

(1992) 06 CAL CK 0010

In the Calcutta High Court

Case No : Appeal Arising Out of Matter No. 316 of 1987

Allahabad Bank

APPELLANT

Vs

Pronab Kumar Mukherjee and Others

RESPONDENT

Date of Decision : 25-06-1992

Acts Referred:

Allahabad Bank Officer Employees (Discipline and Appeal) Regulations, 1976 —
Regulation 6(4)
Evidence Act, 1872 — Section 18

Citation : (1993) 1 LLJ 390

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit Kumar Sengupta, J

Bench : Division Bench

Advocate : Sanjoy Bhattacharjee and Debranjana Basu Mallick, for the Appellant;
Malay Kumar Basu and Nandalal Nayak, for the Respondent

Final Decision : Dismissed

Judgement

Sengupta, J.—This appeal by Allahabad Bank is directed against the judgment and order dated June 26, 1991 of the learned Single Judge setting aside the disciplinary proceeding and order of removal of the respondent

2. Shortly stated the facts are that at the material time the respondent was posted at Calcutta Main Branch of the Bank and worked as Officer-in-Charge of the Extension Counter at the Head Office. The Counter was run by the respondent along with two cashiers, two clerks and one peon. He was required to supervise the work of the Extension Counter including passing of cheques, of the Accounts, of Staff of the office and other miscellaneous vouchers pertaining to the Head Office. On October 9, 1986, being the last working day before the Puja Holidays, at or about 3.00 p.m. two officers from the Calcutta Main Branch paid a visit to the said Extension Counter of which the respondent was in charge. The said Officers checked the cash vis-a-vis the payment vouchers. It was detected that a sum of Rs. 40,000/- was found short of the actual amount. Subsequently, the Manager (Personnel) and the Deputy Manager (Admn) of the Head Office

were deputed to carry out checking of cash at the Head Office, Extension Counter, who in turn just carried out the formalities after getting the cash balance signed by the respondent. According to the respondent, since the day's business was not closed and since the undisbursed amount was not made over to the respondent till that time, the respondent had no knowledge of the said shortage inasmuch as the entire transaction save and except passing of the cheques and vouchers by the respondent made by the cashiers of the said counter. The respondent being in charge of the said Extension Counter proposed in writing dated October 9, 1986 to the Assistant General Manager of the Bank that he would liquidate the said sum of Rs. 40,000/- on his own within ten days from the date. This gesture of the respondent to shoulder the entire burden was only to save his subordinates from being harassed and/or from any disciplinary action inasmuch as the respondent had good faith in them. It is the case of the respondent that the said Assistant General Manager was convinced with the statement made by the respondent and instructed him in the interest of the Bank to make arrangement for liquidation of the same. As the respondent had no capacity to liquidate the said sum of Rs. 40,000/- he approached his two colleagues of the said bank, both officers of the Head Office, who issued two withdrawal slips for Rs. 40,000/-. The two withdrawal slips were not accepted by the Bank and instead the respondent was made to sign a suspense account voucher adjusting day's shortage of Rs. 40,000/-. The day's transaction was not recorded by the respondent save and except passing of vouchers.

3. On the same day, i.e. October 9, 1986, at about 5.30 p.m. the respondent was placed under suspension for the shortage of the sum of Rs. 40,000/-. Immediately after the service of the order of suspension, the respondent was detained by the Officers of the Bank in the office and a report was sent to the Hare Street Police Station. The Police Officer from the Hare Street Police Station attended the office soon thereafter. The respondent earnestly requested the Bank including the Police officers to send a message to the respondent's elder brother Sri Prabhat Kumar Mukherjee, an Advocate of this Court, so that he might arrange for the said short payments to save the respondent from the said unfortunate affairs. The said request was acceded to and the respondent's elder brother attended the office at about 1.0.30 p.m. and after hearing he expressed his desire to pay a sum of Rs. 8,000/- in cash and Rs. 32,000/- by cheque which could be encashed after the Puja vacation. The Bank authorities demanded money in cash which was not otherwise readily possible to procure during the night. The respondent was taken to the Police Station. The respondent was thereafter released on bail on October 14, 1986. The respondent already signed a suspense account voucher for adjusting the said sum of Rs. 40,000/-. This aspect was not also disclosed to the respondent's elder brother.

