

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8764 OF 2015

Rajesh Punlik Warde

...Petitioner

Versus

Union of India

...Respondent

Mr. S. K. Jha for Petitioner.

Mr. Suresh Kumar for Respondent.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C. J. &
M. S. SONAK, J.**

DATE : 27th FEBRUARY 2018

P.C.

1] Heard Mr. Jha for the petitioner and Mr. Suresh Kumar for the respondent.

2] Rule. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

3] The petitioner challenges the judgment and order dated 25th April 2012 made by the Central Administrative Tribunal, Mumbai (CAT) dismissing the petitioner's OA 627

of 2008, in which, he had questioned his dismissal from service by order dated 26th September 2001.

4] Mr. Jha, the learned counsel for the petitioner submits that the petitioner, on baseless allegations of misconduct alleged to have been committed by him, was dismissed from service without affording the petitioner reasonable opportunity as contemplated under Article 311(2) of the Constitution of India, as also the Railway Servants (Discipline & Appeal) Rules, 1968.

5] Mr. Jha submits that in any case, the petitioner, was acquitted by the Metropolitan Magistrate by his judgment and order dated 5th January 2007 in respect of the criminal charges falsely levied upon the petitioner, in respect of the very same alleged incident, for which the petitioner came to be dismissed from service.

6] Mr. Jha submits that the CAT, in the earlier round of litigation instituted by the petitioner, vide order dated 9th June 2008, had in fact directed the respondents to reconsider the issue of petitioner's dismissal in the light of

the Magistrate's order dated 5th January 2007. Mr. Jha submits that despite all this, the respondents failed to revoke the dismissal order and the CAT, in the second round of litigation, has failed to set aside the dismissal order.

7] Mr. Jha relies upon decision of the Hon'ble Supreme Court in **G. M. Tank vs. State of Gujarat & Ors.**¹ to submit that the employee, who has been dismissed from service, once, acquitted by a competent court of law for prosecution on the basis of some facts, is entitled to reinstatement with all consequential benefits. For all these reasons, Mr. Jha submits that this petition may be allowed and the petitioner is reinstated in service with all consequential benefits.

8] Mr. Suresh Kumar, the learned counsel for the respondent points out to the serious charge, on basis of which, the respondents were constrained to issue dismissal order dated 26th September 2009. Mr. Suresh Kumar points out that the dismissal order is relatable to the exercise of powers under the proviso to Article 311(2) of the Constitution of India which is to be read along with the

1 (2006) 5 SCC 446

provisions in Article 311(3) of the Constitution of India. Mr. Suresh Kumar submits that the parameters in the matters of criminal prosecution and departmental proceedings are quite distinct and therefore the acquittal from criminal prosecution, does not, as a matter of right, entitle the petitioner to seek for reconsideration of the dismissal order.

9] Mr. Suresh Kumar submits that in the present case, there is nothing honourable about the acquittal of the petitioner. In any case, Mr. Suresh Kumar submits that the revisional authority, has taken into consideration the said acquittal but, for cogent reasons, declined to reconsider the dismissal order. Mr. Suresh Kumar submits that even the CAT, has taken into consideration the acquittal order, but for cogent reasons, found no necessity to interfere with the dismissal order. Mr. Suresh Kumar submits that taking into consideration the seriousness of the charge and the fact that the witnesses were afraid to depose against the petitioner, the dismissal order came to be made consistent with the provisions of the Constitution of India as well as service rules. Mr. Suresh Kumar therefore submits this petition may be dismissed.

10] The rival contentions now fall for determination.

11] The dismissal order dated 26th September 2001 notes that the petitioner along with 4 outsiders entered the chamber of Senior MPS/BY Central Railway, Byculla, during the office hours brandishing knives and pistols and threatened to kill the senior officer and even otherwise, created a hindrance to the discharge of official work. The dismissal order states that such act of grave misconduct on the part of the petitioner has so much intimidated the employees of the railway press, that, they are afraid to depose against the petitioner, in case, any inquiry is required to be held in the matter. Dismissal order then states that in such circumstances it is in public interest to dismiss the petitioner from service. The dismissal order itself provides that the petitioner could appeal against the same to the appellate authority within the period of limitation indicated in the order.

