

(1994) 09 BOM CK 0058

In the Bombay High Court

Case No : Writ Petition No. 1353 of 1991 With Writ Petition No. 1354 and 1355 of 1991

Vasant Rama Bhagade

APPELLANT

Vs

Bombay Port Trust and others

RESPONDENT

Date of Decision : 27-09-1994

Acts Referred:

Constitution of India, 1950 — Article 21

Penal Code, 1860 (IPC) — Section 114, 381

Citation : (1994) 09 BOM CK 0058

Hon'ble Judges : V.P. Tipnis, J

Bench : Single Bench

Judgement

V.P. Tipnis, J.—1. All these three writ petitions were heard together and are being disposed of by this common judgment in as much as all the 3 petitioners were charged in open single enquiry. The entire evidence was recorded in common and it is an agreed position between the counsel appearing for the rival parties before me that all the three cases are absolutely identical. Various submissions made on behalf of the petitioners and on behalf of the respondent-Bombay Port Trust are common to all three petitions and as such I am disposing of these three petitions by this common judgment and order.

2. All the tree petitioners were chargesheeted and in the statements of imputation of misconduct and articles of charges it was mentioned that on 11-12-1985 during IInd shift Shri C. K. Patil, watchman was posted at Red Gate, Indira Dock and Shri Sukumar Ramdas Manglore was posted as Gate Inspector on the same Gate. The other staff at the gate i.e. gate keepers were also present. Policemen were on duty at the spot. The Chairman of the Bombay Port Trust by valid orders had prohibited entry/exit of pedestrians through this gate totally. At about 5.30 p.m. three Bombay Port Trust employees i.e. (1) Shri K. T. Mahbubani, Assistant Shed Superintendent, (2) Shri B. S. Komurlekar, Clerk Grade I, all of Docks Department were going out of this gate. One of them was carrying rexine bags. C. K. Patil watchman stopped all the 3 employs and a ked

for their photopass. The Shed Superintendent disclosed his position and also informed that other two were First Grade Clerks working with him. Shri Patil required them to show as to what was in the bags. Thereupon they told Shri Patil that they should be taken to the Gate Inspector so that they would show who they are, Shri Patil took them to the Customs Chowky which is adjacent to the Gate Inspector's office. As soon as the three persons were brought to the Customs Chowky, Gate Inspector came there and told Shri Patil that they were the shed staff and he should not take any action against them, Shri Patil informed the Zonal Security Officer of Docks and within 5 minute one Shri Kowlgi. Assistant Security Officer came to the Red Gate Indira Dock. After scrutinising the photo-assess of 3 persons, he directed all the 3 persons to show or open the bags and accordingly they showed or opened their bags. In the bag of Shri K. T. Mahbubani, Assistant Shed Superintendent one new foreign saree, zip fasteners 500 Nos. of 6" size were found. In the bag of Shri B. S. Komurlekar Clerk Gr. I, one Foreign soaps camy-3 Nos. (2) 2 new foreign sarees, (3) 2 foreign made scissors, (4) one flash gun camera with card, (5) 12 lip stick tubes, foreign made, (6) one nylon sweater and (7) one nylon wire small bundle and (8) Camera wire were found. In the bag of Shri V. R. Bhagade, Clerk Gr. I (1) 2 sarees foreign made, (2) one pair of new ladies chappal, (3) one scent spree bottle were found. In the imputations it was stated that these people did not posses any valid documents for taking the above articles out of the Docks. Shri Kowlgi sent his jeep to Yellow Gate Police station and called police sub-Inspector Shri J. D. Sawant who held a panchanama and seized the above property from the above three persons. On the basis of these facts all the 3 persons were noticed that they have committed misconduct of violation of regulation 3(1) of the Bombay Port Trust Employees (Conduct) Regulations, 1976 and have rendered themselves liable to disciplinary proceedings under Regulations 8 and 12 of the Bombay Port Trust (Classification, Control and Appeal) Regulations, 1976. Alongwith the chargesheets list of documents and witnesses were also supplied to these persons.