4. On October 23, 1986 the respondent was served with a show cause notice dated October 21, 1986 issued by the Bank and by the said show cause notice the respondent was directed to show cause in writing within seven days from the date of receipt of the said charge-sheet as to why appropriate disciplinary action

as contemplated in Allahabad Bank Officer Employees (Discipline & Appeal) Regulations, 1976, should not be taken against the respondent.

5. The respondent, therefore, sent a letter dated November 10, 1986 to Sri N.S.T. Chari, Assistant General Manager and Disciplinary Authority, Allahabad Bank. By the said letter the respondent recorded that it is his moral obligation to make good the shortage and accordingly forwarded a cheque bearing No. K 592333/BB/1513 of November 10, 1986, for Rs. 32,000/- in partial liquidation of the said amount. The respondent prayed for fifteen days' time from the date of the said letter for final liquidation and to reply the charge-sheet dated October 21, 1986. By a letter dated November 24, 1986 the respondent again sent a cheque for Rs. 6,000/- leaving balance of Rs. 2,000/- for which the respondent requested the authority to give another ten day's time to pay off for final liquidation of the shortage mentioned in the charge-sheet and to reply the said charge-sheet dated October 21, 1986.

6. By further two letters dated November 24, 1986 and November 25, 1986 the respondent forwarded further cheques aggregating Rs. 8,000/- and thereby liquidated the entire shortfall. According to the respondent the said sum of Rs. 40,000/- was procured by him after taking loan against National Savings Certificate and Fixed Deposits and from his brother and after selling the ornaments of his wife.

7. The respondent replied to the charge-sheet by a letter dated December 9, 1986. The respondent in the said reply stated that he had been in charge of the said Extension Counter. He felt it as his moral obligation to make good the loss of the Bank even at the cost of his personal sufferings. So, the amount of shortage was also adjusted to the debit of the Suspense account and the concerned voucher was signed by him. Subsequently, the respondent also duly made good the shortage. The respondent recorded that he had no intention to misappropriate the Bank's fund or to misuse his official position in the Bank and he also disagreed as to the charges levelled against him. He further recorded that he being a departmental head and in-charge should repent for that.

8. The Disciplinary Authority after receipt of the said reply did not hold any enquiry but arrived at its decision on January 19, 1987 to the effect that the respondent be removed from the service of the Bank with immediate effect.

9. Against the said order imposing the punishment of removal from service, the respondent moved this Court under Article 226 of the Constitution of India and obtained an interim order of stay of the said order of removal. During the pendency of this writ application, the respondent was allowed to retire from the service of the Bank.

10. The main contention that was raised before the Court of the first instance is that the removal from service being a major penalty could not be made without complying with the procedure laid down in the Officer Employees (Discipline & Appeal) Regulations, 1976. However, the contention of the bank was that when

the delinquent Officer admitted his guilt, it was not necessary to hold any further enquiry to impose penalty as warranted, having regard to the facts and circumstances of this case and the gravity of the offence committed by the delinquent Officer.

11. The Learned Judge of the First Court after considering the submissions and the decisions referred to him came to the conclusion that there was no admission in this case by the respondent about commission of any offence and in any event the Bank having allowed the respondent to retire from the service in the usual course must be deemed to have condoned his guilt. The Learned Judge also held that the Bank did not proceed with the original charges but proceeded on a new offence in respect of which the respondent had not been charged with and accordingly the entire proceeding was vitiated. The learned Judge, therefore, allowed the writ petition and quashed the proceedings initiated by the Bank and directed that all service benefits including monetary benefits be paid to the respondent since he had already retired from the service.