12] The petitioner's appeal against the dismissal order was dismissed by the appellate authority, by order dated

2nd February 2005. The order of the appellate authority indicated that the petitioner has a remedy to institute a revision petition to the railway board within the period of limitation indicated in the order. The petitioner accordingly preferred a revision petition on 18th March 2005 before the revisional authority, which was followed by a further representation dated 23rd February 2007. During the pendency of the revision application, the petitioner, was acquitted by the Metropolitan Magistrate by his judgment and order dated 5th January 2007.

13] Based upon such acquittal, the petitioner instituted OA 546 of 2007 before the CAT which was disposed of by judgment and order dated 9th June 2008 directing the revisional authority to consider the petitioner's revision application. The CAT also observed that it is expected of the railway board (revisional authority) takes into consideration the Magistrate's acquittal order dated 5th January 2007. The CAT made it clear that in case the petitioner's grievances are not redressed by the railway board, the petitioner, will be at liberty to approach the CAT as per law.

14] In pursuance of the aforesaid, the railway board, by order dated 4th August 2008, dismissed the petitioner's revision application. The revisional authority has taken into consideration the acquittal order dated 5th January 2007 but has observed that such acquittal was on account of the prosecution witnesses turning hostile. The revisional authority has further held that in departmental matters the standard of proof to be applied is that a preponderance of probability unlike in criminal cases where the charge is required to be proved beyond reasonable doubt. In ***Nelson Motis vs. Union of India & Anr.***², the Hon'ble Supreme Court has held that the nature and scope of departmental action is quite distinct and different from that of a criminal case. Acquittal in a criminal case therefore, cannot conclude disciplinary proceedings in all cases.

15] The CAT, in the impugned judgment and order dated 25th April 2012 also considered the impact of the Magistrate's acquittal order dated 5th January 2007. The CAT has also held that such acquittal, cannot vitiate the dismissal order, which is made consistent with the provisions contained in the proviso to Article 311(2) as also

2 AIR 1992 SC 1981

the said rules, which permit imposition of such penalty.

16] The proviso to Article 311(2) *inter alia* provides that the normal rule regards afford of reasonable opportunity of being heard will not apply where the authority empowered to dismiss an employee is satisfied that for some reason, to be recorded by the authority in writing, it is not reasonably practicable to hold such enquiry. Article 311(3) provides that if, in respect of such person, a question arise whether it is reasonably practicable to hold such enquiry, the decision thereon of the authority empowered to dismiss or remove such person shall be final. The service rules also contain provisions for dismissal where, it is not reasonably practicable to hold an inquiry. Mr. Jha, has not demonstrated any breach of either the constitutional provisions or the service rules. His entire emphasis was on the acquittal dated 5th January 2007 and the decision of the Hon'ble Supreme Court in *G. M. Tank* (supra). He submits that once there is acquittal, the dismissal order is not sustainable and the petitioner is entitled to reinstatement with all consequential benefits.

17] The decision in the case of *G. M. Tank* (supra) is distinguishable. In the said case, a departmental enquiry was conducted on the same facts as the criminal proceedings. In these circumstances, it was held that a honourable acquittal in criminal proceedings will render the dismissal order unsustainable. In the present case, it is doubtful whether the acquittal of the petitioner can at all be deemed as honourable. It was the case of the respondents that the witnesses are scared to depose against the petitioner, taking into consideration the fact that he was capable of entering the officers chamber along with 4 outside elements brandishing knives and pistols. The acquittal is also based upon the prosecution being unable to produce material witnesses or certain material witnesses turning hostile. In such circumstances, the petitioner, cannot succeed on the basis of the decision in the case of *G. M. Tank* (supra).

