

Abhay Kumar Vs. The State of Jharkhand

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Court : Jharkhand

Decided On : Sep-23-2015

Appellant : Abhay Kumar

Respondent : The State of Jharkhand

Judgement :

IN THE HIGH COURT OF JHARKHAND AT RANCHI W.P. (S) No. 317 of 2015 ---
Abhay Kumar --- --- ---- Petitioner Versus The State of Jharkhand through the
Secretary, Department of Rural Development Department, Govt. of Jharkhand ---
--- --- Respondent --- CORAM: The Honble Mr. Justice Aparesh Kumar Singh For
the Petitioner: M/s Anil Kr.Sinha, Sr. Advocate, Chaitali C. Sinha, Advocate For the
Resp-State: Mr. Chanchal, JC to A.A.G. Mr. Shishir Suman, Advocate --- 02/
23.09.2015 Heard counsel for the parties.

2. Petitioner seeks quashing of the Departmental Proceeding initiated vide Resolution No. 239 dated 11.01.2012 and charge sheet issued thereunder containing six specific allegations of passing forged measurement bills in respect of NAREGA Projects bearing nos. 104/07-08, 105/07-08, 108/07-08, 109/07-08, 110/07-08 and 113/07-08 in respect of execution of works at Rural Development Special Division, Galudih where he was posted as an Assistant Engineer at the relevant point of time. Annexure-1 is the charge sheet. Petitioner was also implicated in a criminal case being Potka P.S. Case No. 60./2998 registered under sections 461,468, 471, 420, 406, 408, 409, 34 and 120B of the Indian Penal Code (Annexure-9 to the Supplementary Affidavit). The FIR was registered on the basis

of the report of a Joint Inquiry Committee comprising Sub Divisional Officer, Dalbhum, Jamshedpur, District Engineer, Jamshedpur and Block Development Officer, Potka. The FIR alleges misappropriation of Government money in the execution of NAREGA Projects by committing forgery in which 11 accused were named including the present petitioner. Apart from the six charges in the Departmental Proceeding, charges in relation to execution of work in other NAREGA Scheme also forms part of the FIR. Charge sheet (Annexure-3) has been submitted by the Investigating Agency on 19.03.2014 bearing No. 20/2014 in which while recommending prosecution in respect of other accused persons, it has stated that enough evidence was not available against the petitioner for submission of charge sheet against him.

2. 3. The Trial Court on 21.03.2014 has taken note of the supplementary charge sheet no. 20/2014 and observed that the accused Abhay Kumar has not been charge sheeted. Cognizance has been taken for the offences and processes have been issued against some accused persons (Annexure-4).

4. Inquiry proceeded against the petitioner and out of six charges, charge nos. 2 and 4 were partly found to be proved by the Inquiry Officer i.e. Additional MANREGA Commissioner of the Rural Development Department. Petitioner was served with a second show-cause notice which however has not been brought on record. He has also responded vide Annexure-6 seeking exoneration on the grounds that in the criminal case, final form has been submitted exonerating the petitioner and that there could be no basis for holding him guilty even as per the Inquiry Report. Petitioner has approached this Court after issuance of the second show-cause notice and pleaded that the criminal case and the Departmental Proceeding being based on same charges and similar set of facts and evidence, he deserves protection from any precipitate action taken in the Departmental Proceeding which the respondents were inclined to take.

5. The grounds urged on behalf of the counsel for the petitioner in support thereof inter-alia are as follows: (i) Petitioner was on deputation in Rural Development Department from his parent Water Resources Department and though, the initiation of the Departmental Proceeding was approved by the competent

authority under the Rural Development Department, but the charge memo was not approved by him, as is the mandatory requirement in view of the judgment rendered by the Hon'ble Apex Court in the case of Union of India and others vs. B.V. Gopinath and analogous cases, (2014) 1 SCC351 (ii) Since in the criminal case for the same set of charges, the Investigating Agency has not found any evidence to prosecute him, the Disciplinary Authority should not proceed with the Departmental Inquiry on the same charges, same 3. evidence and set of facts. His exoneration by the Investigating Agency is in effect honourable acquittal and the petitioner deserves exoneration in the Departmental Proceeding as well. Learned counsel for the petitioner has relied upon a judgment rendered by the Apex Court in the case of K. Venkateshwarlu vs. State of Andhra Pradesh (2012) 8 SCC73Para-5 to 11 and 13 thereof. (iii) It is also urged that during pendency of the writ application, respondents have forwarded the proposal for imposing punishment of dismissal upon him to the Public Service Commission i.e. JPSC which shows a premeditated state of mind to punish the petitioner, though even as per Inquiry Report, only two charges were partly proved.