12. At the hearing before us, Mr. Sanjoy Bhattacharjee, learned Senior Advocate appearing for the Bank, has submitted that in this case the Learned Judge failed to appreciate that the respondent had admitted his guilt and accordingly he came forward to liquidate the shortage. Had he not been guilty, he would not have come forward to make good the shortage. In view of the clear admission made in this case, the Bank was justified in imposing the penalty of removal as the Bank lost all confidence in him who was holding a responsible post of trust and confidence. He also submitted that in view of the interim stay granted by the Court, the order of suspension which merged with the order of removal automatically revived and accordingly in the usual course he was allowed to retire from the service. This could not be construed as condonation of the offence committed by the respondent. He has drawn our attention to an unreported decision of a Division Bench of this Court in the case of another employee of the Allahabad Bank in Appeal No. 281 of 1991 (1) (Allahabad Bank v. Nandalal Adhikary) where the judgment was delivered on February 27, 1992. He contended that under similar circumstances, a Division Bench of this Court allowed the appeal of the Allahabad Bank and we should also follow the said decision.

13. Mr. Malay Kumar Bose, learned Senior Advocate appearing for the respondent, has submitted that there was no admission at all on the part of the writ petitioner. In his letter, he made it quite clear that it was his moral obligation to make good the shortage as he was in charge of the counter. He also submitted that no leave was obtained from the Court before retiring the respondent and it should be deemed that the bank condoned the offence, if any, committed by him. He also submitted that there was no admission. It was incumbent on the Bank to hold an enquiry into the charges and even assuming no enquiry was required to be held, even then the Bank acted without jurisdiction in imposing the punishment on a charge not at all framed against the respondent and for which

no show cause notice was issued,

14. We have considered the rival contentions. Regulation 6 of the Allahabad Bank Officer Employees (Discipline & Appeal) Regulations 1976, inter alia, provides that no order imposing any major penalties shall be made except after an enquiry is held in accordance with the said Regulation. Regulation 6 (4) provides as follows:

"On receipt of the written statement of the officer employee, or if no such statement is received within the time specified, an enquiry may be held by the Disciplinary Authority itself, or, if it considers it necessary so to do, appoint under sub-regulation (2) an Inquiring Authority for the purpose;

Provided that it may not be necessary to hold an inquiry in respect of the articles of charge admitted by the officer employee in his written statement but shall be necessary to record its findings on each such charge."

15. The main contention, therefore, of the Bank is that in view of the aforesaid Regulation in this case no enquiry was required to be held as the respondent admitted the charge framed against him. At the outset, we must observe that the said Regulation does not provide that even if articles of charge have been admitted by the charged officer, no enquiry should be held at all. It is the discretion of the disciplinary authority to hold or not to hold any enquiry having regard to the facts and circumstances of a particular case. The Supreme Court in K.S. Srinivasan Vs. Union of India (UOI), , held that the admission is not conclusive of the matter admitted, though it may in certain circumstances operate as an estoppel. In our view, therefore, an admission may not in all cases do away with the requirement of holding an enquiry. But even assuming that no enquiry is required to be held, the conditions laid down in the proviso to Regulation 6 (4) have to be strictly followed.

16. At this stage, it is necessary for us to ascertain whether from the letters or conduct of the respondent any admission of any guilt by the respondent could be spelt out.

17. The first letter which was written by the respondent on October 9, 1986, is to the following effect:

"To

The Asstt. General Manager, Cal. Main Branch

Dear Sir,

I am to state that there is a shortage of Rs. 40,000/- (Rupees forty thousand only) in Rs. 100/- denomination which was detected by inspecting officer deputed from H.O. as also from Cal. Main Branch at the time of closing. I undertake to repay and make good the shortage for the amount of Rs. 40,000/- (Rupees forty thousand only) within a period of ten days from this date.

Yours faithfully, Sd. P.K. Mukherjee October 9, 1986"

18. In this letter, the respondent only undertook to repay and make good the shortage but there was no admission that the shortage was due to his own lapses.

