

Moni Shankar vs Union Of India And Another on 4 March, 2008

Equivalent citations: 2008 AIR SCW 2067, 2008 (3) AIR KANT HCR 153, 2008 LAB IC 1660, 2008 (3) AIR BOM R 386, (2008) 4 MAD LJ 270, (2008) 2 SCT 340, 2008 (3) SCC 484, (2008) 2 SERVLR 818, (2008) 118 FACLR 1092, (2008) 2 CURLR 896, (2008) 3 SERVLJ 325, (2008) 2 LAB LN 753, (2008) 3 SCALE 455, 2008 (4) ALLMR (NOC) 16, 2009 (1) KCCR SN 11 (KAR), (2008) 2 BOM CR 774

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Bench: S.B. Sinha, V.S. Sirpurkar

CASE NO.:

Appeal (civil) 1729 of 2008

PETITIONER:

Moni Shankar

RESPONDENT:

Union of India and another

DATE OF JUDGMENT: 04/03/2008

BENCH:

S.B. SINHA & V.S. SIRPURKAR

JUDGMENT:

J U D G M E N T CIVIL APPEAL NO. 1729 OF 2008 (Arising out of SLP (C) No. 8183 of 2007) S.B. SINHA, J.

1. Leave granted.

2. This appeal is directed against the judgment and order dated 8th March, 2006 passed by a Division Bench of the High Court of Bombay in Writ Petition No. 3748 of 2003 whereby it allowed the writ petition filed by the respondents herein from the judgment and order dated 6th January, 2003 passed by the Central Administrative Tribunal, Mumbai Bench, in O.A. No. 283 of 2002.

3. Appellant herein was working as Booking Supervisor with the Central Railways. He was transferred to Chatrapati Shivaji Terminus in December, 1997. On or about 17th April, 1998 a decoy check was laid in the course whereof he was found to have overcharged a sum of Rs.5/- on the ticket issued to a decoy passenger. A departmental proceeding was initiated wherein the following imputations of charges were drawn :-

"Article - I: He overcharged the decoy passenger by Rs. 5/- (Rs. Five) on issue of one M/E Ticket No. 8148090 Ex. CSTM to Bhubaneswar.

Article - II: He was found having Rs. 199/- (Rs. One hundred ninety nine) short in his railway cash. Article - III: He declared his private cash in computer that the monetary ceiling for the satisfactory staff, without being certified by the supervisor in the private cash register."

4. In the said departmental proceeding, appellant inter alia raised a contention as regard to non compliance of paragraphs 704 and 705 of the Railway Vigilance Manual (the Manual) in the manner in which the purported trap was laid. It was furthermore contended that provisions of Rule 9(21) of the Railway Servant Discipline and Appeal Rules have not been complied with.

5. Appellant was found guilty of the said charges in the said departmental proceeding. A penalty of reduction to the lowest scale of pay fixing his pay at the lowest level at Rs.3,200/- for a period of five years was imposed. An appeal and consequently a revision preferred by him were dismissed by the Appellate Authority as also the Revisional Authority by orders dated 31st May, 2000 and 7th November, 2000 respectively.

6. He filed an O.A. before the Central Administrative Tribunal, Mumbai Bench. It was registered as O.A. No. 283 of 2002.

By reason of a judgment and order dated 6th January, 2003, the same was allowed opining that in terms of paragraphs 704 and 705 of the Manual, the trap ought to have been laid in presence of the independent witness or Gazetted Officer and as only one Head Constable of the RPF and not two Gazetted Officers had been assigned to witness the trap and furthermore the Head Constable was at a distance of more than 30 meters, he could not have heard the conversations by and between the appellant and the decoy passenger and thus the charges could not be said to have been proved. It was moreover found that the decoy passenger neither counted the money at the window nor protested that the balance amount was less by Rs.5/-, and in fact admitted to have left the window and came back half an hour later with the Vigilance Inspector which pointed out loopholes in the trap. It was pointed out that the appellant was not examined by the Enquiry Officer in terms of the provisions of Rule 9(21) of the Railway Servants (Discipline and Appeal) Rules (the Rules), which is mandatory in nature. It was also held that there was no evidence as regards the charge of returning Rs.5/- less to the complainant.

7. Aggrieved by and dissatisfied with the said judgment of the Tribunal, the respondents filed a writ petition before the High Court. By reason of the impugned judgment dated 8th March, 2006 the said writ petition was allowed by the High Court opining that the Central Administrative Tribunal in its original order having entered into the realm of evidence and re-appreciated the same, exceeded its jurisdiction.