6. In response, counsel for the respondents has referred to two counter affidavits filed by the Rural Development Department and Water Resources Department. It is stated on his behalf that initially, an inquiry was done by the Executive Magistrate which the Deputy Commissioner, East Singhbhum did not find satisfactory and directed a joint inquiry by Sub Divisional Officer, Dalbhum, Jamshedpur, District Engineer, Jamshedpur and Block Development Officer, Potka. In the joint inquiry, the complicity of the petitioner of having indulged in defalcation of Government money through the approval of forged measurement books and vouchers were found prima facie established including against other officials and private persons as well (Annexure-A to the counter affidavit of Rural Development Department). It is submitted that the Joint Inquiry was conducted by the three officers, one of whom was a technical member also. This formed the basis of recommendation of initiation of Departmental Proceeding to the Rural Development Department. The Rural Development Department is fully authorized to take a decision to initiate a Departmental Proceeding against such officials on deputation in view of the specific Resolution dated 18.01.2008 (Annexure-A of the counter affidavit of the Rural Development Department). The Inquiry Officer has

found at least two of the charges partly proved against the petitioner. On 4. consideration of the entire Inquiry Report, the Rural Development Department issued a second show-cause notice upon the petitioner with a recommendation of imposing major punishment vide letter dated 07.11.2014 (Annexure-B to the counter affidavit of Water Resources Department). The matter was forwarded to the Water Resources Department for taking a final decision as it is the parent department of the petitioner. The competent authority of the Water Resources Department is the Disciplinary Authority. The Water Resources Department after obtaining concurrence of the competent authority of the department i.e. Hon'ble Minister has forwarded the proposal for dismissal to JPSC for its concurrence vide letter dated 4094 dated 03.08.2015 (Annexure-C to the same counter affidavit).

7. Learned counsel for the respondents submits that the Departmental Proceeding even in cases of acquittal, can proceed against an employee. Reliance has been placed upon the judgment rendered by the Hon'ble Supreme Court in the case of Divisional Controller, Karnataka State Road Transport Corporation vs. M.G. Vittal Rao [(2012) 1 SCC442 in support thereof. It is further urged that at each particular level right from the initiation of the Departmental Proceeding and issuance of charge memo till the opinion of the Disciplinary Authority has been communicated to the JPSC for its concurrence, the approval of the competent authority of Rural Development Department and Water Resources Department have been taken. Records of Rural Development Department relating to initiation of Departmental Proceeding and issuance of charge memo have been produced by the learned counsel for the respondent State in support of the aforesaid submissions. Counsel for the respondents has distinguished the judgment relied upon by the learned counsel for the petitioner as reported in K. Venkateshwarlu (Supra) stating that in that case also, even after acquittal, the Hon'ble Supreme Court had been pleased to observe that the inquiry could be conducted against the delinquent employee; judgement rendered by the Constitution Bench in the case of R.P. Kapur Vs. Union of India and another 5. AIR 1964 SC787 has also been referred therein. It is pointed that the order of the Trial Court dated 21.03.2014 does not show that any final form against the petitioner has been accepted. Learned counsel for the respondent submits that at this stage, neither is the proceeding without jurisdiction, nor it is actuated by malafides, calling for any interference when no final decision

has been taken in the matter. The Disciplinary Authority should be left to take an objective decision on consideration of relevant materials produced during inquiry including the written statement and reply to second show-cause of the petitioner.

8. Learned counsel for the petitioner in rejoinder refers to the inquiry report once again and submits that the Inquiry Officer did find that in respect of Project Nos. 105/07-08, 108/07-08, 109/07-08, 110/07-08 and 113/07-08 for the period 2007-08, the 1st Inquiry Report had given a satisfactory noting. Therefore, petitioner should not be proceeded against and imposed such a harsh punishment of dismissal.

9. I have heard learned counsel for the parties at length, considered their rival submissions and gone through the relevant materials on record including the judgments relied upon by them. While dwelling upon the grounds urged by the counsel for the petitioner, it is found from the official record of Rural Development Department relating to Initiation of Departmental Proceeding against the petitioner that the proposal for initiation of departmental proceeding on the charges framed on the imputation of misconduct against him were processed and placed before the competent authority i.e. Hon'ble Minister of the Rural Development Department. The notings of the Additional Secretary dated 27, October, 2011 refers to the case of the petitioner and the charge-sheet which is placed at pages 333 and 186, on the file, on which approval of the competent authority i.e. the Minister of Rural Development Department has been sought for initiation of departmental proceeding against him. The instant record contains the charge-sheet also and upon notings recorded by the MNREGA6 Commissioner dated 8th November, 2011 and the Principal Secretary of the department dated 11th November, 2011 thereafter, the Minister of Rural Development Department has also approved the proposal relating to the initiation of departmental proceeding on 23rd November, 2011 based on the aforesaid charge-sheet.