3. The explanation given by all the three persons was that they have not committed any misconduct as alleged. Everyone of them disclaimed that they possessed any bag at all. They specifically disclaimed possession of any articles and contended that it was false allegation due to the rivalry between the Dock staff and the security organisation. They also pointed out that earlier criminal case was pending in the same matter and hence the departmental action may be held in abeyance. Ultimately after holding inquiry and examination of various witnesses, the Enquiry Report was submitted. The Enquiry Officer found that the charge was proved against each of the delinquent. The Deputy Chairman of the Bombay Port Trust served a show cause notice on all 3 persons as to why they should not be dismissed for the proved misconduct. In reply it was contended by the delinquents that they had not committed any theft of the articles found in their bags. They contended that they had purchased the sarees and other articles from the crew of the cargo ship berthed at Indira Dock, that they admitted that

they were tempted to buy imported sarees and other articles as their wives had a great craze for those articles. After referring to their long service and the family members, they pleaded for lenient view and for lesser punishment. The Deputy Chairman of the Bombay Port Trust thereafter was pleased to impose a penalty of compulsory retirement on each of the delinquent. Upon receipt of the order of the order of punishment it appears that the delinquents made a request for review of the matter but the same was declined by the Bombay Port Trust authorities.

4. An appeal was preferred, which was, however, rejected by the order dated 11th January, 1991.

5. Being aggrieved by the order of compulsory retirement for the alleged misconduct the aforesaid 3 employees have preferred these three writ petitions.

6. I have heard Shri Cama learned counsel appearing for the petitioners in all these petitions. I have also heard Shri Ramaswamy, learned counsel appearing for the respondents-Bombay Port Trust. With the assistance of the learned counsel I have gone through the entire record. I have also gone through the authorities cited before me.

7. The very first submission of Shri Cama is that in as much as all the 3 petitioners were charged and prosecuted for criminal offence of theft before the Court of Presidency Magistrate and in as much as they were honourably acquitted in the said criminal case, it was impermissible or incompetent for the Bombay Port Trust Authorities to hold any enquiry at all on the very same charge or in the very same matter. Shri Cama in this behalf cited several authorities and contended that in the facts of the present case it was impermissible for the Bombay Port Trust to hold any enquiry at all.

8. The fact that the three employees were prosecuted in a criminal case No. 246/P of 1986 before the learned Presidency Magistrate Ballard Estate Bombay is not disputed. As a matter of fact the judgment of the learned Magistrate is on record. In the said case these very three employees as accused were charged on the allegation that on 11-12-1985 while they were working as servants of the Bombay Port Trust, they committed theft in respect of domestic articles valued at Rs. 3850/- and they have aided and abetted each other in the commission of the said offence. On these allegations they were charged u/s 381 read with section 114 of the I.P.C. The learned magistrate held that there was no evidence of any complaint having been lodged in respect of any theft of the property belonging or in possession of the warehouse and therefore the prosecution was unable to prove and establish beyond reasonable doubt that the property which was alleged to have found with the accused was alleged to have found with the accused was the property stored at the Sales Compartment of the warehouse and therefore the prosecution has not proved the theft itself. So far as the evidence of Chandrakant Patil, who was examined as prosecution witness is concerned, the learned Magistrate observed that the evidence of the said

Chandrakant Patil is not supported by any other evidence and therefore there is no corroboration to the evidence of Chandrakant Patil. The learned Magistrate observed that the prosecution has not examined the police constable who was on duty and therefore there is only evidence of Chandrakant and his evidence cannot be believed as even though there were independent witnesses they have not supported the case. The learned Magistrate further observed that the main ingredient of section and whole foundation of the prosecution building has collapsed when the prosecution witness No. 4 has given admission that there was no complaint of theft or missing of articles from his sales able to establish that the theft has taken place. The learned Magistrate also held that the prosecution was not able to establish that the property which was before the Court, was found in possession of the 3 accused as there was no independent support to the evidence of Chandrakant and hence taking into consideration the overall picture of evidence adduced by the prosecution the learned Magistrate held that the prosecution has miserably failed in bringing home the guilt of the accused. It is on this reasoning the learned Magistrate acquitted all the accused by his judgment and order dated 7-2-1987.