18] More recently, the Hon'ble Supreme Court, in ***Deputy Inspector General of Police & Anr. vs. S. Samuthiram***³ held that mere acquittal of an employee by a criminal Court has no impact on the disciplinary proceedings

3 AIR 2013 SC 14

initiated by the Department. There may be cases where the service rule provide in spite of domestic enquiry, if the criminal Court acquits an employee honourably, he could be reinstated. The issue of whether an employee has to be reinstated in service or not depends upon the question whether the service rules contain any such provision for reinstatement and not as a matter of right. Acquittal of delinquent even if honourable as such does not in absence of any provision in service rules for reinstatement, confer right on delinquent to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal Court and the enquiry conducted by way of disciplinary proceedings is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and it fails to establish the guilt beyond reasonable doubt, the accused is presumed to be innocent. It is settled law that the strict burden of proof required to establish guilt in a criminal Court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient.

19] Further, in *S. Samuthiram* (supra), the Hon'ble Supreme Court held that acquittal in a criminal case on account of the lady complainant turning hostile and the prosecution failing to examine other crucial witnesses, cannot be regarded as honourable acquittal. In the case before the Hon'ble Supreme Court, *S. Samuthiram* – respondent was a member of the disciplined force. He, in a drunken state, misbehaved and eve-teased a married lady. He was criminally tried for offences under the Penal Code and Tamil Nadu Prohibition of Eve-teasing Act and simultaneously proceeded departmentally. In the criminal case he was acquitted as the complainant and the lady turned hostile and the prosecution failed to examine other crucial witnesses. In these circumstances, the Hon'ble Supreme Court held that the acquittal was thus no way honourable. Moreover, there was no provision in the T. N. Service Rules providing for reinstatement for honourable acquittal and therefore, interference with the order of dismissal was uncalled for.

20] In ***Kuldip Singh vs. State of Punjab & Ors.***⁴, a police head constable was dismissed from service without

4 AIR 1997 SC 79

enquiry by invoking proviso (b) to clause 2 of Article 311 of the Constitution of India on the ground that it was not reasonably practicable to hold enquiry. The charge against the police head constable was that he had links with terrorists and was supplying secret information of the police to them. The designated court under the Terrorist and Disruptive Activities (Prevention) Act (TADA) had in fact, acquitted the police head constable at the stage when his petition came up for hearing before the High Court. The High Court, however, upheld the dismissal order. The Hon'ble Supreme Court, after taking into consideration the acquittal by the designated court, held that once the High Court has opined that there was enough material before the appropriate authority upon which it could come to a reasonable conclusion that it was not reasonably practicable to hold an enquiry as contemplated by clause 2 of Article 311, there was no reason to interfere with the dismissal order. The Hon'ble Supreme Court held that once proviso (b) is held to have been validly invoked, the government servant concerned is left open no legitimate ground to impugn the action except perhaps to say that the facts said to have been found against him do not

warrant the punishment actually awarded. In the case before the Hon'ble Supreme Court as well, the appellate authority and the High Court had held that the action of dismissal was legal and proper and further, no *mala fides* were alleged.

21] In ***Southern Railway Officers Association & Anr. vs. Union of India & Ors.***⁵, the issue involved before the Hon'ble Supreme Court was whether the disciplinary authority was justified in imposing penalty on delinquent employees without holding any enquiry, as provided in Article 311(2) second proviso clause (b) of the Constitution and Rule 14(ii) of the Railway Servants (Discipline and Appeal) Rules, 1968. The incident involved some railway employees who were alleged to have abused, threatened and assaulted a railway officer who was proceeding to his native place on retirement. The incident took place at the railway station itself from where the officer was to board train. The other officers who had come to the railway station to see him were also threatened. An FIR was also lodged as a result of which one of the delinquent employees was arrested on the same day and others were arrested

⁵ (2009) 9 SCC 24

later on. Besides, handwritten posters were displayed at the railway workshop and railway station that the officer in question would die on the date he proceeded to his native place. The Hon'ble Supreme Court allowed the appeals and held that it is now well settled that reasons so recorded must be cogent and sufficient. Satisfaction to be arrived at by the disciplinary authority for the aforementioned purpose cannot be arbitrary. It must be based on objectivity. The court is required to consider what a reasonable man taking a reasonable view would have done in the situation then prevailing. An order of disciplinary authority in a case of this nature must be judged by a court exercising power of judicial review by placing itself in the disciplinary authority's armchair. The disciplinary authority was a man at the spot. He acted on the basis of a report made to him. He also knew about the handwritten posters having been displayed. The atmosphere which was prevailing in the workshop must be known to him. Not only the disciplinary authority but also the appellate authority, having regard to the materials brought on record, arrived at the said finding. This is a case where immediate action was absolutely essential.