10. In effect, there is no delegation of authority of the competent authority either in the matter of initiation of Departmental Proceeding or in the matter of approval of charge memo. In the judgment of the Apex Court in the case of B.V. Gopinath (Supra) relied upon by the learned Senior counsel for the petitioner, the Hon'ble

Supreme Court have been pleased to hold that the Disciplinary Authority alone is required to exercise the power of initiation of Departmental Proceeding as also approval of the charge memo. This power could not be delegated as it would be against the established maxim *Delegatus non potest delegare*. After referring to Central Civil Services (Classification, Control and Appeal) Rules, 1965 which were in contention in the said case, the Hon'ble Supreme Court found that though the decision to initiate Departmental Proceeding was taken by the competent authority i.e. Finance Minister, but the charge memo was not approved by the Finance Minister. In such circumstances, the Hon'ble Court was pleased to hold that the requirement of rules and the settled principles of law that the Disciplinary Authority alone has the power to take a decision both in matters of initiation of Departmental Proceeding and approval of charge memo, has not been followed. Paragraph-41, 46 and 50 of the report is quoted hereunder for better appreciation.

41. Disciplinary proceedings against the respondent herein were initiated in terms of Rule 14 of the aforesaid Rules. Rule 14(3) clearly lays down that where it is proposed to hold an inquiry against a government servant under Rule 14 or Rule 15, the disciplinary authority shall draw up or cause to be drawn up the charge-sheet. Rule 14(4) again mandates that the disciplinary authority shall deliver or cause to be delivered to the government servant, a copy of the articles of charge, the statement of the imputations of misconduct or 7. misbehaviour and the supporting documents including a list of witnesses by which each article of charge is proposed to be proved. We are unable to interpret this provision as suggested by the Additional Solicitor General, that once the disciplinary authority approves the initiation of the disciplinary proceedings, the charge-sheet can be drawn up by an authority other than the disciplinary authority. This would destroy the underlying protection guaranteed under Article 311(1) of the Constitution of India. Such procedure would also do violence to the protective provisions contained under Article 311(2) which ensures that no public servant is dismissed, removed or suspended without following a fair procedure in which he/she has been given a reasonable opportunity to meet the allegations contained in the charge-sheet. Such a charge-sheet can only be issued upon approval by the appointing authority i.e. Finance Minister.

46. Accepting the submission of Ms Indira Jaising would run counter to the well-known maxim *delegatus non potest delegare* (or *delegari*). The principle is summed up in *Judicial Review of Administrative Action* by De Smith, Woolf and Jowell (5th Edn.) as follows: The rule against delegation A discretionary power must, in general, be exercised only by the authority to which it has been committed. It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another. The same principle has been described in *Administrative Law*, by H.W.R. Wade & C.F. Forsyth (9th Edn.), Chapter 10, as follows: Inalienable discretionary power An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the courts are rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as *ultra vires* action taken by agents, sub-committees or delegates, however expressly authorised by the authority endowed with the power.

50. In our opinion, the Central Administrative Tribunal as well as the High Court has correctly interpreted the provisions of Office Order No. 205 of 2005. Factually also, a perusal of the record would show that the file was put up to the Finance Minister by the Director General of Income Tax (Vigilance) seeking the approval of the Finance Minister for sanctioning prosecution against one officer and for initiation of major 8. penalty proceeding under Rules 3(1)(a) and 3(1)(c) of the Central Civil Services (Conduct) Rules against the officers mentioned in the note which included the respondent herein. Ultimately, it appears that the charge memo was not put up for approval by the Finance Minister. Therefore, it would not be possible to accept the submission of Ms Indira Jaising that the approval granted by the Finance Minister for initiation of departmental proceedings would also amount to approval of the charge memo.

11. The departmental proceeding against the petitioner who was posted as Assistant Engineer under the respondent has been initiated in terms of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930. Rule 55 is quoted hereunder:

55. Without prejudice to the provisions of Public Servant Inquires Act, 1850, no order of dismissal, renewal, compulsory retirement [or reduction] shall be passed on a member of a service (other than an order based on facts which have led to his conviction in a criminal court or by a Court Martial) unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and on any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so direct and oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officers, conducting the inquiry may, for special and sufficient reasons to be recorded in writing, refused to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof. This Rule shall not apply where the person concerned has absconded or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the Rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing be waived, where there is a difficulty in observing exactly the requirement of the Rule and those requirements can be waived without injustice to the person charged.