8. Mr. A.K. Sanghi, learned counsel appearing on behalf of the appellant would submit that :-

1. The High Court committed a serious error in so far as it failed to take into consideration that the Railways Authorities were required to follow paragraphs 704 and 705 of the Manual scrupulously.

2. Appellant having not examined any defence witness, he should have been examined in terms of Rule 9(21) of the Rules, which being mandatory in nature, non-compliance thereof would vitiate the entire proceeding.

3. The shortage in cash having repaid by the appellant, no charge could have been framed in that behalf.

4. The findings of the High Court that the appellant was found to have been in possession of an excess sum of Rs.5/- was beyond record.

9. Dr. R.G. Padia, learned Senior Counsel, appearing on behalf of the respondents, on the other hand, would contend :

1. That finding of fact having been arrived at by the disciplinary authority, the same should not have been interfered with by the Tribunal particularly when some evidences have been led on behalf of the department.

2. The High Court has rightly opined that paragraphs 704 and 705 of the Manual pertaining to the manner in which the trap could be laid, contain only administrative instructions and are, thus, not enforceable in a court of law.

3. Since there was sufficient compliance of Rule 9(21), the impugned judgment should not be interfered with.

10. We may at the outset notice that with a view to protect innocent employees from such traps, appropriate safeguards have been provided in the Railway Manual.

Paragraphs 704 and 705 thereof read thus :-

"704. Traps

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) When laying a trap, the following important points have to be kept in view:

(a) Two or more independent witnesses must hear the conversation, which should establish that the money was being passed as illegal gratification to meet the defence that the money was actually received as a loan or something else, if put up by the accused.

(b) The transaction should be within the sight and hearing of two independent witnesses.

(c) There should be an opportunity to catch the culprit red-handed immediately after passing of the illegal gratification so that the accused may not be able to dispose it of.

(d) The witnesses selected should be responsible witnesses who have not appeared as witnesses in earlier cases of the department or the police and are men of status, considering the status of the accused. It is safer to take witnesses who are Government employees and of other departments.

(e) After satisfying the above conditions, the Investigating Officer should take the decoy to the SP/SPE and pass on the information to him for necessary action. If the office of the S.P., S.P.E., is not nearby and immediate action is required for laying the trap, the help of the local police may be obtained. It may be noted that the trap can be laid only by an officer not below the rank of Deputy Superintendent of Local Police. After the S.P.E. or local police official have been entrusted with the work, all arrangements for laying the trap and execution of the same should be done by them. All necessary help required by them should be rendered.

(vi) ...

(vii) ...

Departmental Traps For Departmental traps, the following instructions in addition to those contained under paras 704 are to be followed:

(a) The Investigating Officer/Inspector should arrange two gazetted officers from Railways to act as independent witnesses as far as possible. However, in certain exceptional cases where two gazetted officers are not available immediately, the services of non-gazetted staff can be utilised.

All employees, particularly, gazetted officers, should assist and witness a trap whenever they are approached by any officer or branch. The Head of Branch detail a suitable person or persons to be present at the scene of trap. Refusal to assist or witness a trap without a just cause/without sufficient reason may be regarded as a breach of duty, making him liable to disciplinary action.

(b) The decoy will present the money which he will give to the defaulting officers/employees as bribe money on demand. A memo should be prepared by the Investigating Officer/Inspector in the

presence of the independent witnesses and the decoy indicating the numbers of the G.C. notes for legal and illegal transactions. The memo, thus prepared should bear the signature of decoy, independent witnesses and the Investigating Officer/Inspector. Another memo, for returning the G.D. notes to the decoy will be prepared for making over the G.C. notes to the delinquent employee on demand. This memo should also contain signatures of decoy, witnesses and Investigating Officer/Inspector. The independent witnesses will take up position at such a place where from they can see the transaction and also hear the conversation between the decoy and delinquent, with a view to satisfy themselves that the money was demanded, given and accepted as bribe a fact to which they will be deposing in the departmental proceeding at a later date. After the money has been passed on, the Investigating Officer/Inspector should disclose the identity and demand, in the presence of the witnesses, to produce all money including private, and bribe money. Then the total money produced will be verified from relevant records and memo for seizure of the money and verification particulars will be prepared. The recovered notes will be kept in an envelope sealed in the presence of the witnesses, decoy and the accused as also his immediate superior who should be called s a witness in case the accused refuses to sign the recovery memo, and sealing of the notes in the envelope.