9. The question as to when the employees are prosecuted and are acquitted by the competent court having jurisdiction, could be proceeded against by way of a departmental inquiry has been dealt with in several judgments cited before me.

10. Shri Cama mainly relied upon the judgment reported in 1988 M. L. J. 340 Shakti Capacitors v. Heramb Bhaskar Sahastrabudhe & Anr. In the said judgment of this court the division bench has held that the employee came to be acquitted on being given benefit of doubt. It could not be said therefore that no departmental inquiry could have been held in the present case. As the departmental inquiry could be held it was open to the employer to adduce evidence before the Tribunal proving the charges levelled against the employee. There is no bar for holding a departmental inquiry if the acquittal is not completely exonerated of the charge, having been merely given benefit of doubt. Mere acquittal in criminal trial is no bar for holding departmental inquiry though ultimately it must depend upon the facts and circumstances of each case.

11. Shri Cama also relied upon the judgment of the learned Single Judge of this court reported in H.I. Kazi Vs. J.C. Agarwal and others, . In the aforesaid judgment the learned Single Judge has observed that it is very difficult to define what is meant by "honourable acquittal". It will depend upon the facts and circumstances of each case. In the case before In the case before the learned Judge, the learned judge held that the judgment clearly acquits the accused not on some technical ground or not because there was evidence both ways but the evidence of prosecution being found slightly wanting, the benefit of doubt being given to the petitioner. The judgment clearly establishes that the prosecution had miserably failed to establish the case against the accused. The learned Judge felt that if that is not honourable acquittal it is difficult to say what can be said to be honourable acquittal. Shri Cama also relied upon the judgment of another Single

Judge of this court reported in 1993 2 CLR 539 Shaik Iiyas Ayyub v. Dy. Chairman, The BPT wherein the learned Judge has observed that one has to read the findings of the criminal court and on going through the said findings of the criminal court which was relevant in the case before the learned Judge, he held that it is clear that the workman was given the benefit of doubt and it is not possible to accept the contention that it was a honourable acquittal. The learned Judge thereafter also referred to the case in the matter of Abdulla A. Latif; decided by the Single Judge of this court. Shri Cama also relied upon the judgment of the Apex Court reported in Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, . The Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni & Ors. and contended that the expression "lift" mentioned in Article 21 of the Constitution of India does not merely connote animal existence or a continued drudgery through life. The expression has a much wider meaning. Where therefore the outcome of a departmental enquiry is likely to adversely affect the reputation or livelihood of a person, some of the finer graces of human civilisation which make life worth living would be jeopardised and the same can be put in jeopardy only by law which includes fair procedures. On the other hand Shri Ramaswamy learned counsel for the Bombay Port trust heavily relied upon the judgment of the Apex Court reported in 1992 2 CLR 825 Nelson Motis v. Union of India & Anr. In paragraph 5 of the aforesaid judgment the Apex Court has observed as under :

"So far the first point is concerned, namely whether the disciplinary proceeding could have been continued in the fact of the acquittal of the appellant in the criminal case, the plea has no substance whatsoever and does not merit a detailed consideration. The nature and scope of a criminal case are very different from these of a departmental disciplinary proceedings and an order of acquittal. Therefore, cannot conclude the departmental proceeding. Besides, the Tribunal has pointed out that the acts which led to the initiation of the departmental disciplinary proceeding were not exactly the same which were the subject matter of criminal case."

12. On the consideration of the aforesaid authorities in the light of the facts and circumstances of the case, firstly I find that the acquittal of the petitioners before me in the aforesaid case cannot at all be termed as honourable acquittal. Merely because the learned Magistrate has used the phraseology that the prosecution has miserably failed to bring home the guilt, which phrase was emphasised by Mr. Cama, it does not become honourable acquittal. I have also discussed at length the reasoning of the learned Magistrate and in my opinion the main reason for the acquittal was that there was no formal complaint of the theft from the warehouse and secondly that the learned magistrate felt that corroboration was necessary to the evidence of the watchman Patil and in the opinion of the learned Magistrate there was none. The subject matter of the prosecution was theft. It was criminal prosecution and, therefore, the entire approach and requirement of degree of proof is totally different. With the approach and degree of proof and nature of evidence of proof and nature of evidence required in the

department proceedings. Admittedly the persons charged are those employees who were in possession of various articles without any valid document for taking them out of the Docks. On the basis of the material on record I am of the clear view that not only the subject matter was not identical but that the acquittal cannot be treated as honourable acquittal. The first submission of Mr. Cama, therefore, is without any merit, and ought to be rejected.

