
(2015) 03 SIK CK 0010
In the Sikkim High Court
Case No : Writ Petition(C) No. 17 of 2014

Wangchuk Tshering Bhutia

APPELLANT

Vs

State of Sikkim and Others

RESPONDENT

Date of Decision : 12-03-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 409

Citation : (2015) LabIC 2092

Hon'ble Judges : Sonam Phintso Wangdi, J.

Bench : Single Bench

Advocate : N. Rai, Senior Advocate, J.K.P. Jaiswal, Tamanna Chhetri and Bindu Gurung, for the Appellant; J.B. Pradhan, Additional Advocate General, Karma Thinlay Namgyal, Senior Government Advocate, S.K. Chhetri and Pollin Rai, Assistant Government Advocates, Advoca

Judgement

Sonam Phintso Wangdi, J.

1(i). By filing this Writ Petition, the Petitioner seeks to quash Office Order No. 237/FCSandCA dated 11-12-2012, Annexure 15, removing him from service and Office Order No. 203/FCSandCA dated 16-07-2014, Annexure 17, revoking the Office Order of termination in order to hold a fresh disciplinary proceedings against him in terms of Memorandum Ref. No. 1476/FCSandCA dated 14-09-1999, Annexure 6, issued by the Commissioner-cum Secretary, Food and Civil Supplies and Consumer Affairs Department (for short "FCSandCA"), Government of Sikkim and, for other consequential reliefs including reinstatement in service with all arrears of salary.

(ii) The case against the Petitioner has a long and chequered history. He was initially appointed in the post of Lower Division Assistant in FCSandCA on 03-03-1980 and promoted as Sub-Inspector on 20-01-1987 and assigned the charge of Food Godown at Singtam in which post he continued until he was suspended from his service.

(iii) As per report submitted by the Joint Controller, Weight and Measures, FCSandCA, physical verification of the Food Godown at Singtam carried out by him for the period 03-07-1995 to 30-09-1996, revealed shortage of rice and sugar worth Rs. 12,56,300.34 (Rupees twelve lakhs fifty six thousand three hundred and paisa thirty four). Based on this, the Petitioner was placed under suspension vide Office Order dated 18-12-1997 filed as Annexure 2 to the Writ Petition. Soon thereafter, the Joint Secretary of the Department also lodged a written complaint with the Sikkim Vigilance Police, Gangtok, which registered Case No. RC-4/98 under Section 409 of the Indian Penal Code (for short the "IPC") and took up investigation against the Petitioner. The investigation culminated in a charge-sheet filed in the Court of the Judicial Magistrate, East Sikkim at Gangtok, where Criminal Case No. 08 of 2000 was registered and trial commenced against him. After the trial, the Judicial Magistrate vide his judgment dated 29-04-2003, Annexure 1, convicted and sentenced the Petitioner for offence under section 409 IPC. Although he was placed under suspension vide Office Order dated 18-12-1997, Annexure 2, by the Respondent No. 2 contemplating disciplinary proceedings against him, it was only in the year 1999 vide Office Orders No. 125/FCSandCA Annexure 3 and, No. 126/FCSandCA, Annexure 4, both dated 15-07-1999, that Mr. L.P. Pandey, Deputy Secretary - I, as the Inquiry Authority to inquire into and Mrs. Doma Bhutia, Deputy Secretary (ADM), as the Presenting Officer for presenting the charges against the Petitioner, were appointed.

(iv) Later, vide Office Order dated 29-07-1999, Annexure 5, Mrs. Doma Bhutia was replaced by Mrs. Poonam Rapgyal as the Presenting Officer. A Memorandum of charges bearing No. 1476/FCS and CA dated 14-09-1999, Annexure 6, was issued against the Petitioner by the Commissioner-cum-Secretary, FCSandCA, enclosing therewith substance of imputations of misconduct or misbehaviour, Annexure I, Statement of the imputation of misconduct or misbehaviour in support of each article of charge, Annexure II and the list of documents and witness Annexures III and IV. The Inquiry Authority by his notice dated 12-11-1999, Annexure 7, directed the Petitioner to appear before him on 27-11-1999 at 11 a.m. The Petitioner in due compliance appeared before him on the date and time fixed but the proceedings were not taken up.

(v) Almost two years later the then Commissioner-cum-Secretary, FCSandCA vide Office Order dated 10-08-2001, Annexure 8, again appointed Mr. L.P. Barfungpa, Joint secretary, as the Inquiry Authority. By an Office Order of the same date i.e., 10-08-2001, Annexure 9, Mr. L.P. Pandey, Deputy Secretary-(I), the earlier Inquiry Authority, was appointed as the Presenting Officer to present the charges against the Petitioner. Mr. L.P. Barfungpa, Joint secretary, as the new Inquiry Authority, issued another notice dated 28.01.2002, Annexure 10, directing the Petitioner to appear before him on 01-02-2002 at 11.00 a.m. but, when the Petitioner did so as directed, again no proceeding was taken up.

(vi) Almost a year and the half after 01-02-2002 when he had appeared before

the Inquiry Officer, Memorandum No. 1117/FCS and CA dated 23-06-2003, Annexure 11, was issued to the Petitioner by Mr. S.C. Gupta, Commissioner-cum-Secretary, FCSandCA, conveying, inter alia, that in view of him being convicted and sentenced under Section 409 IPC in Criminal Case No. 8 of 2000, a major penalty for dismissal from his service was proposed which ordinarily would be a disqualification for future employment under the Government under Rule 3(ix) of the Sikkim Government Servants' (Discipline and Appeal) Rules, 1985 (for short "Rules of 1985"). An opportunity was thus provided to him to make a representation on the proposed penalty within one month from the date of receipt of the Memorandum.

