2022 LiveLaw (SC) 374

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

K.M. JOSEPH; HRISHIKESH ROY; JJ.

APRIL 7, 2022

CIVIL APPEAL NO.2794 OF 2022 (Arising out of SLP (C) No.12061/2021)

EASTERN COALFIELDS LIMITED & ORS. *VERSUS* **RABINDRA KUMAR BHARTI**

Code of Civil Procedure, 1908; Order 41 Rule 33 - The Rule clothes the appellate court with an extra ordinary power, which however is a rare jurisdiction. It is to reach justice in the special facts of a case. It is not an ordinary rule to be applied across the board in all the appeals. In fact, the principle is interalia no doubt that even if there is no appeal by any of the parties in the proceedings, an order can be passed in his favour in the appeal carried by the other side. (Para 13)

(Arising out of impugned final judgment and order dated 04-03-2021 in MAT No. 213/2021 passed by the High Court at Calcutta)

For Petitioner(s) Mr. Parijat Kishore, AOR Mr. Saurabh Tanwar, Adv.

For Respondent(s) Mr. Mahesh Prasad, Adv. Mr. Mansha Ram Singh, Adv. Mr. Shambu Prasad, Adv. Mr. Naresh Kumar, Adv. Ms. Vaishali, Adv. Mr. Rajesh Singh Chauhan, AOR

J U D G M E N T

K.M. JOSEPH, J.

1. Leave granted.

2. On the basis of the complaint lodged against the respondent who was employed as a clerk with the appellant(s) relating to demands for bribe by the respondent to clear retirement formalities, the respondent came to be arrested by the Central Bureau of Investigation on 31st August, 2015. A case was lodged against the respondent under Section 7 (12) & (13), sub-section 2 read with Section 13(i)(d) of the Prevention of Corruption Act, 1988. The appellant also passed an order of suspension against the respondent on 3rd August, 2015. This suspension was no doubt revoked on 15th September, 2015. Appellant served respondent a notice of the departmental enquiry on 20th March, 2017. This prompted the respondent to move a writ petition. In the writ petition, the following order was passed on 29.06.2017: -

> "Let the affidavit-of-service filed in Court today be kept with the record.
>
> Let an affidavit-in-opposition be filed within a period of three weeks. Let an affidavit-in-reply thereto, if any, be filed within a period of one week thereafter.
>
> Let this matter appear for hearing in the Combined Monthly List of August, 2017 within the first 50 matters under that heading.
>
> In the affidavit-in-opposition the respondents shall disclose the nature of the criminal proceeding pending against the petitioner including the names of the witnesses in the criminal proceeding as well as the departmental enquiry.

The respondents shall be at liberty to proceed with the departmental enquiry but shall not pass any final order without the leave of the Court."

3. The departmental proceedings accordingly, continued. According to the appellant(s), the enquiry was held and the respondent participated in the enquiry also. At the end of the enquiry, the appellant(s) filed an application seeking leave to pass the final orders. This resulted in, the learned Single Judge passing judgment dated 10th, February 2021. This decision was impugned by the respondent before the Division Bench. In the meantime, the respondent's service came to be dismissed from service by order dated 2nd March, 2021. By the impugned judgment the Division Bench has proceeded to direct that the final order of dismissal of the respondent be stayed till the disposal of the criminal case. It was further ordered that the order of the dismissal against the respondent will become operative on the criminal proceeding culminating in an order of conviction. The Court also notes that the Court was exercising power of the Court of Appeal provided in Order 41 Rule 33.

4. We have heard the learned counsel for the parties. The complaint of the appellant(s) is that the Division Bench of the High Court has erred in not noticing that principally it is not desirable to delay the departmental proceeding on account of pendency of a criminal case. The principle that it is desirable to delay the departmental proceeding when a criminal trial is also pending, is owing to the fact that the employee would be compelled to disclose his defence before the departmental proceedings. The principle is inapplicable. This is for the reason that by virtue of the order, we have referred to dated 29.06.2007, the learned Single Judge had permitted the enquiry to go on. According to the appellant(s), the respondent participated in the enquiry and thereafter on the culmination of the enquiry in keeping with the order passed on 29.06.2017 after the judgment of the Single Judge dated 10.02.2021 the order of dismissal came to be passed. The further case of the appellant(s) is that the order of dismissal was not the subject matter of appeal. In other words, dismissal of the respondent was not challenged before the Division Bench.