13. Shri Cama then submitted that there could be no charge under regulation 3(1) of the Bombay Port Trust Employees (Conduct) Regulation, 1976. In this behalf Shri Cama relied upon the judgment of the Apex Court reported in A.L. Kalra Vs. Project and Equipment Corporation of India Ltd., . In the aforesaid case Supreme Court referred to rule 4 of the Project & Equipment Corporation of India Ltd. Employees" (Conduct, Discipline and Appeal) Rules, 1975, which is as under :

"4(1) Every employee shall at all times :

(i) maintain absolute integrity;

(ii).....

(iii) do nothing which is unbecoming of a public servant".

The Court has further observed that rule 5 prescribes various misconducts for which action can be taken against an employee governed by the rules. The Apex Court as observed that rule 4 bears the heading "general" whereas rule 5 bears heading "misconduct". The Apex Court therefore has held in para 22 of its judgment as under :

"The draftsman of the 1975 Rules made a clear distinction about what would constitute misconduct. A general expectation of a certain decent behaviour in respect of employees keeping in view Corporation culture may be a moral or ethical expectation. Failure to keep to such high standard of moral, ethical or decorous behaviour befitting an officer of the company by itself cannot constitute misconduct unless the specific conduct falls in any of the enumerated misconduct in rule 5. Any attempt to telescope R. 4 into R. 5 must be looked upon with apprehension because rule 4 is vague and of a general nature and what is unbecoming of a public servant may vary with individuals and expose employees to vagaries of subjective evaluation. What in a given context would constitute conduct unbecoming of a public servant to be treated as misconduct would expose a grey area not amenable to objective evaluation. Where misconduct when proved entails penal consequences, it is obligatory on the employer to specify and if necessary define it with precision and accuracy so that any ex-post-facto interpretation of some incident may not be camouflaged as misconduct."

The Apex Court thereafter referred to the decision in the case of Glaxo Laboratories (I) Ltd. Vs. Presiding Officer, Labour Court, Meerut and Others, wherein the Apex Court had held that everything which is required to be prescribed has to be prescribed with precision and no argument can be

entertained that something not prescribed can yet be taken into account as varying what is prescribed. The Apex Court thereafter again reverted to the reference to rules with which they were concerned and observed that "rule 4 styled as "General" specifies a norm of behaviour but does not specify that its violation will constitute misconduct. In Rule 5, it is nowhere stated that anything violative of rule 4 would be per se a misconduct in any of the sub-clause of R. 5 which specifies misconduct. It would therefore appear that even if the facts alleged in the two heads of charges are accepted as wholly proved yet that would not constitute misconduct as prescribed in Rule 5 and no penalty can be imposed for such conduct. It may be well be mentioned that R. 25 which prescribes penalties specifically provides that any of the penalties therein mentioned can be imposed on and employee for misconduct committed by him. Rule 4 does not specify a misconduct. " It is therefore clear that the rules with which the Apex Court was concerned were rule 4 which was "General" and rule 5, which specifically catalogues items which would amount to misconduct. On the basis of this when misconduct was precisely and definitely described or defined, the Apex Court found it impermissible, to use the terminology of the Apex Court itself, "to telescope the provisions of rule 4 into rule 5." So far as the Bombay Port Trust is concerned, I find that at the relevant time there was no rule prescribing any misconduct as such, but the Bombay Port Trust Employees (Conduct) Regulations, 1976, under heading "General" specified several requirements, which an employee is supported to adhere to. If the submission of Shri Cama is accepted than it will have to be held that in as much as there is no specific act which is described or defined in the Regulation as constituting a misconduct, the Bombay Port Trust cannot take disciplinary action against any employee, whatever may be the seriousness or severity of the conduct. I find myself totally unable to subscribe to any such unreasonable conclusion. I am told that thereafter in the year 1990 the Bombay Port Trust has amended the Regulations by providing specific acts of misconduct. On the basis of the regulations as they existed I am of the view that once the act of omission or commission or conduct of the employee is specifically mentioned and it is alleged that on the basis of the same he has failed to maintain absolute integrity and devotion to duty, whether in a given case the said acts of commission and omission or conduct would amount to lack or failure to maintain absolute integrity and devotion to duty, can always be ascertained objectively. The Apex Court's judgment, in my opinion, is clearly distinguishable in as much as in the case before the Apex Court there was independent rule 5 clearly defining various kinds of misconducts. It is in that background that the Apex Court has observed that the general provisions of rule 4 which is not included in rule 5 cannot be permitted to telescope in rule 5.