(vii) In his representation dated 11-08-2003 Annexure 12, the Petitioner informed that an appeal against the order of conviction and sentence had been preferred by him in the Court of the Sessions Judge, East and North Sikkim at Gangtok, and the order of conviction and sentence passed by the Judicial Magistrate East at Gangtok had been stayed. The matter thus being sub judice it was requested that the Memorandum be kept at abeyance until disposal of the appeal. Nothing transpired thereafter, but after a period of almost 9 (nine) years, Mrs. Jemima Pradhan, the then Secretary, FCSandCA, issued with another Memorandum bearing No. 1400/FCS and CA dated 27-01-2012, Annexure 13, proposing to impose on him the penalty of removal from service again on the basis of the same order of his conviction in the criminal case, under Rule 3(viii) of the Rules of 1985 by invoking powers under Rule 7 of the Rules of 1985 prescribing special procedure in certain cases. An opportunity was also provided to the Petitioner to represent on the penalty proposed within one month from the date of the receipt thereof.

(viii) The Petitioner accordingly submitted a representation dated 27-02-2012, Annexure 14, once again requested for withdrawal of the Memorandum informing of the appeal filed by him against the order of conviction, the order being suspended by the Appellate Court and the arguments in the appeal being concluded and pending judgment. It had also been reminded that an appeal being continuation of the trial presumption of innocence of the accused continues even at the stage of an appeal until proven guilty.

(ix) In the meanwhile, the Sessions Judge by judgment dated 18-10-2012, Annexure 16, set aside the conviction and sentence passed by the Judicial Magistrate, East at Gangtok, acquitting the Petitioner of the charges under section 409 IPC. In spite of this and several requests thereafter, the Respondent No. 2, after almost one month issued Office Order No. 237/FCSandCA dated 11-12-2012 Annexure 15, removing the Petitioner from his service under Rule 3(viii) of the Rules of 1985 w.e.f. 26-11-2012 on the basis of the very order of conviction that had been set aside in Appeal.

(x) It is stated that since the basis of the disciplinary proceedings against the Petitioner had been rendered non est by virtue of the judgment of the Sessions Judge, East and North Sikkim at Gangtok, in Criminal Appeal No. 4 of 2005, the

Office Order dated 11-12-2012, Annexure 15, issued by the Respondent No. 2, removing the Petitioner from service, was bad in law, illegal and invalid.

(xi) During the course of the proceedings of the present Writ Petition, an application dated 21-07-2014 was filed on behalf of the Respondent No. 1 informing that the impugned Office Order dated 11-12-2012, Annexure 15, had since been revoked by Office Order No. 203/FCSandCA dated 16-07-2014, Annexure 17, as it was found to be in violation of principle of natural justice and a fresh disciplinary proceedings in terms of Memorandum No. 1476/FCSandCA dated 14-09-1999, Annexure 6, was decided to be held against the Petitioner.

(xii) It is alleged that the decision to initiate a fresh disciplinary proceedings after undergoing torture of more than 17 (seventeen) years was mala fide and arbitrary. Representation submitted to the Respondent No. 2 by the Petitioner on 28-07-2014 suggested by the Learned Additional Advocate General during the course of the hearing of the case, was also not responded to.

(xiii) It is thus, inter alia, prayed that an appropriate writ be passed quashing and setting aside the Office Order of removal dated 11-12-2012, Annexure 15, the Office Order No. 203/FCSandCA dated 16-07-2014, Annexure 17 and to reinstate the Petitioner in service with arrear salary and other dues.

2. In their counter-affidavit, the Respondents have not denied the factual aspects set out in the Writ Petition and have admitted to the sequence of events found in the averments contained therein. Their contention was that on being issued with the Memorandum of charges, the Petitioner had admitted having misused Government money when he was in-charge of the Singtam Food Godown but, not to the extent of Rs. 12,56,300.34 (Rupees twelve lakhs fifty six thousand three hundred and paise thirty four) as alleged. It was also stated that the Office Order of removal of the Petitioner from service dated 11-12-2012, Annexure 15, was revoked in order to initiate a fresh disciplinary proceedings in terms of the first Office Memorandum dated 14-09-1999, Annexure 6, having found to have been issued in violation of the principle of natural justice. It was alleged that the impugned Office Order of termination dated 11-12-2012, Annexure 15, had been issued considering that the case had been pending for long and that the Petitioner had initially admitted having misused Government money which he had assured to refund on instalments. It was alleged that as the Petitioner later did not turn up, the case had remained pending. That it was after long deliberations and based on the opinion of the Learned Advocate General and in consultation with the Sikkim Public Service Commission and approval of the Government that the impugned Office Order dated 11-12-2012, Annexure 15, was issued removing the Petitioner from service under Rule 3(viii) by the Secretary, FCSandCA, invoking Rule 7 of the Rules of 1985.

3(i). Mr. N. Rai, Learned Senior Counsel, appearing on behalf of the Petitioner, argued on two premises. Firstly, it was submitted that the impugned Office Order of termination dated 11-12-2012, Annexure 15, could not be sustained as it was

issued on the basis of the judgment of the Judicial Magistrate, East Sikkim at Gangtok in Criminal Case No. 8 of 2000 dated 29-04-2003 convicting the Petitioner, which had since been set aside by the Sessions Judge, East and North Sikkim at Gangtok in Criminal Appeal No. 04 of 2005 dated 18-10-2012 acquitting the Petitioner of the charge under Section 409 IPC as the prosecution had failed to prove its case beyond reasonable doubt. In support of his submission, Mr. Rai drew the attention of this Court to various parts of the judgment to demonstrate that the prosecution had completely failed to establish the offence under Section 409 IPC against the Petitioner.