19. As indicated, the charge sheet dated October 21, 1986 was served upon the respondent on October 23, 1986. Upon receipt of the said charge sheet by a letter dated November 10, 1986 the respondent intimated to the Asstt. General Manager, inter alia to the following effect:

"Dated November, 10, 1986

Dear Sir,

You are aware that on October 9, 1986 shortage of Rs. 40,000/- (Rupees forty thousand only) was detected from the Calcutta Branch Extent. Counter (at H.O.) Cal. Since I was the In Charge of the said Deptt. it is my moral obligation to make good of the shortage. Hence, I enclose herewith the Banker's Cheque No. K 592333/BR/1513 of November 10, 1986 for Rs. 32,000/- (Rupees thirty two thousand only) frg. Yourselves issued by Calcutta Main Branch, in partial liquidation of the said amount. At this stage, I would request you to give me another 15 days time from the date hereof for final liquidation and to reply your letter No. Est/520 dated October 21, 1986. Please acknowledge receipt of my letter and the enclosed Bankers' Cheque and oblige.

Thanking you,"

20. In this letter also the respondent only said that it was his moral obligation to make good the shortage as he was in charge of the Extension Counter. There is no admission of any article of charge.

21. Subsequent thereto by two letters dated November 24, 1986 and November 25, 1986 the respondent only asked for time to liquidate the shortage and also extension of time to reply to the charge-sheet dated October 21, 1986. As a matter of fact, in the letter dated November 25, 1986 he reiterated that it was his "moral obligation to make good the shortage" and the entire shortage had been liquidated on that date.

22. Next comes his letter dated December 9, 1986 which is the written reply to the charge-sheet on which heavy reliance has been placed by the learned Advocate for the appellant to bring out clear admission on the part of the respondent which dispensed with the enquiry proceeding. The said letter, inter alia, records as follows:

"(a) It is submitted that I was the in-charge of Cal. Branch Extn. Counter at Head Office on October 9, 1986.

(b) That on the said date after the close of business a shortage of Rs. 40,000.- (Rupees forty thousand only), was detected. As I was in-charge of the said Extn.

Counter, I felt it as my moral obligation to make good the loss of the Bank even at the cost of my personal sufferings. Accordingly, on the said date the shortage was adjusted to debit of suspense a/c and the concerned voucher was signed by me. Subsequently, I have liquidated the said shortage vide Bankers' Cheque Nos. K 592333/BR/1513 dated November 10, 1986, K 593888/BR/1568 dated November 25, 1986 and K 503892/BR/1572 dated November 25, 1986 for Rs. 32,000/-, Rs. 6,000/-and Rs. 2,000/- respectively.

(c) I had no intention either to misappropriate bank's fund or to misuse my official position and I humbly disagree the charges levelled against me. As Departmental in charge, if there was any lapse on my part in performing my duties, I am repentant for that, The shortage which was found on the said date has been liquidated fully by me as stated above, as such, the charge on Breach of Trust should not lie on me."

23. This letter would clearly indicate that the respondent was dictated by his moral conscience to liquidate the shortage as he was in-charge of the Extension Counter. Regulation 6 ! (4) on which the reliance was placed, which we have already extracted, provides that holding of enquiry is dispensed with when any article of charge is admitted by Officer Employee; but in this case, the respondent specifically denied the charges levelled against him and also said that the charge of breach of trust did not lie on him on the facts and in the circumstances of this case. Having regard to the contents of the said letter read with the conduct of the respondent and the surrounding circumstances, we are unable to hold that the respondent admitted any article of charge levelled against him. An admission must be considered as a whole. Mr. Bhattacharjee wanted us to read this letter dehors the context. He only emphasized the fact that the respondent made good the shortage and harped on the theme of having his moral obligation being in-charge of the Extension Counter, which according to the learned Counsel, demonstrated his admission. Whether it was his moral or legal obligation to make good the shortage is not the issue. The question is whether, in fact, the charged officer admitted the article of charge. An admission has to be construed strictly because it deprives a delinquent officer of his right to appear before a duly constituted enquiry to show that the allegations had no basis at all; in other words, he was innocent. An admission may deprive a person of his livelihood as was sought to be done in this case by removing the respondent from service. The admission of a guilt and moral obligation are quite different and distinct. It may be that a charged officer may because of the dictates of his conscience and moral values, make an admission of his guilt. He may also feel that he has a moral obligation to safeguard the interest of the subordinates and the Bank as well and he volunteers to make good the shortage. This cannot be taken to be an admission of his guilt. The Disciplinary Authority did not enquire as to whether it was an act of the in-charge of the counter or the employees under him which resulted in the shortage as detected.

