

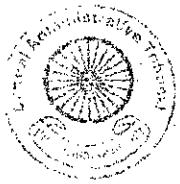
**CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH
(CIRCUIT AT PORT-BLAIR)**

LIBRARY

O.A.Nos. 351/895/2018 & 351/859/2018

Date of Order: 10/07/2018

Present: Hon'ble Ms. Bidisha Bauerjee, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member



Mahesh Lall,
S/o Shri Kishan Lall,
R/o Caddlegunj,
South Andaman
Pin--744108

-----Applicant in O.A. No. 895/2018

Probir Kr. Mazumdar
S/o Shri Ashok Kumar Mazumdar,
R/o Kishori Nagar, Kalighat
North & Middle Andaman
Pin--744202

-----Applicant in O.A. No. 859/2018

Versus

1. Union of India,
Ministry of Home Affairs,
Service through the Secretary,
Department of Police,
New Delhi-110041.

2. The Director General of Police,
Andaman & Nicobar Islands,
Port Blair-744101,
South Andaman.

3. The Superintendent of Police,
South Andaman District,
Port Blair-744101,
South Andaman.

----Respondents in both the O.As.

For the Applicants: Ms. A.Nag, Counsel,

For the Respondents: Mr. A.Prasanth, Counsel

ORDER

Per: Ms. Bidisha Banerjee, Member (J):

Since facts of both the O.As. are quite similar and common question of law is involved, both the O.As. were heard together and are disposed with this common order. For the sake of brevity, the facts of O.A. No. 895/2018 are delineated hereunder.

2. The applicant, in O.A. 895/2018, has sought for the following reliefs:

- "a. To set aside and quash and memorandum No.SP(D)SA)/DE-21/2011/542, dated 10th December 2011 issued by the Superintendent of Police, South Andaman District, Port Blair.*
- b. To set aside and quash the order book no. 1509, dated 18th May, 2018 passed by the Director General of Police, A & N Islands (Appellate Authority).*
- c. To aside the memorandum no.SP(D)/SA/DE-21/2014-16/6295 dated 28-09-2016 issued by the Superintendent of Police, South Andaman District (disciplinary authority)*
- d. To set aside and quash the order no. 38 dated 4th January, 2018 passed by the Superintendent of Police, South Andaman District Port Blair (Disciplinary Authority).*
- e. To pass an order directing the respondent authorities to reinstate the service of your applicant and to release all the consequential benefits of your applicants.*
- f. To pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of Justice."*

3. The facts in a nutshell are thus :

The applicant was appointed as Constable in A & N Police. While posted at Police Station, Aberdeen, on 08.07.2013, a case was registered at P.S. Pahargaon under Section 363 of the CrPC in terms of FIR No. 126/2011. He was arrested on 13.07.2011 and tried for offence under Section 363/366 A/376/342/376(g)/368/372/506/34 of IPC. He was placed under suspension vide order dated 14.07.2011.

A preliminary inquiry was conducted and, on the basis of the said inquiry, on 10.12.2011, a memorandum was issued initiating a disciplinary proceeding against the applicant on the basis of the criminal case initiated against him. A regular disciplinary proceeding was conducted and, on 5.11.2014, the Disciplinary Authority ordered his dismissal from service.

Meanwhile, the criminal case initiated against the applicant by the Police of P.S. Pahargaon was also committed to the Court of Learned Sessions Judge and, on 30.07.2014, the applicant was acquitted of the charges on the ground that the prosecution has failed to prove the case against him and, thus, he was discharged from the said criminal case.

The applicant has alleged that although his acquittal was prior to dismissal from service, the Disciplinary Authority failed to consider the factum of his acquittal. The applicant has also alleged that the victim and her mother were never examined in the disciplinary proceeding.