(ii) The allegation of the Petitioner having admitted embezzling Government money was rebutted squarely by referring to the application said to have been submitted by him to that effect. He states that far from admitting, the Petitioner had in no uncertain terms stated that he had been placed under suspension because of untallied godown account and that he be permitted to settle it on instalments which was accepted by the Respondents as would appear from the discussions found in the judgment of the Sessions Judge in Appeal. He would further submit that both the FCSandCA and the Vigilance Department were not certain of the amount said to have been embezzled thereby revealing the falsity of the prosecution case.

(iii) It was thus submitted that as the disciplinary proceedings had been instituted against the Petitioner on the very same charge alleged in criminal case from which he had been given a clear acquittal, removing him by way of punishment vide the impugned Office Order dated 11-12-2012, Annexure 15, was untenable and bad in law and liable to be quashed and set aside as such.

(iv) In support of his submission, reliance was placed by G.M. Tank Vs. State of Gujarat and Another, , Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, as also the judgment of the Madurai Bench of the Hon'ble Madras High Court dated 21-12-2012 in Writ Petition No. 3898 of 2008 and M.P. (MD) Nos. 1 and 2 of 2008 in the matter of N. Ramakrishnan v. The Deputy Inspector General of Police, Tirunelveli Range.

(v) The second premise on which Mr. Rai sought to assail the action of the Respondents is the inordinate and unexplained delay in the conduct of the disciplinary proceedings against the Petitioner. He would argue that the Petitioner was suspended from his service way back on 18-12-1997 but the Inquiry Officer and the Presenting Officer were appointed only on 15-07-1999 and the first Memorandum of charge was issued on 14-09-1999 by the Inquiry Authority followed by a notice issued by him directing the Petitioner to appear before him. Although he appeared before the Inquiry Authority on the date and time fixed, no proceedings were taken up thereafter.

(vi) Almost 2 (two) years later, by Office Order dated 10-08-2001 issued by the Respondent No. 2 Inquiry Authority and the Presenting Officer appointed earlier were replaced but, the new Inquiry Authority, except for issuing the Petitioner

with notice dated 28-01-2002, did not do anything further. It was only about one and a half years later that the Petitioner received Office Memorandum dated 23-06-2003, Annexure 11, issued by the Respondent No. 2, stating that in view of his conviction by the Court of the Learned Judicial Magistrate, East Sikkim, it was proposed to impose on him the penalty of dismissal from service under Rule 3(ix) which ordinarily would be a disqualification for future employment and that an opportunity of making representation was being provided to him.

(vii) After the Petitioner had represented in compliance to the directions contained in the Office Memorandum dated 23-06-2003, Annexure 11, again no further action followed but, it was only after almost 9 (nine) years, the Secretary, FCSandCA issued Memorandum dated 27-01-2012, Annexure 13, reiterating the decision to impose major penalty on the Petitioner but under a revised provision being Rule 3(viii) by purportedly invoking Rule 7 of the Rules of 1985. Mr. Rai then drew the attention of this Court to the representation dated 27-02-2012, Annexure 14, submitted by the Petitioner in response to the Memorandum to emphasise that he had once again conveyed to the Respondent No. 2 that the judgment of the Judicial Magistrate convicting the Petitioner had been suspended in the Appeal filed by him before the Sessions Judge and that since the matter was sub judice the Memorandum be kept at abeyance until the Appeal was disposed of.

(viii) However, despite this, the Secretary, FCSandCA after 11 (eleven) months issued the impugned Office Memorandum dated 11-12-2012, Annexure 15, removing the Petitioner from his service based upon his conviction in Criminal Case No. 8 of 2000 vide judgment of the Judicial Magistrate, East Sikkim dated 29-04-2003. It was submitted that the entire exercise taken by the Respondents against the Petitioner was arbitrary and mala fide.

(ix) That mala fide on the part of the Respondents, particularly Respondent No. 2, became manifest when, during the pendency of the Writ Petition, the Respondent No. 1 placed before this Court Office Order No. 203/FCSandCA dated 16-07-2014, Annexure 17, whereby the impugned Office Order dated 11-12-2012, Annexure 15, stood revoked as it had been decided to hold a fresh disciplinary proceedings in terms of the first Memorandum dated 14-09-1999, Annexure 6, ostensibly for the reason that in the opinion of the FCSandCA, the order of removal under Rule 3(viii) of the Rules of 1985 being a major penalty, the principle of natural justice had to be abided by. Strongly assailing the Office Order, Mr. Rai submitted that it was a device to inflict harassment and torture on the Petitioner afresh after having suffered the agony of being placed under suspension for more than 17 (seventeen) years. It was submitted that inordinately long pendency of the disciplinary proceedings was due to the leisurely manner in which it was taken up to the detriment of the Petitioner. It was submitted that since the disciplinary proceedings and the criminal case against the Petitioner were taken up parallelly, there was no impediment for the Respondents to have concluded the disciplinary proceedings expeditiously. The

fact that they did not and allowed it to drag on for a period of almost 2 (two) decades revealed the mala fide and arbitrariness on the part of the Respondents.

(x) In support of his contentions, Mr. Rai placed the case of *The State of Madras Vs. K.A. Joseph*, and judgment dated 19-03-2012 in Writ Petition No. 23452 of 2010 and M.P. Nos. 2 and 3 of 2010 in the matter of *M. Asaithambi v. The Director of Municipal Administration, Chepauk, Chennai and Others*, and submitted that in the latter case, resting on the decision of the Apex Court in *P.V. Mahadevan Vs. M.D., Tamil Nadu Housing Board*, where it had taken 10 (ten) years in initiating a disciplinary proceeding, it was held that proceeding further with such proceeding would be prejudicial to the delinquent.