24. As this stage, we may consider the judgment of a Division Bench in the case

of Nandalal Adhikari (supra) . In that case, a proceeding was initiated against the Cashier-in-Charge of Bhulaguri Branch of the Allahabad Bank. In that case, the Disciplinary Authority, on the basis of his admission, dismissed the said Cashier-in-Charge from Bank's service. This was challenged by the dismissed employee in the writ jurisdiction. There the Learned Single Judge, inter alia, observed as follows:

"Considering the facts and circumstances of this case I hold that the bank has correctly found the petitioner guilty, but the punishment of dismissal inflicted upon the petitioner is too harsh and is causing great hardship to the petitioner. Out of the sum of Rs. 5,000/- (50,000?) misappropriated by the petitioner, a sum of Rs. 40,000/- has already been deposited. The petitioner has expressed his regret and there is also no allegation of any insubordination which renders the petitioner disqualified to work in any post in the bank. It has been submitted on behalf of the petitioner that he is on the verge of starvation with his wife and children and he is ready and willing to accept any lesser punishment, In my view, ends of justice will be met if the petitioner is reverted to the post of peon-cum-farash which does not involve handling or entrustment of any money. Since the petitioner had been appointed in the post of peon-cum-farash and since the petitioner has agreed to accept that post, there will be no difficulty in such reversion."

25. In that case, no contention was raised as regards the admission made by the writ petitioner. On appeal against the said judgment, the Division Bench recorded as follows:-

"Mr. Bhattacharya, the learned Counsel appearing in support of the appeal, has submitted that the respondent was also found guilty on one earlier occasion for defalcation of funds. At that time a lenient view was taken and no punishment was awarded to him. But since he has repeated the same offence, the learned Trial Judge has not been correct in holding that the respondent has been awarded harsh punishment. Mr. Bhattacharya has further submitted that the Bipartite agreement which provides for awarding punishment to the employees in the category of the respondent, does not provide for such reversion in the rank. Clause 19.6 of the said Bipartite agreement provides that an employee found guilty of gross misconduct may be dismissed without notice or be warned or have an adverse remark entered against him or have his increment stopped or have his mis-conduct condoned or merely discharged. The Conduct Rules as contemplated by the Bipartite settlement does not contemplate the reversion to the lower rank."

26. The Division Bench thereafter proceeded to hold as follows:-

"The Writ Court, while disposing the application under Article 226 of the Constitution, can set aside an order of the punishment, if it finds that it is not maintainable or otherwise suffers from any other infirmity. In this case, the Learned Trial Judge has substituted his judgment in place of the order of the

Disciplinary Authority. We are afraid that the learned Trial Judge is not competent to do so. In this view of the matter, as well as in view of the fact that the disciplinary Rules does not make such provision, and also taking into consideration the repealed misconduct of similar nature committed by the appellant, we are of the view that there is no case for showing any leniency to him, neither the Writ Court is competent to do so in the circumstances of this case."

27. In that case, however, the decision of the Supreme Court was not referred to where the Supreme Court had laid down that if the punishment is disproportionate to the offence charged and proved, the Court has the jurisdiction to set aside the punishment. Supreme Court in *Bhagat Ram Vs. State of Himachal Pradesh and Others*, held that penalty must be commensurate with gravity of the misconduct and if justice and fair play demanded, a minor penalty may be imposed by the Court "without being unduly technical about jurisdiction." (para 15-p. 7). In that case, the Supreme Court after setting aside the order of removal from service imposed a penalty of withholding of two increments with future effect. It is, therefore, not correct to say that in no case the Writ Court can revise the penalty imposed by the Disciplinary Authority. This will depend on the facts and circumstances of each case. It is neither desirable nor possible to lay down a broad proposition restricting the jurisdiction of the Writ Court in substituting a major penalty by a minor penalty on grounds of justice, equity and fair play or when such substitution is warranted by the arbitrariness in the quantum of punishment negating reasonableness and fairness.