Aggrieved, the applicant preferred an appeal to the Appellate Authority. He also preferred an Original Application before this Tribunal in O.A. No. 68/2015, which was allowed by setting aside the orders of the Disciplinary Authority and the Appellate Authority with the direction for *de novo* inquiry from the stage of evidence of the victim and her mother. A *de novo* inquiry was initiated. The victim and her mother were examined but they never supported the case of the prosecution. The Inquiry Officer found him not guilty of the charges but, disagreeing with the finding of the Inquiry Officer, the Disciplinary Authority issued show cause for imposition of a penalty and once again dismissed the applicant from service. The Appellate Authority upheld the view of the Disciplinary Authority. Aggrieved whereby, the present O.A. has been filed.

4. At hearing, Ld. Counsel for the applicant would vociferously contend that when the alleged victim and her mother deposed against the prosecution and in favour of the applicant, the authorities could not have punished him on the basis of the statements recorded in the preliminary inquiry when such preliminary inquiry followed by a full fledged trial, resulted in acquittal of the applicant from all the charges.

Ld. Counsel, in support of her contentions, would place the

following depositions, which is extracted from the inquiry report with supplied emphasis for clarity :

"Cross Examination of PW-5 (Smti Kaushalamma) by DA of CO-I and CO-II

Q1. Have you any idea what is content of the FIR No. 126/11 dated 08/07/2011 U/s 363 IPC lodged by you at PS Pahargaon?

Ans. No

Q2. Whether the contents of the said FIR read over and explained to you?

Ans. No

Q3. Whether you complained and lodged FIR against Police Constable namely PK Mazumdar and Mahes Lal at PS Pahargaon on 08/07/2011, that they kidnapped your daughter and raped?

Ans. No

Q4. Is it fact that your daughter was never kidnapped and raped by Cos?

Ans. Yes

6. Statement of Kumari V.Rama Devi D/o Appa Rao (22yrs) R/o Old Pahargaon, PW6

The earlier statement of PW-6 recorded during preliminary enquiry recorded by Insp. Jenifer Paul dated Nil read over today on 26/04/2016 to PW-6 by PO during enquiry proceeding, but she has not corroborated and denied the contents of her earlier statement which is marked (Ex-S-7) and she identified her signature appeared on the body of the statement marked (Ex-S-7/1).

Her fresh statement recorded today and she stated that she is residing at Old Pahargaon along with her mother in their own house. My father died long ago. Uday Bhaskar Rao is my elder brother resides in mainland. My mother Smt. Kaushalamma works at Utkrosh. I read upto class-v. My mother generally reported her duty at about 8AM and returned home at about 1PM. I have no

acquaintance with B Laxman Rao of Buniyadabad. On 06/07/11, in the morning I had a quarrel with my mother and that's why I went to Rangat by bus to my relative's house with my friend Kumari. I returned home on 08/07/11. My mother told me that she had already reported to Police and that is why she took me to police station and informed to police that I have returned. After that we returned to our home at Pahargaon. My statement also recorded before the Judicial Magistrate on 15/07/11 but I don't know the contents of it. She identified her signature appeared on body of the statement recorded by Judicial Magistrate. The Contents of the recorded statement by Judicial Magistrate marked (Ex-S-7/2) and the signature of PW-6 marked (Ex-S-7/3).

The fresh statement rendered as above by PW-6 during enquiry proceeding before enquiry officer read over in Hindi and acknowledged by PW-6.

"Cross Examination of PW-6 (Kumari Rama Devi) by DA of CO-I and CO-II

Q.1. Whether you have any acquaintance with Cos (Constable PK Mazumdar and Mahes Lal)?

Ans. No.

Q.2. Whether the Cos namely PK Mazumdar and Mahes Lal who are present here, kidnapped and raped you?

Ans. No.

Q.3. When you returned from Rangat to your residence at Old Pahargaon on 08/07/2011, What did you say to your mother when she asked that where were you on 06/07/2011 and 07/07/2011?

Ans. I told my mother that I was at Rangat with our relatives.

Q.4. When your mother took you to PS Pahargaon, what she says there?

Ans. My mother informed to the PS that my daughter returned to my house from Rangat today on 08/07/2011.