(xi) The Learned Senior Counsel further went on to submit that in the case of the Petitioner even the payment of subsistence allowance was stopped after the impugned Office Order of removal dated 11-12-2012, Annexure 15, was passed against the Petitioner when the very ground of such removal ceased to exist after he was acquitted by the Appellate Court. It was submitted that the period of suspension undergone by the Petitioner, which was more than 17 (seventeen) years, was far in excess of even the punishment provided for the offence under Section 409 IPC. The decision to hold a fresh disciplinary action now on the basis of a Memorandum belatedly issued in the year 1999 after being kept under suspension since the year 1997, amounted to perpetuation of illegality and infliction of endless agony, hardship and torture on the Petitioner. Mr. Rai submits that no reason has been given, let alone acceptable reason, for the delay caused in completing the disciplinary proceedings against the Petitioner within a reasonable time.

(xii) For all these reasons, it was his submission that both the impugned Office Order dated 11-12-2012, Annexure 15 and Office Order of his revocation dated 16-07-2014, Annexure 17, deserved to be quashed and set aside and the Petitioner reinstated in service honourably with all back salary.

4(i). In reply, Mr. J.B. Pradhan, Learned Additional Advocate General, on the other hand, submitted that there was no bar under the law to continue with the disciplinary proceedings in spite of the acquittal of the Petitioner in the criminal case. That the nature of the departmental proceedings and proceedings in a criminal case widely differ in as much as in a criminal case onus lies upon the prosecution to prove its case beyond reasonable doubt but, in the disciplinary proceedings such burden is not placed on the Disciplinary Authority as the strict rule of evidence does not apply. It was further his submission that the charge in the criminal case and the one in the disciplinary proceedings against the Petitioner are not the same. He clarifies that while in the criminal case it is an offence of misappropriation of Government fund, the case against the Petitioner in the disciplinary proceedings would also include dereliction of his duties and cognate misconduct apart from the misappropriation of funds. As per Mr. Pradhan, the argument on this aspect placed on behalf of the Petitioner was misconceived.

(ii) It was further stated that if the submission that the two charges were identical as asserted on behalf of the Petitioner, he would certainly have been entitled to the disciplinary proceedings against him being dropped if he had got an honourable acquittal in the criminal case. But the acquittal being for the reason that the prosecution had failed to produce credible evidence, he was not entitled to such benefit. The following decisions were cited by him in support of his contention:--

"(a) Depot Manager, Andhra Pradesh State Road Transport Corporation Vs. Mohd. Yousuf Miya, etc., ;

(b) Nelson Motis Vs. Union of India and another, ;

(c) Chairman-cum-M.D., T.N.C.S. Corpn. Ltd. and Others Vs. K. Meerabai, ;

(d) Suresh Pathrella Vs. Oriental Bank of Commerce, ;

(e) Union of India (UOI) and Others Vs. Naman Singh Sekhawat, ;

(f) Avinash Sadashiv Bhosale (D) Thr. L.Rs.. Vs. Union of India (UOI) and Others, ; and

(g) The Deputy Inspector General of Police and Another Vs. S. Samuthiram, .

Mr. Pradhan submits that the case of the Respondents is fully covered by Yousuf Miya (supra).

(iii) On the second premise argued by Mr. Rai, he admits that there had been delay in the conduct of the disciplinary proceedings but as this aspect was not taken by the Petitioner in the Writ Petition where the thrust was only on first premise, it had not been dealt with comprehensively by the Respondents in the counter-affidavit. It was, however, submitted that delay was caused on account of the Petitioner not following up with the disciplinary proceedings. As per him, he ought to have applied for its early disposal by appearing before the Inquiry Authority. Since he did not do so, the delay was squarely on account of his negligence. Even otherwise, as per him, as per the law laid down in Chairman, LIC of India and Others Vs. A. Masilamani, the disciplinary proceedings could not be held to be bad for the sole reason of delay.

5. Heard the Learned Counsel for the parties and examined the pleadings and the documents on record. The law on the two premises argued by Mr. N. Rai, Learned Senior Counsel on behalf of the Petitioner, appears to be well-settled.

6(i). Taking up the first premise for convenience, the thrust of argument of the Learned Senior Counsel was that the Petitioner was discharged honourably as the prosecution had failed to prove its case beyond reasonable doubt and acquitted accordingly. The facts on the basis on which the disciplinary proceedings had been instituted against the Petitioner being the same based on the same materials and evidence, the Respondents ought to have dropped the disciplinary proceedings and the Petitioner reinstated in service.

(ii) There are catena of decisions of the Apex Court on this but, we may refer to G.M. Tank (supra) relied upon on behalf of the Petitioner. The Hon"ble Supreme Court after noticing several of its earlier decisions commencing from Capt. M. Paul Anthony (supra), R.P. Kapur Vs. Union of India (UOI) and Another, , Corporation of the City of Nagpur, Civil Lines, Nagpur and another Vs. Ramchandra and others, , Management of Krishnakali Tea Estate Vs. Akhil Bharatiya Chah Mazdoor Sangh and Another, , Ajit Kumar Nag Vs. General Manager (P.J.), Indian Oil Corporation Ltd., Haldia and Others, , Yousuf Mian (supra) and State of Andhra Pradesh Vs. Sree Rama Rao, , held as follows:--

"30. The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a departmental case against the appellant and the charge before the criminal court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts, namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer, Mr. V.B. Raval and other departmental witnesses were the only witnesses examined by the enquiry officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand.

31. In our opinion, such facts and evidence in the department as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though finding recorded in the domestic enquiry was found to be valid by the courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed."

(underlining mine)

(iii) The above finding was based on the fact that the disciplinary proceedings launched against the Petitioner had been completed and the Petitioner had been found guilty of the charge resulting in his dismissal from service as punishment. This was sought to be set aside after he was honourably acquitted in the criminal case which had been launched on the same set of charges.