9. The full procedure prescribed in this Rule not be followed in the case of a probationer discharged in the circumstances described in explanation II to Rule 49. In such cases, it will be sufficient if the probationer is given an opportunity to

show cause in writing against the discharge after being apprised of the grounds on which it is proposed to discharge him and his reply duly considered before orders are passed.

12. Power to initiate Departmental Proceeding and issue charge memo against such employee posted on deputation in the Rural Development Department, upon approval of the competent authority of the said department is also supported by the Government Resolution dated 18.01.2008 (Annexure-A to the counter affidavit of the Rural Development Department). Therefore, this ground urged on behalf of the petitioner does not merit acceptance.

13. Now coming to the second ground of challenge. It is to be observed that the position of law that has emerged on the question whether a Departmental Proceeding can be continued on similar set of charges even after a criminal case has ended in acquittal of the said employee, is that each case has to be determined on its own set of facts. There are two lines of decision as has been taken note of in the judgment rendered in the case of Divisional Controller, Karnataka State Road Transport Corporation vs. M.G. Vittal Rao [(2012) 1 SCC442. The Apex Court while dealing with the two lines of decision operating in the field, had been pleased to observe that each case is therefore required to be considered on its own facts. Consideration which may arise in dealing with the matter relating to continuance of a Departmental Proceeding even in case where the criminal case has ended in honourable acquittal, are inter-alia, (i) that the order of acquittal has not been passed on same set of facts or same set of evidence, (ii) the effect of difference in the standard of proof in a criminal trial and disciplinary proceeding has not been considered or where the delinquent officer was charged with something more than the subject-matter of the criminal case and / or covered by a decision of the civil court. The opinion of the Apex Court at Para-23 of the Report is quoted hereunder as it lays down the guidelines in dealing with such matters.

10.

23. In Pandiyan Roadways Corpn. Ltd. v. N. Balakrishnan, this Court reconsidered the issue taking into account all earlier judgments and observed as under: (SCC

pp. 766-67, paras 21-22)

21. There are evidently two lines of decisions of this Court operating in the field. One being the cases which would come within the purview of Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. and G.M. Tank v. State of Gujarat. However, the second line of decisions show that an honourable acquittal in the criminal case itself may not be held to be determinative in respect of order of punishment meted out to the delinquent officer, inter alia, when: (i) the order of acquittal has not been passed on the same set of facts or same set of evidence; (ii) the effect of difference in the standard of proof in a criminal trial and disciplinary proceeding has not been considered (see Commr. of Police v. Narender Singh, or; where the delinquent officer was charged with something more than the subject-matter of the criminal case and/or covered by a decision of the civil court (see G.M. Tank, Jasbir Singh v. Punjab & Sind Bank and Noida Entrepreneurs Assn. v. Noida, SCC at p. 394, para 16).

22. 41. We may not be understood to have laid down a law that in all such circumstances the decision of the civil court or the criminal court would be binding on the disciplinary authorities as this Court in a large number of decisions points out that the same would depend upon other factors as well. (See e.g. Krishnakali Tea Estate and RBI v. S. Mani. Each case is, therefore, required to be considered on its own facts.

14. In the facts of the instant case, it appears that the petitioner was not put on trial, therefore, question of honourable acquittal does not arise. Criminal case was instituted on the basis of a joint inquiry report conducted by the Department in respect of about 13 charges while the Departmental Proceeding is also in relation to six charges. The charges which are part of the Departmental Proceeding also do reflect not only allegations of criminal culpability, but acts of official misconduct in discharge of duties by the delinquent employee. Nothing more needs to be observed at this stage on the merits of the allegations as it would prejudice the case of the parties. However, this Court is of the view that though the petitioner may not have been charge sheeted in the criminal case, but the Departmental Proceeding could continue on the set of charges alleged against him. As has been

found, two of the charges has been partly proved against the petitioner. This also formed the basis of issuance of the second show-cause notice upon the petitioner. The petitioner has submitted his reply and thereafter the procedural formalities have been followed by the respondent Department after due application of mind by the competent authority seeking concurrence from the public service commission before any final decision is to be taken by the Disciplinary Authority. It therefore appears that neither are the initiation of the proceeding suffering from lack of jurisdiction, nor are they found to be suffering from malafides or in violation of statutory rules. Merit of the allegations in the Departmental Proceeding need not be gone into at this stage as it is the role of the Disciplinary Authority. In sum and substance, this Court does not find any reason to injunct the Departmental Proceeding against the petitioner.

15. As an upshot of the detailed discussions and reasons recorded hereinabove, this Court does not find any merit in the writ petition. Accordingly, the writ petition is dismissed. Interim order dated 19.08.2015 stands vacated. Pending I.A. no. 4436/2015 stands closed. (Aparesh Kumar Singh, J) Ranjeet/

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