Q.5. Whether you gave any statement before the

Investigation Officer of preliminary enquiry officer that the Cos kidnapped and raped you?

Ans. No.

Q.6. Is it fact that as tutored by Police against the Cos and shown their photographs in the Police Station and accordingly, you identified Cos during TIP in presence of Magistrate?

Ans. Yes.

Q.7. Is it fact that as tutored and pressurized you to give statement before the Magistrate against the Cos?

Ans. Yes.

Q.8. It is my submission that neither you were kidnapped by Cos from Ayyaner temple where on duty nor they kept you in their rented room and raped you.

Ans. Yes."

Ld. Counsel would submit that the applicant on 20.03.2017 had represented to the Superintendent of Police as follows :

"As there is no evidence to prove the charges brought on record during the proceeding initiated against me and as such the principles of "Preponderance of Probability" is also not applied in the instant case.

In view of the facts and circumstances mention herein above I therefore request your good self to accept the findings submitted by the inquiry officer and to exonerate me from the charges leveled against me as the charges has not been proved by the prosecution either by documents or by oral evidence."

Ld. Counsel would submit that giving the said statement a complete go by, the Disciplinary Authority in its order dated 04.01.2018 recorded as under:

"After careful examination of records of the case, I am of the view of the view that the evidences collected during the course of enquiry are sufficient to prove the

charges framed against the Charged Officers PC/1310 Mahes Lall (U/S) and PC/1354 Prabir Kumar Mazumdar (U/S) on the principle of preponderance of probability although during the de-novo enquiry, both the complainant and the victim minor girl turned hostile.

It is also significant to mention that during the Test Identification Parade, the victim minor girl had rightly identified the Charged Officers PC/1310 Mahes Lall (U/S) and PC/1354 Prabir Kumar Mazumdar (U/S) as accused persons. Furthermore, while recording the victim's statement made before Ld. Magistrate u/s 164 Cr.PC, she had also stated about heinous offence committed by the Charged Officers.

Smt. Kaushalamma (Complainant) victim mother had lodged a missing report at PS Pahargaon regarding missing of her daughter Ms. Rama Devi (victim minor girl) and on the basis of her written complaint, a case was registered at PS Pahargaon against the Charged Officers PC/1310 Mahes Lall (U/S) and PC/1354 P.K. Mazumdar (U/S).

It is also fact that before committing the misconduct the Charged Officers were deployed on picketing duty at Ayyenar Temple and they left the duty place without informing their superiors.

The evidences collected during the enquiry is sufficient to prove the charges framed against the Charged Officers on the basis of the circumstantial and oral evidences on record. The Charged Officers cannot be exonerated from the charges levelled against them and as such, the undersigned is in disagreement with the findings of the Enquiry Officer. Therefore, the charges levelled against the Charged Officers have been found to be substantiated on the principle of preponderance of probability.

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During the personal hearing, they have not raised any new points other than which were mentioned in their

written replies to the de-novo enquiry findings and to the disagreement memorandum and pleaded for leniency.

Considering all aspects of the case, the undersigned finds that both the Charged Officers being members of a disciplined force and entrusted with the responsibility of ensuring the safety of the society have indulged in the most deplorable and inhuman act of violating a minor girl. By indulging in such an act, they have defamed the entire police force in the most obnoxious manner, which cannot be tolerated. Such misconduct needs to be curbed bot only for better discipline of the police force, but for the betterment of the society also.

Therefore, the proposed penalty of "Dismissal from Service, from A & N Police Service with immediate effect" upon both the Charged Officers PC/1310 Mahes Lall and PC/1354 Prabir Kumar Mazumdar have been made absolute for the proven misconduct on their part."

5. The Appellate Authority has dealt with the grounds as mentioned in the appeal in the following manner, which are extracted with supplied emphasis for clarity:

"The Appellants have mainly taken the following grounds/contentions in their Appeals against the order, passed by the Disciplinary Authority:-

(i) That the Disciplinary Authority has failed to appreciate the fact that the charges levelled against hem have not been held proved by the Enquiry Officer and therefore, the order of dismissal from service, passed by the Disciplinary Authority is bad in law and the same is liable to be set aside and quashed.