(c) XXX

(d) XXX"

11. The trap was laid by the members of the Railways Protection Force (RPF). It was a pre-arranged trap. It was, therefore, not a case which can be said to be an exceptional one where two gazetted officers as independent witnesses were not available.

12. Indisputably the decoy passenger was a constable of RPF. Only one Head Constable from the said organization was deputed to witness the operation. The number of witness was, thus, not only one, in place of two but also was a non gazetted officer. It was a pre-planned trap and thus even independent witnesses could have also been made available.

13. When the decoy passenger purchased the ticket, the Head Constable was at a distance of 30 meters. The booking counter was a busy one. It normally remains crowded. Before the Enquiry Officer, the said decoy passenger accepted that he had not counted the balance amount received from the appellant after buying the ticket It was only half an hour later that the Vigilance Team arrived and searched the appellant.

14. While we say so we must place on record that this Court in the Chief Commercial Manager, South Central Railway, Secunderabad and Ors. vs. G. Ratnam and Ors. : (2007) 8 SCC 212 opined that non-adherence of the instructions laid down in Paras 704 and 705 of the Vigilance Manual would not invalidate a departmental proceeding, stating :-

"17. We shall now examine whether on the facts and the material available on record, non-adherence of the instructions as laid down in paragraphs 704 and 705 of the Manual would invalidate the departmental proceedings initiated against the

respondents and rendering the consequential orders of penalty imposed upon the respondents by the authorities, as held by the High Court in the impugned order. It is not in dispute that the departmental traps were conducted by the investigating officers when the respondents were on official duty undertaking journey on trains going from one destination to another destination. The Tribunal in its order noticed that the decoy passengers deployed by the investigation officers were RPF Constables in whose presence the respondents allegedly collected excess amount for arranging sleeper class reservation accommodation etc. to the passengers. The transaction between the decoy passengers and the respondents was reported to have been witnessed by the RPF Constables. In the facts and circumstances of the matters, the Tribunal held that the investigations were conducted by the investigating officers in violation of the mandatory Instructions contained in paragraphs 704 and 705 of the Vigilance Manual, 1996, on the basis of which inquiries were held by the Enquiry Officer which finally resulted in the imposition of penalty upon the respondents by the Railway Authority. The High Court in its impugned judgment has come to the conclusion that the Inquiry Reports in the absence of joining any independent witnesses in the departmental traps, are found inadequate and where the Instructions relating to such departmental trap cases are not fully adhered to, the punishment imposed upon the basis of such defective traps are not sustainable under law. The High Court has observed that in the present cases the service of some RPF Constables and Railway staff attached to the Vigilance Wing were utilised as decoy passengers and they were also associated as witnesses in the traps. The RPF Constables, in no terms, can be said to be independent witnesses and non-association of independent witnesses by the investigating officers in the investigation of the departmental trap cases has caused prejudice to the rights of the respondents in their defence before the Enquiry Officers.

18. We are not inclined to agree that the non- adherence of the mandatory Instructions and Guidelines contained in paragraphs 704 and 705 of the Vigilance Manual has vitiated the departmental proceedings initiated against the respondents by the Railway Authority. In our view, such finding and reasoning are wholly unjustified and cannot be sustained."

It has been noticed in that judgments that Paras 704 and 705 cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. This Court proceeded on the premise that the executive orders do not confer any legally enforceable rights on any persons and impose no legal obligation on the subordinate authorities for whose guidance they are issued.

15. We have, as noticed hereinbefore, proceeded on the assumption that the said paragraphs being executive instructions do not create any legal right but we intend to emphasise that total violation of the guidelines together with other factors could be taken into consideration for the purpose of arriving at a conclusion as to whether the department has been able to prove the charges against the delinquent official. The departmental proceeding is a quasi judicial one. Although the provisions of

the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Court exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality. (See - State of U.P. v. Sheo Shanker Lal Srivastava :

(2006) 3 SCC 276 and Coimbatore District Central Cooperative Bank vs.
Coimbatore District Central Cooperative Bank Employees Association and another :
(2007) 4 SCC 669 2007.

16. We must also place on record that on certain, aspects even judicial review of fact is permissible. E v Secretary of State for the Home Department : [2004] 2 W.L.R. 1351.