28. The admission on which Mr. Bhattacharjee heavily relied in the case of *Nandalal Adhikari* (supra), is in the following terms:-

"Respected Sir,

In reply to the charge-sheet sent by you (R.O. III/Staff/1045, dated June 12, 1987), my humble submission is that I admit your all charges. I further admit that this type of nasty activity is most offensive in the interest of the Bank.

In reply to question No. 1, I inform that I had to commit the offence No. 1 only to cover the offences Nos. 2, 3 & 4. I have committed this type of offence neither to steal or role nor under the control of avarice, I have done this suddenly to satisfy my want only. But Sir, I am very needy. I have to maintain my wife, two minor daughters, mother and another old dependent in my family. I am the only person without whose income all of them shall have to die. In such circumstances, if I am discharged from service, then there is no other alternative than death before me or the members of my family. Sir, please forgive me for this time and save me and all of my family from death. Sir, just coming into contact directly with cash, this needy feeling of mine raised head and being worried due to want, I suddenly committed this mistake to save myself temporarily. Besides dismissal from service, you please inflict any other

punishment, I shall accept the same bowing down my head. Please for give me for the last time. I shall not commit this type of offensive activity again, at any time and in any circumstances."

29. This letter would clearly demonstrate that the charged officer admitted the articles of charge in no uncertain terms. He admitted his guilt and prayed for mercy. It was a clear case of admission, on the basis whereof the Disciplinary Authority was entitled to proceed by dispensing with the enquiry. That apart, the issue as to whether there is an admission and whether the enquiry should have been dispensed, with was neither urged before the Court of the first instance nor before the Appellate Court. The aforesaid decision, therefore, does not advance the case of the Bank.

30. In our view, unless the statement made by the charged officer amounts to a clear and unambiguous admission of his guilt, failure to hold a formal enquiry would certainly constitute serious infirmity in the order of removal passed against him. Under the Regulations of the bank, the respondent was entitled to have a reasonable opportunity of meeting the charges framed against him and in the present case, before the show-cause notice was served on him, he has had no opportunity to meet the charges. In the instant case, there is no admission by the respondent and consequently, the action of the bank in passing the order of removal without holding an enquiry under the Regulations cannot be sustained.

31. It is also contended that even assuming that the statement made by the respondent in the letters referred to above amounted to admission, the condition laid down in the proviso to Regulation 6 (4) must be strictly complied with. The Disciplinary Authority, if it does not hold any enquiry, must record its finding on each charge. The Learned Judge found that there was no recording of any finding on the charge originally framed against the respondent. In the absence of such finding, even if it may not be necessary for the authority to hold an enquiry into the article of charge allegedly admitted by the respondent, the action of the bank authorities in removing the respondent from service is not sustainable. The Disciplinary Authority failed to act in terms of the said proviso by not recording its finding on the charge originally framed against the respondent.

32. The next contention is that the respondent was fastened with the charge which does not find place in the charge-sheet and accordingly, the decision arrived at by the Disciplinary Authority is illegal. In our view, this contention has substance. The charge-sheet which was issued to the respondent on October 21, 1986, is, inter alia, to the following effect:

"You are hereby charged for the following acts of misconduct committed by you. On October 9, 1986 while you were working as Officer-in-charge of the Extension Counter of the Calcutta Main Branch at the Head Office, 2 N.S. Road, Calcutta-700 001. At the close of business hours on October 9, 1986 when a surprise checking of the cash balance of the Extension Counter was conducted a shortage of Rs. 40,000/- was detected. As per cash balance register maintained

at the Extension Counter the amount of Cash Balance at the close of business on October 9, 1986 was shown Rs. 4,25,352.83 but on physical verification of cash, the actual amount held was Rs. 3,85,352.83 showing a shortage of Rs. 40,000/- as indicated above. The fact that this shortage of cash was not reported by you to the higher authorities and that the cash at the Extension Counter was held under your sole custody, clearly indicates that the said amount of Rs. 40,000/- was misappropriated by you.