Such contentions of the Appellants are devoid of any merit. xx xx xx xx. It can disagree with the findings and come to its own conclusion by giving reasons for such disagreement. The Enquiry Officer's report is also not final or conclusive and the Disciplinary Proceedings do not stand concluded on

submission of the Enquiry Report by the Enquiry Officer. The Disciplinary Proceedings stand concluded with the final decision of the Disciplinary Authority as it is the Disciplinary Authority which can impose the penalty and not the Enquiry Officer.

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(ii) xx xx xx on the ground that no evidence available on record prove or establish the charges on the basis of preponderance of probability and directed to conduct a de-novo enquiry from the stage of examination of the victim girl and her mother.

Such contentions of the Appellants have no merit. The Hon'ble Tribunal had set aside the earlier orders passed by the then Disciplinary Authority and the then Appellate Authority due to no-examination of the prime Prosecution Witnesses viz. the victim minor girl (PW - 6) and her mother Smt. Kausalamma (Complainant / PW - 5) xx xx xx xx the Disciplinary Authority has now rightly replied upon the evidences viz. the statement of the victim girl recorded under Section 164 CrPC and the report of Test Identification Parade to prove the guilt of the Appellants on the principle of preponderance of probability.

(iii) That the Disciplinary Authority failed to appreciate that in the de-novo enquiry conducted in pursuance of the order passed by the Hon'ble Tribunal, the victim girl and her mother were examined but neither the victim girl nor her mother supported the charges against them and on the other hand the victim girl has categorically stated that neither they have kidnapped nor they had committed any sexual intercourse with her.

Such contentions of the Appellants have not merits as although the victim girl and her mother have retracted from their earlier statements made during the preliminary enquiry and under Section 164 CrPC but they have agreed of giving such statements and indentified their signatures too. It is a well settled principle of law that strict rules of evidence as envisaged under the Indian Evidence Act are not applicable in the departmental enquiry and the "Principle of Preponderance of probability" applies. Since,

the victim girl and her mother have now appeared in the Departmental Enquiry and they have cross examined by the Appellants in the interest of natural justice, now, I do not find anything wrong in taking into account of the statement given by the victim girl before the Magistrate under Section 164 Cr.PC and also the report of Test Identification Parade of the accused, which is a vital document in which the victim girl had identified the Appellants as accused persons. The Disciplinary Authority has rightly taken into account these evidences to prove the guilt of the Appellants on the principle of preponderance of probability. Moreover, the possibility of winning over the victim girl and her mother subsequently by the appellants cannot be ruled out.

(iv) That the Disciplinary Authority failed to appreciate that during cross examination, Smt. Kaushalamma had categorically stated that she has no idea about the contents of the FIR and she did not make any complaints against the Appellants regarding kidnapping or raping her daughter.

Such contentions of the Appellants have not merit as the fact remains on record that Smti. Kaushalamma had made a complaint to the Police Station about missing of her daughter.

(v) That the Disciplinary Authority failed to appreciate that altogether four witnesses were examined by the Enquire Officer but none of the witnesses were had levelled the allegation against them and the order passed by the Disciplinary Authority is without any evidence in support of the charges leveled against them.

There is not merit in such contentions of the Appellants as the Prosecution Witnesses adduced during the departmental enquiry have corroborated the statements made by them during the preliminary enquiry except Shri Barun Bhakta (PW-1), who has retracted from his earlier statement the reason best known to him. As per the statement of PW-4 (S.I Rasheeda) adduced before the DE proceeding, it amply proves that the Appellants were detailed for picketing duty on 06/07/2011 near Ayyanar Temple from 1700 hrs to 2200 hrs where they spotted the

victim minor girl near Ayyanar Temple and confined her in their rented house at Atlanta Point and sexually abused her forcefully. The documentary evidences also proves about their deployment for duty near Ayyanar Temple during the above mentioned time.