14. Shri Cama also relied upon the judgment of the Apex Court reported in 1983 LIC 1909 M/s. Glaxo Laboratories (i) Ltd. v. Presiding Officer, Labour Court, Meerut & Ors. which has been also referred to and relied upon by the Apex Court in Kalra's case, to which I have made a detailed reference. Shri Cama also brought to my notice the judgment of the learned single Judge delivered on July

31, 1990 and August 1, 1990 in writ petition No. 2325 of 1988, wherein in respect of this very regulation 3(1) of the Bombay Port Trust Employees (Conduct) Regulations, 1976, relying upon the judgment of the Apex Court in Kalra's case the learned judge has held that there can no charge under regulation 3(1). However, it is an admitted position before me that the said judgment and order of the learned Single Judge was quashed and set aside by allowing the appeal by the division Bench of this court by its judgment and order dated 2nd December, 1993 in appeal No. 942 of 1990. In view of the said fact the judgment of the learned Single Judge on which reliance is placed cannot be of any help to Mr. Cama, Shri Cama Also referred to the judgment of the learned Single Judge on which reliance is placed cannot be of any help to Mr. Cama. Shri Cama also referred to the judgment of the learned Single Judge reported in 1993 2 LLR 529 Shaik Iiyas Ayyub v. Dy. Chairman, the B. P. T. in this behalf. After having gone through the said judgment carefully I am unable to appreciate as to how the said judgment helps Mr. Cama so far as this point is concerned. Shri Cama then referred to the judgment of the division bench of this court reported in 1992 1 CLR 148 Nabisha Hussein Shaik v. K. K. Uppa & Anr. In paragraph 4 of the said judgment there is a reference to the learned counsel's submissions and reliance on the judgment of the Apex Court in Kalra's case. After referring to the submissions of the learned counsel before the divisions bench, in paragraph 5 it is observed that the effect of accepting the contention on behalf of the Bombay Port Trust would be to give retrospective application to the conduct regulations which is something impermissible in law. It was further observed that quite apart from this, one cannot have resort to the general conduct regulations applicable to the Central Government Employees because the appellant was neither informed of those regulations nor did he stand charged under those regulations. Thereafter it is observed "Additionally, by virtue of the observations of the Supreme Court reproduced by us above in the A. L. Kalra's case 1984 LIC 961, the Supreme Court has itself held that the wording of rule 3 of those Regulations is itself too vague and hence cannot be of any help to the B. P. T. and cannot form the basis of any charge. The institution of a disciplinary proceeding against an employee entails serious consequences and we are not prepared to condone the action of the B. P. T. in commencing such proceedings when the C. B. I. report indicated that there was no case against the employee. We are constrained to hold that either there was total non-application of mind on the part of the respondents, or more, likely, as alleged by Mr. Cama, the action was founded on malafides. In either case, there was no justification in law for the action". In my opinion the main reason was that there was no regulation in existence and the division bench held that it was not permissible to give retrospective effect to the said regulations. Secondly reliance on the regulations applicable to the Central Government Employees in respect of B. P. T. employees was also not found to be permissible by the division bench and thereafter with reference to the specific submissions of the learned counsel for the appellant therein, there has been a reference to the decision in Kalra" case as additional ground in support of rejecting the submissions made on behalf of the B. P. T. On

the other hand I find much substance in the submissions of Mr. Ramaswamy appearing for the B. P. T. that some reasonable and practicable view has to be taken in the matter and it cannot be that the B. P. T. could not have initiated any action against the employees only because the misconduct has not been defined or catalogued. Shri Ramaswamy in this behalf heavily relied upon the judgment of the Apex Court reported in 1993 I CLR 415 Union of India v. K. K. Dhawan. Although the principal issue before the Apex Court was can the authority enjoy immunity from disciplinary proceedings with respect to matters decided by him in exercise of quasi judicial functions. It requires to be stated that the rule with which the Apex Court was concerned, was almost identical with regulation 3(1). Rule 3 of the Central Civil Services (Conduct) Rules, 1964 is as under :