(iv) In Capt. M. Paul Anthony (*supra*) relied upon by Mr. Rai, it has been held that a proceeding in a criminal case and departmental proceedings can proceed simultaneously, the basis of the proposition being that proceeding in a criminal case and the department proceedings operate in distinct and different jurisdictional areas. We may reproduce below the relevant portion of the decision:--

"13. As we shall presently see, there is a consensus of judicial opinion amongst the High Courts whose decisions we do not intend to refer to in this case, and the various pronouncements of this Court, which shall be copiously referred to, on the basic principle that proceedings in a criminal case and the departmental proceedings can proceed simultaneously with a little exception. As we understand, the basis for this proposition is that proceedings in a criminal case and the departmental proceedings operate in distinct and different jurisdictional areas. Whereas in the departmental proceedings, where a charge relating to misconduct is being investigated, the factors operating in the mind of the disciplinary authority may be many such as enforcement of discipline or to investigate the level of integrity of the delinquent or the other staff, the standard of proof required in those proceedings is also different than that required in a criminal case. While in the departmental proceedings the standard of proof is one of preponderance of the probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt. The little exception may be where the departmental proceedings and the criminal case are based on the same set of facts and the evidence in both the proceedings is common without there being a variance."

(underlining mine)

(v) On a consideration of the decisions cited at the bar, it clearly emerges that the acquittal of an employee in a criminal case ought to be an honourable one if the findings of the disciplinary proceedings is to be dropped for that reason. Secondly, in order to be entitled to such advantage, it is the "charge" in the criminal case and the disciplinary proceedings that ought to be identical.

(vi) On the first aspect on the question as to whether the acquittal of the Petitioner was an honourable one or not it would be essential to examine the judgment of the Learned Sessions Judge dated 18-10-2012 in Criminal Appeal No. 4 of 2005.

(vii) On a careful perusal of the judgment the Appellate Court found serious

discrepancies in the calculations on the part of the authorities that led to the Petitioner being charged with the offence as would appear in paragraphs 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 126, 127, 129 and 131. This assumes significance because the foundation of the case against the Petitioner is the purported shortage detected in the godown of which he was the In-charge.

(viii) The Learned Sessions Judge also was of the view that both the FCSandCA and the Vigilance Department were not confident of the shortage found either during the physical verification or by its own investigation but had left the matter to be decided by the Court.

(ix) Paragraph 124 of the judgment of the Appellate Court reveals that the physical verification was conducted in the godown when the Petitioner was on official tour when it would have been in keeping with the principle of natural justice that he was given an opportunity to be present at that time.

(x) Question was also raised as to why the allegations contained in the complaint was filed after a delay of 15 (fifteen) months. It was also noticed that the department had not drawn up a Manual, Code or specific Office Order dealing with the works of the in-charge of the Food Godown. Even the Chowkidar used to receive and distribute foodgrains thereby leading the Court to assume that the shortfall could have been caused by the Chowkidar who had access to the keys of the godown as established by evidence. It was, therefore, held that the prosecution had failed to establish by cogent evidence and calculations that the Petitioner had committed criminal breach of trust in respect of the property entrusted to him.

(xi) In the case of G.M. Tank (supra) the following passage from the Constitutional Bench decision of R.P. Kapur (supra) has been quoted:--

"10. If the trial of the criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant so convicted, even in case of acquittal proceedings may follow where the acquittal is other than honourable." (xii) Similarly, in Corporation of the City of Nagpur (supra), it has been held that -

"6. Normally where the accused is acquitted honourably and completely exonerated of the charges it would not be expedient to continue a departmental inquiry on the very same charges or grounds or evidence, but the fact remains, however, that merely because the accused is acquitted, the power of the authority concerned to continue the departmental inquiry is not taken away nor is its direction (discretion) in any way fettered." (xiii) As held in the case of Yousuf Mian (supra) there cannot be an inflexible rule of universal applicability and each case requires to be considered in the backdrop of its own facts and circumstances.

(xiv) Similar has been the view in R.P. Kapur (supra) and Corporation of the City

of Nagpur (supra). In view of the finding of the Learned Sessions Judge, there can be no doubt that the acquittal of the Petitioner was an honourable one.

(xv) Having held so, it would be essential to consider as to whether such acquittal would call for the disciplinary proceedings pending against him being dropped. For better appreciation, we may reproduce the charge framed against him in the criminal case and the disciplinary proceedings:--

"Charge framed against the Petitioner by the Court of the Learned Judicial Magistrate, East Sikkim at Gangtok in Criminal Case No. 8 of 2000

"..... That you, on or about the period from 3.7.95 to 30.9.96 while you were In-charge, Singtam Food Godown and entrusted with departmental property, upon a departmental enquiry conducted by the Joint Controller (W/M) Food and Civil Supplies Department, was found to have committed Criminal Breach of Trust in respect of the property as a total sum of Rs. 12,56,300/34 p was found to be shortage from the over all accounts,

And thereby committed an offence punishable under Sec. 409 of the IPC and within my cognizance"

Statement of charge framed against the Petitioner filed with the Memorandum dated 14-09-1999

"That the said Mr. Wangchuk Tshering Bhutia, S.I. while functioning as Incharge, Singtam Food Godown during the period from 03.07.95 to 30.9.96 has mis-appropriate Government money to the tune of Rs. 12,56,300.34 (as per PV reports submitted by Joint Controller, W/M Cell).

Therefore, you have violated Rule 3 of the Sikkim Government Servants' Conduct Rules, 1981."

(underlining mine)

(xvi) Rule 3 of the Sikkim Government Servants' Conduct Rules, 1981, being relevant is reproduced below:--

"3. General.-

(i) Every Government Servant shall at all times -

(a) maintain absolute integrity,

(b) maintain devotion to duty,

(c) do nothing which is unbecoming of a Government Servant.

(ii) Every Government Servant holding a supervisory post shall take all possible steps to ensure the integrity and devotion to duty of all Government Servants for the time being under his control and authority.