(vi) That the Disciplinary Authority failed to appreciate that the Hon'ble Court has honorably acquitted from them from the criminal case, on the basis of which the disciplinary proceeding was initiated and therefore, the order passed by the Disciplinary Authority is liable to be set aside and quashed. xx xx xx xx acquittal in the criminal case is not the determinative of the commission of misconduct or otherwise, and it is open to the authorities to proceed with the disciplinary proceedings, notwithstanding acquittal in criminal case. The scope of the departmental enquiry is to determine as to whether a Government servant has committed the misconduct and to consider the question whether the delinquent deserves to be retailed in public service or otherwise and to deal with such delinquency suitably. The object and the standard of proof of criminal prosecution and the departmental action are entirely different.

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The charges against the Appellants are grave. The Appellants as part of the uniformed police force, which is entrusted with the responsibility of safety and security of the society, had indulged in a reprehensible crime against a minor girl, which amounts to grave misconduct and gross indiscipline and such conduct is highly unbecoming of a member of the discipline police force.

6. Ld. Counsel for the applicant, Ms. A.Nag, and Ld. Counsel for the respondents, Mr. A.Prasanth, were heard and the records were perused.

7. We note that, in the earlier round, this Tribunal had observed as under:

"10. At the outset itself, we would like to reiterate the well settled as well as the trite proposition of law that Central Administrative Tribunal shall not act as an appellate authority over disciplinary authority in departmental proceedings. But one paramount and significant fact should be kept in mind that if any recording of guilt is made by the authority concerned without any admissible evidence, then it would amount to perverse order which would warrant interference by CAT. Once there is perversity in the order of the disciplinary authority or the appellate authority then necessarily interference of Central Administrative Tribunal is warranted. As such, keeping the aforesaid proposition in mind, we would like to analyze the records available. The article of charge is so grave that it is relating to kidnapping, detention, rape etc. The important fact that should be noted here is that neither the complainant namely, one B. Kausalamma and her daughter the victim girl Rama Devi was examined before the enquiry officer.

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The above excerpt and the perusal of the entire inquire report would reveal that the enquiry officer simply relied on the previous record emerged during preliminary enquiry and investigation. Certain excerpts from Annexure A -17, the order of disciplinary authority would run thus:

xxx xxx xxx. Further during the course of recording of statemet of victim u/s 164 Cr.PC, she had made allegation against both the charged officers. Later on during the trial, victim had turned hostile by not deposing/identifying the charged officers. Moreover, victim had made allegation against both the charged officers as is evident from the statements recorded during the preliminary enquiry by Insp. Jenifer Paul, an officer senior in rank to the charged officer. xxx xxx xxx

The aforesaid excerpts would also reveal that the disciplinary authority simply adopted the records emerged during preliminary enquiry and investigation.

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The appellate authority relied on the decision of the Hon'ble Apex Court in *Commissioner of Police, New Delhi v. Narender Singh* reported in (2006) 4 SCC 265. The said judgment of the Hon'ble Apex Court would point out that confession made by the accused during investigation by police in a criminal case could be proved before the department proceedings in spite of the embargo contained in section 25 and 26 of the Evidence Act and nowhere in the said judgment it is stated that the statement of the victim and other witnesses recorded under Section 161 of Cr. PC could be directly taken as evidence even in the absence of examining those witnesses before the enquiry officer. This important distinction in this case was not noticed by the appellate authority.

It is not the law that merely based on the statements recorded during preliminary enquiry and investigation and the statement recorded U/s 164 of Cr. PC and the medical report, in a case of this nature, simply charged official could be held guilty of rape and other acts, even though Session Court acquitted the charged official, who was accused therein. The Hon'ble Apex Court's decisions were not interpreted and understood properly by the appellate authority. The respondent authorities relied on medical evidence, but the Learned Sessions judge in his judgment observed thus:-

"PW 6 is the Doctor who examined the victim and according to the opinion there was no injury and no sign of violence or inflammation to the victim and the victim was stated to be sexually habituated."