It is also contended that a verdict of acquittal in the trial which may occur in the future would not affect the disciplinary proceedings as these proceedings have purport different from the disciplinary proceedings. The principles applicable to disciplinary proceedings are different is apparently the contention.

5. Per Contra, Mr. Mahesh Prasad, learned counsel for the respondent would point out that the impugned order does not call for any interference. He would further submit that the disciplinary proceedings were not conducted in a proper manner.

It is pointed out that the charges, the witnesses and evidence in the Criminal case and also in the departmental proceedings are the same. He relied on ***'Capt. M. Paul Anthony Versus Bharat Gold Mines Limited & Another, (1999) 3 SCC 679***. In **M. Paul Antony** (supra) it was held as follows:

20. This decision has gone two steps further than the earlier decisions by providing:

1. The “advisability”, “desirability” or “propriety” of staying the departmental proceedings “go into the scales while judging the advisability or desirability of staying the disciplinary proceedings” merely as one of the factors which cannot be considered in isolation of other circumstances of the case. But the charges in the criminal case must, in any case, be of a grave and serious nature involving complicated questions of fact and law.

2. One of the contending considerations would be that the disciplinary enquiry cannot — and should not be — delayed unduly. If the criminal case is unduly delayed, that may itself be a good ground for going ahead with the disciplinary enquiry even though the disciplinary proceedings were held over at an earlier stage. It would not be in the interests of administration that persons accused of serious misdemeanour should be continued in office indefinitely awaiting the result of criminal proceedings.

21. In another case, namely, *Depot Manager, A.P. SRTC v. Mohd. Yousuf Miya [(1997) 2 SCC 699 : 1997 SCC (L&S) 548 : AIR 1997 SC 2232]* again it was held that there is no bar to proceed simultaneously with the departmental enquiry and trial of a criminal case unless the charge in the criminal case is of a grave nature involving complicated questions of fact and law.

6. We may further notice that in the said judgment this Court took note of the judgment in ***State of Rajasthan v. B.K.Meena and Ors; (1996) 6 SCC 417*** wherein it was inter alia held as follows:

“The only ground suggested in the above decisions as constituting a valid ground for setting the disciplinary proceedings is that the findings of the trial court in the criminal case may not be prejudiced.” This ground has however been hedged by providing further that this may be done in the cases of grave nature involving question of facts and law”.

7. In ***Pandiyan Roadways Corpn. Ltd. v. N. Balakrishnan, (2007) 9 SCC 755*** this Court noticed two different streams of judicial views:

“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. [(1999) 3 SCC 679 : 1999 SCC (L&S) 810] and G.M. Tank v. State of Gujarat [(2006) 5 SCC 446 : 2006 SCC (L&S) 1121]*. 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 [(2006) 4 SCC 265 : 2006 SCC (L&S) 686]*), 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 [(2006) 5 SCC 446 : 2006 SCC (L&S) 1121] , Jasbir Singh v. Punjab & Sind Bank [(2007) 1 SCC 566 : (2007) 1 SCC (L&S) 401 : (2006) 11 Scale 204]* and *Noida Entrepreneurs' Assn. v. Noida [(2007) 10 SCC 385 : (2008) 1 SCC (Cri) 792 : (2008) 1 SCC (L&S) 672 : (2007) 2 Scale 131]*, para 18).”

8. We may notice a recent judgment in ***Karnataka Power Transmission Corpn. Ltd. v. C. Nagaraju and Another, (2019) 10 SCC 367*** wherein it was interalia held: -

“9. Acquittal by a criminal court would not debar an employer from exercising the power to conduct departmental proceedings in accordance with the rules and regulations. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different

objectives. [*Ajit Kumar Nag v. Indian Oil Corpn. Ltd., (2005) 7 SCC 764 : 2005 SCC (L&S) 1020*] In the disciplinary proceedings, the question is whether the respondent is guilty of such conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal proceedings, the question is whether the offences registered against him under the PC Act are established, and if established, what sentence should be imposed upon him. The standard of proof, the mode of inquiry and the rules governing inquiry and trial in both the cases are significantly distinct and different. [*State of Rajasthan v. B.K. Meena, (1996) 6 SCC 417 : 1996 SCC (L&S) 1455*]"

9. We would notice that this is a case where there is a criminal case against the respondent. The appellant(s) as employer also launched disciplinary proceedings. It is undoubtedly true that this Court has taken the view that when the charges are identical and gives rise to complicated issues of the fact and law and evidence is the same, it may not be appropriate to proceed simultaneously in disciplinary proceedings, along with the criminal case. The rationale behind the principle largely is that the employee who is facing the disciplinary proceeding would necessarily have to take a stand. This in turn would amount to revealing his defense and therefore prejudice the employee in the criminal proceedings. No doubt, this Court has laid down that it is not an absolute embargo and the principle is one to be applied based on the facts of each case.