(iii) No Government Servant shall, in the performance of his official duties or in

the exercise of powers conferred in him, act otherwise than in his best judgment except when he is acting under the direction of his official superior and shall, when he is acting under such direction, obtain the direction in writing, wherever practicable, and where it is not practicable to obtain the direction in writing, he shall obtain written confirmation of the direction as soon thereafter as possible.

Explanation.--Nothing in Rule 3 shall construe as empowering a Government Servant to evade his responsibilities by seeking instructions from, or approval of, a superior officer or authority when such instructions are not necessary under the scheme of distribution of powers and responsibilities."

(xvii) Quite obvious from the above, the charge in the two proceedings are quite distinct. While the charge in the criminal trial is to inflict appropriate punishment on the Petitioner for the offence under Section 409 IPC, the purpose of enquiry proceedings on the other hand was to deal with him departmentally and to impose penalty on charges of misconduct involving moral turpitude under Rule 3 of the Sikkim Government Servants' Conduct Rules, 1981.

(xviii) In Yousuf Mian (supra) relied upon by the Learned Additional Advocate General, it has been held as under:--

"8. The purpose of departmental enquiry and of prosecution are two different and distinct aspects. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Evidence Act. Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. The enquiry in the departmental proceedings relates to the conduct of the delinquent officer and proof in that behalf is not as high as in an offence in criminal charge. The nature of evidence in criminal trial is entirely different from the departmental proceedings. In the former, prosecution is to prove its case beyond reasonable doubt on the touchstone of human conduct. The standard of proof in the departmental proceedings is not the same as of the criminal trial. The evidence also is different from the standard point of the Evidence Act. The evidence required in the departmental enquiry is not regulated by the Evidence Act." (xix) Similar has been the view in G.M. Tank (supra) and the other decisions cited at the bar.

(xx) It thus follows that the scope of departmental enquiry and a criminal prosecution are different. The onus charged upon the prosecution is heavy and it has to prove the case against the Petitioner beyond reasonable doubt based upon the principles of law of evidence strictly. This is not the case in a disciplinary proceedings where the strict law of evidence is not applicable and is decided on the principle of preponderance of probabilities.

(xxi) In the light of the above discussions, I am of the view that even though the acquittal of the Petitioner in the criminal case was an honourable one it will make no difference to the disciplinary proceedings as the charge in the two proceedings are distinct as already alluded to.

(xxii) The submission on the first premise placed by Mr. Rai on behalf of the Petitioner would thus fail.

7(i). The second premise on which the Petitioner contends is the inordinate delay in the conduct of the disciplinary proceedings. From the undisputed sequence of events narrated earlier, one cannot but hold that the Respondents have not been aboveboard in the conduct of the disciplinary proceedings. On a perusal of the relevant file pertaining to the disciplinary proceedings, it is noticed that the Disciplinary Authorities were not at all diligent and serious. It reveals that they were rather unsure of the actions to be taken and found dithering very often.

(ii) As submitted on behalf of the Petitioner, the entire exercise was being taken up by the Authorities in a leisurely manner spanning a period of almost 18 (eighteen) years now and, from the Respondent's own case, it is even yet to commence, if the second impugned Office Order dated 16-07-2014, Annexure 17, is permitted to survive. This is evident also from the fact that way back on 27-11-1999, the Inquiry Authority had disposed of the case on the finding that the Petitioner did not admit before him that he would repay Government money and would rather face the enquiry and trial. We need not delay ourselves on the rest of the sequence of events for the sake of brevity as those have been alluded to in detail earlier and are undisputed.

(iii) Mr. N. Rai, Learned Senior Counsel strongly argues that the inordinate delay in the conduct of the disciplinary proceedings was not only arbitrary but also mala fide. The dismissal of the Petitioner by the Office Order dated 11-12-2012, Annexure 15, could not be sustained not only for the reason that the Petitioner had been acquitted honourably in the criminal case on the same charge but, also because of the delay.

(iv) Reference was made to the case of P.V. Mahadevan (supra) in which the Hon'ble Supreme Court quoting the cases of The State of Madhya Pradesh Vs. Bani Singh and another, and State of Andhra Pradesh Vs. N. Radhakishan, held as follows:--

"11. Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary enquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry.

The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer." (v) As noted above, several decisions of the Hon'ble Madras High Court were also cited.

(vi) Curiously, when it is the case of the Respondents that the charge against the Petitioner in the departmental proceedings is very serious and, that it had commenced almost simultaneously with the criminal case, in fact even before the criminal trial had begun, it is not understood as to why it was not concluded expeditiously when there was no impediment whatsoever for the Respondents in doing so. No plausible explanation was forthcoming from them except to state that the Petitioner had failed to appear in the proceedings, a statement which is not supported by any material except for a bald pleading to that effect in their counter-affidavit.

(vii) In *N. Radhakishan* (supra) in which the question of delay in disciplinary proceedings was involved it was held as follows:--

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

considerations." (viii) It is undisputed that it took 15 (fifteen) years long for the FCSandCA to issue Office Order of removal dated 11-12-2012, Annexure 15, of the Petitioner from service which admittedly was in violation of principle of natural justice as well as Rule 3 of the Rules of 1985 having failed to give the Petitioner an opportunity to make a representation against the penalty imposed. It then took 2 (two) more years, that too during the pendency of this Writ Petition, to issue Office Order dated 16-07-2014, Annexure 17, revoking the said Office Order having realised the error in issuing it.

(ix) In the very cases of Yousuf Mian (*supra*) and Avinash Sadashiv Bhosale (*supra*) it has been held that it would be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible and that the interest of the delinquent officer as well as the employer lies in a prompt conclusion of the disciplinary proceedings. It is needless to mention that similar view has been taken in a catena of other decisions.