The appellate authority simply relied on the statement recorded U/s 164 of Cr. PC and the medical report for holding the charged officer guilty of rape without in any way highlighting as to how that is permissible factually and legally as per law. The fact remains that the author of such previous statement was not subjected to cross-examination.

11. No doubt not even for a moment we hold that all statements recorded by the police during police investigation or the statement recorded U/s 164 of Cr. PC cannot be taken into consideration by the disciplinary authority. The disciplinary proceedings are different from criminal proceedings in stricto sensu. However, those

statements should be proved in the way known to law. For that there should be corroboration by the witnesses who gave the statements before police or if the same witness goes against the previous statement, there should be cross-examination of that witness and it would be elicited out that the witness turned hostile or won over etc. But in this case, indubitably and indisputably those witnesses did not appear at all. Even PW1, Shri Barun Chandra Bhakta who was relied upon to prove the circumstantial evidence turned turtle and he did not support the case of the State in the disciplinary proceedings. xxx xxx xxx.

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13. We are of the considered view that no stones should be left unturned for securing the presence of the complainant as well as the victim girl at the expense of the state and even if they are in the Mainland their presence should be secured at the cost of the State and they should be examined, otherwise it would be presumed that the department concerned did not take appropriate action in conducting the departmental proceedings."

8. The above extract from the previous order by this Tribunal would exemplify and demonstrate that this Tribunal had discarded the view of the Disciplinary Authority and the Appellate Authority that they could punish the delinquent solely on the basis of the statement-recorded against him in the preliminary inquiry. This Tribunal had clearly and unambiguously intended an examination and cross-examination of the victim girl and her mother so that the statement made in preliminary/police investigation and statement recorded under Section 164 of CrPC could be proved in the way known to law, or it should be proved that the witness turned hostile or won over etc. Whereas, once again the Disciplinary Authority and the Appellate Authority religiously

followed the statements recorded in the preliminary examination and totally discarded their deposition before the Inquiry Officer during their cross-examination. The violation of the earlier direction of the Tribunal is thus palpable.

In the case of *Narayan Misra vs. State of Orissa*, 1969 *SLR* 657, the Hon'ble Supreme Court noticed that the reasons as to why the disciplinary authority differed from the enquiry report were not communicated to the employee. The Hon'ble Court held as under:

"the Conservator of forests used against him the charges of which he was acquitted without warning him that he was going to use them. This is against all principles of fair play and natural justice."

In *Punjab National Bank vs Kunj Behari Misra*, (1998) 7 *SCC* 84 the disciplinary authority had disagreed with the report, holding the employee guilty of all the charges. No reason for disagreement was communicated to the employee and the disciplinary authority passed an order of punishment of recovery of loss out of bank's contribution to his Provident Fund. On challenge, High Court quashed the penalty order. The Bank's appeal was dismissed by a three Judges' Bench of the Supreme Court relying on *ECIL vs. B.Karunakar* (supra). The Hon'ble Court held as follows:

"It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording of guilt, imposes punishment on the officer. In our

opinion, in any such situation the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of inquiry as explained in Karunakar's case."

9. It is discernible from the record that neither in the criminal case nor in the departmental proceedings the respondents have been able to prove the charge against the applicant except from the fact that an FIR was lodged against the present applicant and the witnesses identified their signatures. But that, they have deposed that the contents of FIR was not known to them and that identification was done as tutored, have been brushed aside. They were not declared hostile during departmental inquiry and no evidence is forthcoming that they were won over.

10. In view of such glaring omissions in the orders, as noted in both the O.As., we feel it appropriate to set aside and quash the impugned penalty order and the order of Appellate Authority, and remand the matter back to the Disciplinary Authority to pass his order strictly in terms of the earlier order passed by this Tribunal and to act in accordance with law.

Both the O.As. are disposed of accordingly. No costs.

(Dr. N. Chatterjee)
Administrative Member

(B. Banerjee)
Judicial Member

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