 from the post of Director, G.B. Pant Hospital.

22. If prayer (a) or (d) is to be granted, this Court should be satisfied that;

(a) the impugned action or inaction of respondents 1 and 3 is one which can be subjected to judicial review; and in case judicial review is permissible, then, that the impugned action or inaction is liable to be reviewed by court in the facts and circumstances of this case; for

(b) Respondents 1 and 3 had a duty to suspend respondent No. 2 but they failed or refused to discharge such duty; or

(c) Assuming that there was no such duty, the circumstances of the case warrant some order or direction by this Court under Article 226 of the Constitution to Respondents 1 and 3 in the interest of justice or in order to protect public interest and common good.

23. It is settled law that even executive/administrative decisions or orders can be

subjected to judicial review. Hence, there cannot be any doubt that this Court has power and jurisdiction to review the decision of respondent Nos. 1 and 3 on the question of suspension of respondent No. 2. But it is necessary to examine whether the circumstances of the case call for such a judicial review and even if a judicial review is called for; to what extent such review is possible and permissible and what relief can be granted by the Court. This examination has necessarily to be made only with reference to judicially accepted principled and parameters.

11. Counsel for the petitioner referred to several portions of Dr. A.K. Gupta Committee report and submitted that the said Committee had made a very sharp indictment of Dr. M. Khalilullah, respondent No. 1. He has also quoted Archana Arora Committee report in which it is mentioned that the Director was not able to exercise effective supervision over other officers and it appears that irregularities went unnoticed at the level of the Director. Our attention was also drawn to the fact that noting sheets of 228 files relating to purchase orders have gone missing and authorities of G.B. Pant Hospital had taken contradictory stands. Counsel for the petitioner has highlighted that Dr. M. Khalilullah, respondent No. 1 was not only the Director of the Hospital but also head of Cardiology Department for which the bulk of the equipment had been purchased and he was also the head of the Purchase Committee.

12. Prima facie, there appears to be merit in the allegation that Dr. M. Khalilullah, respondent No. 1 being the Director, head of Cardiology Department and head of Purchase Committee, has to share blame and responsibility. However, there are several factors and reasons why we feel that the prayers as made in the Writ Petition for Mandamus to initiate disciplinary proceedings against Dr. M. Khalilullah, respondent No. 1 should not be issued at this distinct point of time. Archana Arora Committee report no doubt mentions about responsibility and role of the Director of the Hospital but is not very clear about the role of Dr. M. Khalilullah, respondent No. 1. It has been observed:

Director has not been able to exercise effective supervision over the officers....

Though Director is not responsible for day to day routine functioning of various officers in the hospital, yet he is responsible for macro issue like planning, financial discipline....

...It appears that all this went unnoticed at the level of Director.

13. A.K. Gupta Committee report is more direct and obvious, specially with reference to missing /destroyed files, failure to procure machinery and equipment through DGS&D and availability of consumable and non-consumable store items, which would be verified only to the extent of 7.5% approximately. However, on the other hand we have Dr. S.K. Khanna Committee report and Dr. G.G. Mansharamani Committee report, which do not indict or make reference to Dr. M. Khalilullah, respondent No. 1. Moreover, the Comptroller and Auditor General of India had also conducted test check, did not find involvement of Dr. M.

Khalilullah, respondent No. 1 in the irregularities. The Collector of Customs has also come to the conclusion that there was no evidence to prove mensrea on the part of Dr. M. Khalilullah and no personal penalty has been imposed on him. Central Bureau of Investigation in their affidavit filed before this Court has referred to three cases in which Challans have been filed. It is stated that during investigation of the aforesaid three cases, role and conduct of Dr. M. Khalilullah, as a Director, was examined but no evidence either oral or documentary regarding his involvement in the said cases was found. Dr. M. Khalilullah, respondent No. 1 has not been included in the list of accused persons in column 3. Reference is made by Central Bureau of Investigation to Writ Petition Civil No. 4622/1996, which was filed by the petitioner herein for direction to CBI to file status report relating to G.B. Pant Hospital investigated by them. The matter was disposed of on 30th July, 2003.

14. Dr. M. Khalilullah respondent No. 1 superannuated on 30th June, 1995, almost 13 years back. The normal rule that no departmental proceedings can be instituted after retirement, is subject to statutory rule to the contrary. As per Clause 2(b) of Rule 9, C.C.S. (Pension) Rules, 1972, departmental proceedings shall not be instituted after retirement in respect of any event, which has taken place more than four years before such institution. The alleged misconduct pertains to years 1989-90 till 1991-92. Four years have lapsed long back. However, the Writ Petition Civil No. 3032/1994 was filed before Dr. M. Khaliullah, respondent No. 1 had retired. The present writ petition was filed in 1995. Therefore, bar of four years may not be applicable. Albeit, it appears to us that it will be impossible after more than 13 years from the date of retirement and nearly 18 to 19 years after the alleged misconduct, to collate and collect relevant documents, evidence and proceed further.