(x) Records reveal that even the Inquiry Officer in his order dated 27-11-1999 evidently was not satisfied with the manner of physical verification conducted by the concerned officers and the dues shown against the Petitioner. Re-verification of the amount, as per him, was not possible at that stage as records of the profit deposited by the Petitioner during the questioned period, the stock register and the sale proceeds along with the relevant register, etc., were with the Vigilance Department in connection with the enquiry against the Petitioner. In view of this, the case was disposed by him.

(xi) From facts and circumstances, it is quite evident that the proceedings against the Petitioner is based on materials of which the Respondents were unsure of. The Petitioner in his representation dated 11-08-2003, Annexure 12, had clearly stated that he was placed under suspension because of some untallied godown account with that of the office and had requested for permission to settle those after proper verification of the accounts on instalments within 2 (two) years. The record of proceedings reveal that vide letter dated 26-10-1998, this request had been acceded to and accordingly was allowed to deposit Rs. 5,40,000/- in the first instance for the period January, 1998 to September, 1998 and the balance in monthly instalments of Rs. 60,000/- until the entire shortage was cleared.

(xii) Even after this, bereft of any reason the proceeding continued culminating in the impugned Office Order dated 11-12-2012, Annexure 15, i.e., 14 (fourteen) years later, being issued by which the Petitioner was removed from service. Curiously, after almost 2 (two) years, this order was withdrawn with the decision to conduct the disciplinary proceedings de novo against the Petitioners. In the first instance when the dismissal order, Annexure 15, was under consideration by this Court, the Respondents ought to have sought leave to withdraw the impugned Office Order dated 11-12-2012, Annexure 15 and to issue the fresh Office Order dated 16-07-2014, Annexure 17, which obviously was not done. Be that as it may, decision to commence the disciplinary proceedings de novo now,

after almost 18 (eighteen) years, in my view, is grossly unjust and reflects the absolute callousness on the part of the Respondents.

(xiii) As held in N. Radhakishan (supra) this Court has to take into consideration all the relevant factors and to balance and weigh them to determine if it is in the interest of justice calling honest administration that the disciplinary proceedings should be allowed to terminate after delay when the delay is abnormal and there is no explanation therefor. The delinquent employee has a right for expeditious conclusion of the disciplinary proceedings against him and is not made to undergo mental agony and monetary loss due to unnecessary prolongation of the proceedings for no fault of his. The delay being unexplained, prejudice to the delinquent employee is writ large on the face of it reflecting also the lack of seriousness on the part of the Disciplinary Authority in pursuing the charges against the Petitioners.

(xiv) In the present case, nothing has been shown to indicate that the Petitioner was responsible for the delay. There is also no proper explanation on the part of the Respondents for such delay. Having regard to the nebular premises under which the Petitioner has been charged as revealed from the discussions alluded to above, I have no hesitation in holding that the delay has caused serious prejudice to the Petitioner.

8(i). In the above facts and circumstances, the prayer for quashing or setting aside or cancellation of the termination or the removal of the Office Order No. 237/FCSandCA dated 11-12-2012, Annexure 15, ought to have been allowed. However, passing such an order would now be redundant and superfluous since it already stands withdrawn by Office Order dated 16-07-2014, Annexure 17.

(ii) The predicament with which the Court is now faced with is as to whether or not Office Order being No. 203/FCSandCA dated 16-07-2014, Annexure 17, should be quashed.

9(i). I have given thoughtful and anxious consideration to the entire facts and circumstances.

(ii) There is no doubt that the records of the enquiry proceedings reveal that the proceedings were being carried out perfunctorily without direction.

(iii) However, since the charge under the disciplinary proceedings involve question of moral turpitude and integrity, it would not be appropriate for this Court to quash the Office Order dated 16-07-2014, Annexure 17, although there has been an inordinate delay with the inherent inadequacies in the proceedings alluded to above.

(iv) It would rather be in the interest of justice if the Petitioner faces the disciplinary proceedings in which all defences would be available to him to establish that he was not guilty of the misconduct charged against him as well as effective redressal of Appeal in the Rules in the event of his being dissatisfied with the proceedings and its result.

10(i). In view of this, the Writ Petition stands disposed of with the following directions:--

(ii) The disciplinary proceedings against the Petitioner, if the State-Respondents intend to initiate one, should be commenced with at the earliest. While taking up the proceedings, the State-Respondents/Disciplinary Authority shall take into account the following:--

(a) (i) The case of the Petitioner is clearly a case of untallied accounts. This is obvious from his application dated 06-01-1998 at CP 13 of the part file of FCSandCA pertaining to the disciplinary proceedings in which it has, inter alia, been stated that --

"....."

That I beg to bring the facts of my service rendered so far to the department concerned without any adverse remark, but this is the first time in the long tenure of my service carrier, which I am facing with such situation, which I feel most unfortunate.

I most magnanimously beg to pray before your honour to be so gracious enough that I may very sympathetically be allowed to clear all the dues which is drawn against me on instalment basis within the period of 2 (two) years.

....."

(ii) This also is the finding of the Learned Sessions Judge in Appeal which has not been challenged by the State-Respondents by filing a revision before this Court. Reference in this regard may also be made to the note of the Deputy Secretary - I, FCSandCA, who was also the Presenting Officer, dated 27-11-1999 at NSP 43 of the part file of FCSandCA pertaining to the disciplinary proceedings, referred to earlier, more particularly -

"....."

The undersigned also appraised him of the fact that he had submitted one written application dated 6-1-99, to the Commissioner cum Secretary, Food and Civil Supplies Department stating that he was ready to repay the misappropriated amount of Rs. 12,56,300.34 paise on instalment basis. In reply to this, Shri Wangchuk Tshering Bhutia has submitted that he had hurriedly submitted that application to the Commissioner cum Secretary, Food, with the hope that the Department would consider revocation of his suspension order and also to avoid legal complication (sic). But when he saw that immediately on submission of the said application to the Commissioner cum Secretary the case was forwarded to vigilance Department for enquiry. He does not confirm with the written application given by him to the Secretary, Food, regarding re-payment of the Governments money used by him on instalment basis. He submits that he is not satisfied with the manner of physical verification conducted by the officers concerned and the dues shown against him. According to his own statement (sic)

of account, the misappropriated money may come to Rs. 8-9 lakhs only out of which Rs. 2.27 lakhs approx is to be made as book adjustment in the Head Office. Therefore, he is not convinced with the calculation done. Hence, he wants re-verification (sic) of the accounts of the period.