10. Even applying the principles as such to the facts, that is, examining its impact on the destiny of this case, we find as follows:

When the respondent was faced with the disciplinary proceeding, he approached the High Court. Apparently, he sought stay of the proceedings. The High Court did not deem it appropriate to grant stay of the disciplinary proceeding. Instead, as noticed by us by order dated 29.06.2017, the proceedings were allowed to be continued. According to the appellant(s) proper enquiry was held and the respondent participated. As to whether the enquiry was held properly or not is not a matter on which we do express our opinion. However, at the end of the enquiry as held by the appellant in view of the order passed by the High Court the appellant sought permission to pass the final order, or the appropriate order of penalty. This led to the disposal of the writ petition itself by the learned Single Judge. The learned Single Judge in the judgment noticed that this is a case where the respondent had already revealed his defence by participating in the proceedings. It is further found that order dated 29.06.2017, which permitted the enquiry to be continued was not challenged. The learned Single Judge accordingly permitted the disciplinary proceedings to attain finality at the hands of the disciplinary authority. The disciplinary authority accordingly passed an order dismissing the respondent from service. No doubt this is during the pendency of the appeal.

11. In the appeal, the order of the disciplinary authority dismissing the respondent was not the subject matter of challenge by way of an amendment in the writ petition. The Division Bench has posed the question as to what would happen if the criminal trial culminates in acquittal and it is thereafter that the High Court deemed it appropriate also apparently with reference to its power under Order 41 Rule 33 to pass the order keeping in abeyance the order of dismissal and it was to become operative upon the criminal trial going against the respondent.

12. We would notice that what is most pertinent is the aspect that in the challenge in the writ petition against the holding of the disciplinary proceedings, obtaining of an interim

order in the nature of the case was of relevance and importance to the question at hand. The principle involved being that when parallel proceedings are held on the basis of identical charges and the same evidence, the employee should not be allowed to disclose his defence. This aspect of the matter is to be looked into with reference to the effect of the order dated 29.06.2017. As a result of the said order passed during the pendency of the writ petition, the respondent had allegedly participated in the enquiry and there would be no scope for applying that principle as such. In such circumstances, we think that High Court may not have been justified in passing the impugned order the result of which is that though the appellant(s) conducted the disciplinary proceeding as permitted by the learned Single Judge and the respondent allegedly participated in it and all that remained was passing of an order by the disciplinary authority and what is more during the pendency of the appeal no doubt the order of the dismissal has been passed, the appellant is forced to retain the respondent and the order is to remain in suspended animation to attain finality only if the criminal case is decided in the future and it ends in the conviction of the respondent. We do not think that the High Court was justified in passing such an order in the facts of this case.

13. We may also observe that reference made to Order 41 Rule 33 of the Civil Procedure Code may not have been justified. Order 41 Rule 33 no doubt clothes the appellate court with an extra ordinary power, which however is a rare jurisdiction. It is to reach justice in the special facts of a case. It is not an ordinary rule to be applied across the board in all the appeals. In fact, the principle is interalia no doubt that even if there is no appeal by any of the parties in the proceedings, an order can be passed in his favour in the appeal carried by the other side. Any order which ought to have been passed can be passed. In this case, there is no order against the appellant(s) by the learned Single Judge. The order of dismissal was not specifically the subject matter of challenge as noticed. We do not think in the facts of this case, that it is a fit case where the High Court could have supported the directions with reference to Order 41 Rule 33.

14. The upshot of the above discussion is that the impugned judgment cannot be sustained. Accordingly, we allow the appeal and set aside the impugned judgment. We, however, make it crystal clear that it will be without prejudice to the rights of the respondent to challenge the disciplinary proceeding in any competent forum. We leave open all remedies and contentions of the respondent in this regard.

The appeal is allowed as above. There will be no order as to costs.

All pending applications stand disposed of.