22] In *Southern Railway Officers Association & Anr.* (supra), the Hon'ble Supreme Court has further held that acquittal in criminal case by itself cannot a ground for interfering with the order of punishment imposed by the disciplinary authority. In this case, the Hon'ble Supreme Court found that the revisional authority had in fact taken into consideration the ground for acquittal and therefore, this was not a case where the authorities were oblivious to the issue of acquittal or had failed to take this consideration into account. The Hon'ble Supreme Court went on to observe that it is now well settled principle of law that the order of dismissal can be passed even if a delinquent official had been acquitted of the criminal charge.

23] In the present case, as noted earlier, the disciplinary authority has recorded satisfaction that there is sufficient material on record on the aspect of reasonable practicability of holding enquiry into misconduct of the petitioner. The appellate authority, revisional authority and finally the CAT have examined records and have satisfied themselves that there was indeed sufficient material on record to sustain the satisfaction recorded by the

disciplinary authority. This is not a case of perversity or unreasonableness. As noted earlier, the petitioner, along with 4 outside elements barged into chamber of a senior officer, brandishing knives and pistols and threatened the officer thereby disrupting the functioning of the office. In the light of creation of such terror by the petitioner and his associates, it cannot be said that the satisfaction recorded by the disciplinary authority that the employees are afraid to depose against the petitioner is perverse or based upon no material on record. Further, in this case, no *mala fides* have been alleged by the petitioner or in any case, no *mala fides* have been proved by the petitioner. The appellate authority, revisional authority and the CAT have concurrently held that there was sufficient material to invoke proviso (b) to Article 311 (2) of the Constitution of India. Nothing has been brought to our notice to persuade us to reject this finding recorded by the authorities concurrently and to interfere with the impugned order in the exercise of extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

24] Applying the principles in *Southern Railway Officers*

Association (supra) to the facts and circumstances of the present case, it is not possible to hold that a reasonable man, taking a reasonable view, would not have issued the dismissal order in the situation created by the petitioner. As has been held by the Hon'ble Supreme Court, the order of disciplinary authority, in a case of this nature, has to be judged by a Court exercising power of judicial review by placing itself in the armchair of disciplinary authority. This Court has to be conscious that disciplinary authority was the man at the spot. He acted on the basis of the reports made available to him. The atmosphere prevalent when the petitioner and four others entered the chamber of the senior officer and threatened him by brandishing knives and pistols must have been known to him. The impact of this act also must have been known to him. The matter has been examined by the appellate authority, revisional authority and the CAT, who have concurrently held that there was sufficient material on record to invoke the provisions of Article 311(2) second proviso (b). The revisional authority and the CAT have taken into consideration the impact of the petitioner's acquittal in the criminal proceedings. In such circumstances, there is really no case made out to interfere

with the impugned judgment and order. Further, applying the principle in *S. Samuthiram (supra)* to the facts and circumstances of the present case, it cannot be said that the petitioner's acquittal is an honourable acquittal. In this case as well, the acquittal was on account of the prosecution failing to examine some crucial witnesses and on account of some witnesses turning hostile. Further, in the present case as well, no rules were pointed out to indicate that reinstatement has to follow in consequence of an acquittal or an honourable acquittal.

25] Upon cumulative consideration of all the aforesaid circumstances as well as the law laid down by the Hon'ble Supreme Court, there is no case made out to interfere with the impugned judgment and order. This petition is accordingly dismissed. Rule is discharged.

26] There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)