....."

(iii) The Petitioner's representation dated 19-01-2001 addressed to the Hon'ble Chief Minister at CP 73 of the part file of FCSandCA pertaining to the disciplinary proceedings which contains the following:--

"Most humbly and respectfully, I beg to state that I was placed under suspension vide Food and Civil Supplies Department's Office Order No. 2680/FCS dated 18.12.1997 on the ground that while functioning as In-Charge, Singtam Godown, my godown accounts did not tally with those maintained by the Department and there was a huge deficit. I even requested the Department to reconcile the figures through an experienced and expert Accounts Officer but my requests were ignored. Despite a lapse of more than three years, my case has not been resolved.

.....

4. That Sir, if the accounts figures are reconciled once again through some Accounts expert and a definite figure is arrived at, I am prepared to settle the amount so that the Government does not have to incur losses.

5. That sir, considering my immense difficulties, agonies and problems being encountered by me for more than three years since my suspension from service, I pray that Your Honour taking a humanitarianly compassionate and lenient view, be most graciously kind enough to order for withdrawal of the court case filed against me, revoke my suspension order and reinstate me in service. Once again, I assure Your Honour that once definite and actual deficit figures are arrived at to my satisfaction, I will deposit the amount in deficit in suitable instalments to the Government till final clearance. May your honour be also pleased to appreciate that remaining under suspension for indefinitely long time will not allow me to clear off the dues. Hence this humble petition for mercy to resolve my case."

(iv) The note of the Joint Secretary dated 09-01-2012 at NSP 88 of the part file of FCSandCA pertaining to the disciplinary proceedings which contains the following remarks:--

".....

Therefore, since no conclusive Inquiry Report is available in the records of the Department and wherein a lot of time has lapsed and Officers who were well versed with this case have been transferred to other Departments, we may have no option but to invoke Rule 7 of the Sikkim Government Servant's Rule (Discipline and Appeal) Rule, 1985 in these circumstances and issue a

memorandum giving him one month time to submit his defense in writing or in person to the Disciplinary Authority who is the Secretary of the Department in this case and thereafter, the D.A. may impose a penalty taking into consideration the merit of this case which lead to his conviction on a criminal charge in the first instance. Thereafter, SPSC may be consulted if the D.A. concludes that he should be imposed any one of the Major Penalties under Rule 3 of the Sikkim Government Servant's Rule (Discipline and Appeal) Rule, 1985.

....."

(v) Perhaps, the most telling of them all is the note of the Under Secretary dated 25-07-2012 at NSP 101 of the part file of FCSandCA pertaining to the disciplinary proceedings:--

"14. On having been placed under suspension for a longer period, a lot of disadvantages has appeared as detailed below:--

i) The Department is facing shortage of man power, since the department has to look after 27 Food Godown in the State.

ii) The Department has been paying Subsistence Allowance to the Suspended official without performance of any duty.

iii) Promotion of a Senior Sub-Inspector, who is just below Shri Bhuita in seniority, has been withheld by SPSC. Out of 4 vacancies, 3 Sub-Inspector have already been promoted to the posts of Inspectors on recommendation of SPSC and approval of the Government.

iv) The concerned Sub-Inspector of this Department has been deprived of his promotion without any fault. As a matter of natural justice, he should be given promotion at the earliest please."

(vi) Therefore, having regard to the indisputable fact that the case of the Petitioner pertains to untallied accounts, this aspect be taken serious note of in the disciplinary proceedings.

(b) The representation dated 28-07-2014 submitted by the Petitioner on the suggestions of the Learned Additional Advocate General made during the course of the hearing of this case on 25-07-2014, admittedly has not been considered and disposed of despite the advice of the Learned Additional Advocate General in his opinion dated 13-08-2014. This presumably may be due to the pendency of this case. The representation, therefore, shall also be considered in the disciplinary proceedings along with facts indicated under the foregoing directions.

(c) Apart from the above, the following shall also be taken as factors for consideration in the disciplinary proceedings:--

(i) The facts and circumstances set out in paragraphs 6(vii), 6(viii), 6(ix), 6(x), 7(i), 7(ii), 7(vi), 7(viii), 7(x), 7(xi), 7(xii), 7(xiii) and 7(xiv) above.

(ii) No appeal was filed by the State Government against the judgment of the

Learned Sessions Judge honourably acquitting the Petitioner of the charge under Section 409 IPC thereby giving finality to the judgment.

(iii) 18 (eighteen) years have gone by due to the delay in the disciplinary proceedings and, now the age of the Petitioner is about 55 (fifty five) years with just about 3 (three) years left for superannuation.

(d) Since the impugned Office Order dated 11-12-2012, Annexure 15, stood revoked by Office Order dated 16-07-2014, Annexure 17, by implication the order of suspension dated 18-12-1997, Annexure 2, would stand restored thereby entitling him to the subsistence allowance withheld from December, 2012. The amount accumulated on that account be paid to the Petitioner forthwith and the rest of it occurring from month to month be paid to him regularly until a decision is taken in the disciplinary proceedings.

(e) The entire disciplinary proceedings shall be completed within a period of 90 (ninety) days from the date of this judgment and not later than that.

11. No order as to costs.

12. The part file of the Petitioner bearing No. GOS/1(43)/84 of the FCSandCA containing records of the department along with disciplinary proceedings be returned to the State-Respondent No. 2.