"3 (1) Every Government Servant shall at all time-

(i) maintain absolute integrity;

(ii) maintain devotion to duty; and

(iii) do nothing which is unbecoming of a Government servant."

In the facts before the Apex Court, the Apex Court observed that if there was any culpability or any allegation of taking bribe or trying to favour any party in exercise of quasi-judicial functions, then disciplinary action could be taken. In the facts before the Apex Court, the Apex Court found that the allegations of conferring undue favour is very much there and therefore certainly disciplinary action ins warranted. The Apex Court felt that it was not concerned with the correctness or legality of the decision of the concerned officer, but his conduct in discharge of his duty as such officer. Government is not therefore precluded from taking the disciplinary action for violation of the Conduct Rules and in the facts of the case as stated earlier, it was violation of rule 3, which has been quoted above, and which is identical with regulation 3(1). On consideration of the entire matter in the light of the submissions and decisions cited before me, therefore, I do not find any merit in the second submission of Shri Cama that no disciplinary proceedings can at all be held for breach of regulation 3(1).

15. Coming to the merits of the matter, though the appellate order is extremely unsatisfactory and in my opinion does not at all satisfy the requirements of regulation 26 of the Bombay Port Trust Employees (Classification, control and Appeal) Regulations, 1976, still that by itself will not be of any help to the petitioners,. Because the order of the disciplinary authority would be having its own force and independent existence. So far as the order of the disciplinary authority is concerned, it accepts the report of the Enquiry Officer. The report of the Enquiry Officer shows that several witnesses were examined before the Enquiry Officer. What is extremely relevant in the facts and circumstances of the case, is that the statements of these witnesses were recorded by the Vigilance Officer, much prior to even commencement of the criminal proceedings. The chargesheet was issued too the employees during the criminal proceedings and much prior to the judgment by the learned Magistrate. Therefore, the criticism

that the employer or the Bombay Port Trust has tried to improve upon the case after its failure to secure conviction of the employees, is without any force. As stated earlier not only chargesheets were issued much prior to the decision of the criminal court but in fact all the statements recorded by the vigilance officers and the list of witnesses was already given to the delinquents. Though as in the criminal trial most of the colleagues have gone back on their statements the evidence of watchman Patil has been very clearly corroborated and supported by evidence of P. W. 6 Abdul M. Abas Shaik, Assistant Shed Superintendent, as also to a large extent by evidence of Shri Kowlgi. After carefully examining the evidence of various witnesses, the Enquiry Officer has come to the conclusion that it is clear that these three employees who were posted for duty at No. 1. Uncleared warehouse removed articles from the said warehouse and were apprehended at the Red Gate, Indira Dock by PW. 1 in possession of unauthorised articles as mentioned in the panchanama without valid documents. The Enquiry Officer also found that the explanation given by the employees that the bags did not belong to them and the same were placed on them by watchman Patil is not satisfactory. It is pertinent to notice that the Enquiry Officer has also adverted to the fact that the acquittal of the employees in the criminal case and has given very good reason as to how and why inspite of the said acquittal, the Enquiry Officer has come to the conclusion that the charges as levelled in the departmental enquiry are substantiated. Having carefully gone through the report of the Enquiry Officer and the order of the disciplinary authority, I am of the opinion that there is enough material to form the basis of the conclusions reached by the Enquiry Officer which has been accepted by the disciplinary authority. In this view of the matter even on merits, I do not find that the petitioners have made out any case for interference by this Court in these writ petitions.

16. In the result all the petitions fail and the Rule is discharged in each of the petitions. However, there shall be no order as to costs.