15. Dr. M. Khalilullah's stand detailed out in paragraph 18 onwards of the counter affidavit is that the purchase Committee had authorized the purchases indented by the heads of the Departments. Dr. M. Khalilullah, respondent No. 1 has stated in paragraph 19 to 21 of the affidavit as follows:

19. That it appears that the then Medical Superintendent Dr. O.P. Jain, Sh. P.K. Banerjee, Store Officers and Sh. Hari Om Gupta, Pharmacist and Store Keeper along with officials of Purchase and Stores Department of G.B. Pant Hospital were found having committed irregularities in placing indents with DGS & D for purchase of stores for the Hospital. Since this matter was not referred to the deponent nor were the indents got signed by him, the deponent was not aware of the manipulation in the aforesaid departments. Not a single indent was sent to the DGS&D under the signatures of the deponent. The deponent has no reason to resume that the procedure adopted by the Purchase and Stores Department of the Hospital was not in order.

20. The Director of Revenue intelligence sometime in October, 1990 received information that the equipments imported on behalf of the G.B. Pant Hospital and cleared duty free even after lapse of considerable time, are still lying in the

premises of various Indenting Agents of the foreign suppliers. Accordingly raids were carried out on 12.10.1990 and equipments and other incriminating documents were seized from various premises of the Indenting Agents. Since the equipments purchased for G.B. Pant Hospital had not reached the Hospital and were still lying in the premises of the Indenting Agents, the Collector of Customs (Judicial) New Delhi on 16.3.1991 issued show-cause notice to the G.B. Pant Hospital, its Director and 27 other persons. The Collector of Customs (Judicial), New Delhi after hearing the parties in exercise of his powers conferred u/s 112 of the Customs Act, 1962 vide its order dated 21.1.1993 directed to release all the seized goods to the G.B. Pant Hospital and imposed a personal penalty of Rs. 25, 000/- each on Dr. O.P. Jain the then Medical Superintendent and Shri. P.K. Banerjee, Stores Officer of G.B. Pant Hospital. A personal Penalty of Rs. 5, 000/- was imposed on Sh. Hari Om Gupta, Pharmacist and Stores Keeper of G.B. Pant Hospital. Personal Penalty of Rs. 1, 00, 000/- each was imposed on Indenting Agents, Suppliers who were found guilty. However, so far the deponent herein is concerned the Collector of Customs in Paragraph 12 of his order clearly recorded a finding that there is no evidence to prove mensrea on the part of the Director, G.B. Pant Hospital. The allegations made in the Petition are cryptic and are based on mere conjectures and surmises. Since there is no evidence documentary or otherwise to prove the Director, G.B. Pant Hospital guilty, no penalty can be imposed on him. In paragraph 28 again the collector of Customs came to the conclusion that there is no adequate evidence to implicate the Director of G.B. Pant Hospital in this case. Finally in paragraph 36 it concluded that adequate evidence is not available that the Director of G.B. Pant Hospital and Mrs. Monimala Ghose, one of the Director of IBPL has in any way indulged in rendering themselves liable to penal action u/s 112 of the Customs Act, 1962. The Collector of Customs again vide his order dated 27.7.1994 while dealing with the case of some other persons in paragraph 36 of his order came to the conclusion that there is no other clinching evidence to suggest the active involvement of Dr. Khalilullah in the whole episode. I, therefore, do not hold him liable for any penal action. However, the Collector of Customs found Dr. O.P. Jain, Medical Superintendent, P.K. Banerjee, Store Officer and Sh. Hari Om Gupta, Store Keeper, guilty of the charges and found that they have rendered themselves liable for penal action u/s 112 of the Customs Act, 1962.

21. That as soon as the deponent herein came to know about the various illegalities and bungling committed by some staffs of G.B. Pant Hospital in purchase of equipments, he on 3.11.1990 constituted a Committee under the chairmanship of Dr. S.K. Khanna, Professor and Head of the Department of Cardiothoracic Surgery, Dr. S.L. Broor, Professor & Head of the Deptt; (Gastro Entrology) Dr. (Mrs.) Meena Gupta, Professor & Head of Deptt. Neurology, Dr. R.C. Aranaya, Professor and head of Deptt., (Gastro-entrology Surgery) and Mr. Shabbir Ali, Accounts Officer. This Committee after detailed enquiry and after recording the evidence of Dr. O.P. Jain, Medical superintendent, Mr. P.K. Banerjee, Store Officer & Hari Om Gupta, submitted its report and did not find the

deponent's involvement in any way. The said Committee made certain recommendations and suggestion in order to improve the functioning of the Purchase Branch and also recommended to provide adequate staff to assist the Purchase Officer.

16. Keeping these aspects in mind, we are not inclined to issue any mandamus or direction in the present Writ Petition. The question whether any Mandamus or direction can be issued to the respondents for initiation of disciplinary proceedings is left open to be decided in an appropriate case. It is also clarified that this order will not construed as an order exonerating Dr. M. Khalilullah and it will be open for the criminal court to act in accordance with law, in case any evidence or material is found against Dr. M. Khalilullah in the three criminal cases.

The Writ Petition is accordingly disposed of with no order as to costs.