By your aforesaid act of misconduct you have misused your official position and committed Breach of Trust reposed upon you by the Bank. Your aforesaid acts are quite unbecoming of an officer of the Bank and are in violation of Regulation 3 (1) of Allahabad Bank Officer Employees (Conduct) Regulations, 1976. This act of yours constitutes misconduct in terms of Rule 24 of the said Regulations."

33. The order passed by the Disciplinary Authority dated January 19, 1987, removing the respondent from service, inter alia, recorded as follows:-

"1. Sri Pronab Kumar Mukherjee, an Officer of the Branch has been suspended and served with a charge-sheet for certain lapses. He has submitted a reply to charge-sheet. As a Disciplinary Authority, I decide to dispose of the matter in the following:-

2. The fact of the case in brief is that at the time of surprise checking of the cash balance of the Head Office Extension Counter of Calcutta Main Branch on October 9, 1986, a cash shortage of Rs. 40,000/- was detected. Sri Pronab Kumar Mukherjee at that time, i.e. on the date of said checking, was working as Officer-in-Charge of the said Extension Counter. He was suspended vide my letter No. AGM/Est dated October 9, 1986, on the charge of said cash shortage. Subsequently, the charge-sheet bearing No. Est/520 dated October 21, 1986 has been issued to him for the said charge of misconduct asking him to submit his explanation as to why disciplinary action as contemplated in Allahabad Bank Officer Employees (D & A) Regulations, 1976 should not be taken against him.

3. After that Sri Mukherjee at his own has made good the loss of Rs. 40,000/- to the Bank and has also submitted his reply dated December 9, 1986. In this reply while accepting the charge brought against him he has stated inter alia that he had no intention either to misappropriate Bank's fund or to misuse his official position. He has, however, repented for the occurrence of the incident and prayed for taking a lenient view.

4. However, taking into consideration the whole aspects of the case, I find that there was temporary misappropriation of Bank's fund by Sri Pranab Kumar Mukherjee, the charged officer. No doubt, he had repaid the money in few instalments, but his credibility is at stake. In an organisation dealing with public money, such a person whose credibility is not worthy of credence cannot be allowed to continue. This temporary misappropriation of public money cast a shadow in the integrity of the charged officer. His case, therefore, cannot be dealt with leniently. Accordingly, I feel inclined to remove the charged officer

from the service of the Bank in its greater interest.

5. I, therefore, order for the under-noted punishment on him in terms of Regulation 5 (g) of Allahabad Bank Officer Employees" (D& A) Regulation, 1976- Sri Pranab Kumar Mukherjee be removed from service of the Bank with immediate effect."

6. The pay and allowance for the period of suspension except the subsistence allowance already paid may be paid to him since the loss sustained by Bank has been recouped."

34. The scrutiny of the charge-sheet and the aforesaid order of removal would clearly indicate that the respondent was fastened with the charges which do not find place in the charge-sheet. There is no admission or evidence in support of the finding of the Disciplinary Authority that the respondent had committed temporary misappropriation. The Supreme Court in *State of Punjab v. Bakhtawar Singh and Ors.*, reported in 1972 SLR 85, held that no finding can be arrived at in taking into consideration a charge in respect of which a person was not given any opportunity to explain his position. The relevant portion of the said judgment is as follows:

"Sri Bakhtawar Singh was not charged with having not discharged his duties impartially. None of the charges levelled against him accused him of not discharging his duties impartially. Hence the Minister was not justified in taking into consideration a charge in respect of which the member was not given any opportunity to explain his position. Further the finding of the Minister that Sri Bakhtawar Singh was taking part in politics is a vague finding. Politics is a word of wide import. By merely saying that he was taking part in politics nothing concrete is conveyed or established."

35. In our view, it is not within the competence of the Disciplinary Authority to frame a fresh charge and hold the charged officer guilty without giving an opportunity of hearing, as has been done in the instant case. The respondent was charged with misconduct for breach of trust and misuse of his official position. But the order of removal records that he was found guilty of temporary misappropriation. The Disciplinary Authority proceeded to hold the respondent guilty on a fresh charge and as such it was acting without the authority of law. The finding recorded by the Disciplinary Authority into a charge framed by it not already included in the charge-sheet is a finding which has no existence in the eye of law and cannot properly form the foundation for the imposition of a punishment on the charged officer. Temporary misappropriation was not the charge originally levelled against the respondent and it could not have been made the ground for imposition of penalty. It appears to us that the Disciplinary Authority has not at all applied its mind and it had passed the order of removal mechanically on totally extraneous and irrelevant grounds.