17. We have been taken through the evidence of Shri S.B. Singh by Dr. Padia. Significantly the examination-in-chief was conducted by the Enquiry Officer himself. As the proceeding was for imposition of a major penalty, why the Presenting Officer, who must have been engaged by the department, did not examine the witness is beyond any comprehension. Even the minimum safeguard in regard to the manner in which examination-in-chief was conducted has not been preserved. The questions posed to him were leading questions. It is interesting to note that in answer to a question as to whether he had asked the appellant to return Rs.5/- , he not only answered in the negative but according to him the said statement was made by him as instructed by the Vigilance Inspector. He although proved Exhibits P/1 and P/2 which were written in English language but also stated that he did not know what had been written therein Strangely enough, the Enquiry Officer started reexamining him. Even in the re-examination he accepted that he could not read and write English.

18. The Enquiry Officer had put the following questions to the appellant:-

"Having heard all the PWs, please state if you plead guilty? Please state if you require any additional documents/witness in your defence at this stage? Do you wish to submit your oral defence or written defence brief? Are you satisfied with the enquiry proceedings and can I conclude the Enquiry?"

19. Such a question does not comply with Rule 9(21) of the Rules. What were the circumstances appearing against the appellant had not been disclosed.

20. The High Court, on the other hand, as indicated hereinbefore, proceeded to opine that the Tribunal committed a serious illegality in entering into the realm of evidence. It is permissible in law

to look to the evidence for the purpose of ascertaining as to whether the statutory requirement had been complied with or not.

21. Dr. Padia would submit that the jurisdiction of the Tribunal was limited and as some evidence was adduced, the Tribunal should not have interfered with the order of punishment imposed upon the appellant.

The Tribunal was entitled to consider the question as to whether the evidence led by the department was sufficient to arrive at a conclusion of guilt or otherwise of the delinquent officer. While re-appreciation of evidence is not within the domain of the Tribunal, an absurd situation emanating from the statement of a witness can certainly be taken note of. The manner in which the trap was laid, witnessed by the Head Constable and the legality of enquiry proceeding were part of decision making process and, thus, the Tribunal was entitled to consider the same.

It was only for the aforementioned purpose that paragraphs 704 and 705 of the Manual have been invoked. It may be that the said instructions were for compliance of the Vigilance Department, but substantial compliance thereof was necessary, even if the same were not imperative in character. A departmental instruction cannot totally be ignored. The Tribunal was entitled to take the same into consideration alongwith other materials brought on records for the purpose of arriving at a decision as to whether normal rules of natural justice had been complied with or not.

21. The High Court unfortunately even without any material on record held that some excess amount was found from the appellant which itself was sufficient to raise a presumption that it had been recovered from the decoy passenger. No such presumption could be raised. In any event there was no material brought on records by the department for drawing the said inference. The High Court itself was exercising the power of judicial review. It could not have drawn any presumption without there being any factual foundation therefor. It could not have taken judicial notice of a fact which did not come within the purview of Section 57 of the Indian Evidence Act.

22. We must also place on record that even Dr. Padia has taken us through the evidence of one of the witnesses.

23. The High Court has only noticed paragraph 704 of the Manual and not the paragraph 705 thereof. Paragraph 705 was very relevant and in any event both the provisions were required to be read together.

The High Court, thus, committed a serious error in not taking into consideration paragraph 705 of the Manual.

The approach of the High Court, in our opinion, was not entirely correct. If the safeguards are provided to avoid false implication of a railway employee, the procedures laid down therein could not have been given a complete go bye.

24. It is the High Court who posed unto itself a wrong question. The onus was not upon the appellant to prove any bias against the RPF, but it was for the department to establish that the charges levelled against the appellant.

25. The High Court also committed a serious error in opining that sub- rule (21) of Rule 9 of the Rules was not imperative. The purpose for which the sub-rule has been framed is clear and unambiguous. The railway servant must get an opportunity to explain the circumstances appearing against him. In this case he has been denied from the said opportunity.

26. The cumulative effect of the illegalities/irregularities were required to be taken into consideration to judge as to whether the departmental proceeding stood vitiated or not.

27. For the aforementioned purpose, the manner in which the enquiry proceeding was conducted was required to be taken into consideration by the High Court. The trap was not conducted in terms of the Manual ; the Enquiry Officer acted as a Prosecutor and not as an independent quasi judicial authority ; he did not comply with Rule 9(21) of the Rules, evidently, therefore, it was not a case where the order of the Tribunal warranted interference at the hands of the High Court.

27. The impugned judgment, therefore, cannot be sustained. It is set aside accordingly and that of the Tribunal restored. The appeal is allowed with costs. Counsel fee assessed at Rs.25,000/-.