36. In this case, as we have already indicated, the charged officer was not asked to explain why he should not be penalised for temporary misappropriation. The

Disciplinary Authority failed to apply its mind and carry out its quasi-judicial duty in finding the respondent guilty of temporary misappropriation without evidence which is contrary to the rules and principles of natural justice. Even otherwise, misappropriation, even though temporary, must be established on proving dishonest intention. Only when one retains or converts the money to his own use dishonestly, there could be any misappropriation. It is well settled that mere retention of money would not warrant a conviction u/s 403 of the Indian Penal Code.

37. The Supreme Court in the case of A.L. Kalra v. Project & Equipment Corporation of India Ltd., reported in 1984 II LU 186 observed as follows (p. 193):

"Where misconduct when proved entails penal consequences, it is Obligatory on the employer to specify and if necessary define it with precision and accuracy so that any ex post facto interpretation of some incident may not be camouflaged as misconduct."

38. In our opinion, the respondent is justified in contending that in the circumstances of this case he had no opportunity of showing cause at all and the requirement of the regulation was not satisfied and consequently, the order of removal cannot be sustained.

39. The last contention is that the appellant by its conduct had condoned the misconduct, if any, committed by the respondent. The writ petition filed by the respondent against the decision of the authority to remove him from service was not otherwise determined by the Court at the time when the order of retirement was passed. During the pendency of the writ application, the order of retirement was passed. The said order of retirement dated October 9, 1990, is as follows:-

"Dear Sir,

RETIREMENT

As you are attaining the age of superannuation on January 1, 1991 in terms of Bank's Circular Staff No.29/23/1457 dated July 9, 1983 you will retire from the Bank's service with effect from February 1, 1991.

Accordingly, you will stand relieved from the Bank's Service as at the close of working hours on the last working day of January 1991 i.e., January 31. 1991.

Wish you a happy and contented retired life."

40. It has been contended by Mr. Bose that this order of retirement amounts to condonation of misconduct. The principle is well settled that if an employer on discovering that the employee has been found guilty of misconduct which would justify a removal, yet elects to continue him in his service, he cannot at any subsequent time remove him on account of that misconduct which the employer has waived or condoned.

41. Our attention has been drawn to a decision of the Supreme Court in the case of *The State of Punjab Vs. Dewan Chuni Lal*, There the Supreme Court observed as follows:-

"In our view reports earlier than 1944 should not have been considered at all inasmuch as he was allowed to cross the efficiency bar fn that year. It is unthinkable that if the authorities look any serious view of the charge of dishonesty and inefficiency contained in the confidential reports of 1941 and 1942 they could have overlooked the same and recommended the case of the officer as one fit for crossing the efficiency bar in 1944."

42. During the pendency of the writ petition, the respondent was allowed to retire in the usual course. He was shown under suspension and allowed to retire. If the authority had treated the respondent as retired from service when the determination of the challenge against the order of removal was not reached, the action of the Bank authorities would show that by passing an order of retirement they have condoned the order of removal. As rightly pointed out by the Learned Judge, there must be some predictability in the action of the executive. The authorities cannot be allowed to both approbate and reprobate at the same time. The Learned Judge considered the matter in detail and we entirely agree with the view taken by him.

43. For the reasons aforesaid, the appeal fails and is dismissed with costs. The order of removal is set aside. The respondent shall be deemed to have retired from service with effect from February 1, 1991. The order of suspension will stand revoked. The respondent shall be treated as on duly from the date of suspension till the date of retirement for all purposes. All monetary benefits including arrear salaries after adjustment of subsistence allowance, if any, paid and all retirement benefits, treating him as retired on February 1, 1991, shall be released to the respondent within four weeks from the date of communication of the signed xerox copy of the operative part of the judgment and order.

Sen, J.

44. I agree.