
(2013) 12 CAL CK 0080
In the Calcutta High Court
Case No : W.P. No. 6399 (W) of 2009

Asim Kumar Hajrah

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 24-12-2013

Acts Referred:

Citation : (2014) 1 CALLT 413

Hon'ble Judges : Soumitra Pal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Soumitra Pal, J.—In this writ petition, Asim Kumar Hajrah, the petitioner, has challenged the order, dated 29th January, 2009, issued by the Managing Director, West Bengal State Co-operative Bank Limited, (for short the "said bank") the respondent No. 5, being annexure P8 to the writ petition, dismissing him from service with immediate effect and directing that the subsistence allowance paid to him during his period of suspension shall be treated as the full and final payment made to him and also holding that all dues outstanding against him should be realised by way of adjustment from his accounts standing in his credit, if any, in the bank on exercise of the banker's lien thereon. The facts in brief, which are relevant for adjudication, are that on 26th February, 2007, while being posted as the Branch Manager, Poura Bhavan Branch of the said Bank, the petitioner suffered a severe cerebral attack and was admitted in a hospital at Kolkata with loss of consciousness. Since then he has undergone treatment in different hospitals. At present the petitioner is unable to communicate verbally or non-verbally and is fed artificially. Because of such mental infirmity, as he is not in a position either to put his signature or to convey instruction to his advocate he had filed this writ petition with the help of his wife Anjali Hajrah, the next friend, who is major, of sound mind and her interests are not adverse to that of the writ petitioner. It has been stated that while he was critically ill and was on leave for medical treatment, the Managing Director of the said bank, inspite of

knowing fully well about his physical condition, by an order dated 17th July, 2007 made over to his daughter, had placed him under suspension whereby he was directed not to attend office unless he was asked by the Managing Director in writing and not to leave the headquarters without the prior permission in writing. Subsequently, the petitioner was called upon by a show cause notice dated 19th September, 2008 as to why departmental proceeding should not be initiated against him for negligence in discharge of duties, indifference towards the interest of the bank and insubordination. In answer, by an advocate's letter dated 4th October, 2008, it was brought to the notice of the respondent No. 5 that the petitioner had undergone medical treatment and was not in a position to give reply effectively to the notice to show cause and request was made not to proceed with the said notice till he regained his memory. Thereafter, by an order dated 9th January, 2009, issued by the respondent No. 5, served on his wife, it was intimated that the bank had decided to initiate departmental proceedings. The said order contained a list of Article of Charges, imputations, list of documents and list of witnesses to be relied on to prove the charges. The Article of charges levelled against the petitioner pertained to alleged irregularities in sanction and/or payment and disbursement of loan or issuance of bank guarantee by the petitioner as Branch Manager of the said Branch to different customers. By an advocate's letter issued on "behalf of the petitioner, delivered on 16th January, 2009, the authorities were requested not to proceed with the disciplinary proceedings in view of the physical condition of the petitioner of which the respondents were aware. Request was also made to release the six term-deposits of the petitioner which had matured. Thereafter, the respondent No. 5 issued the order of dismissal which, as noted, is under challenge.

2. The writ petition was moved on 30th June, 2009 when, by an order, directions were issued to file affidavits. It was recorded in the order that all questions including the point of maintainability of the writ petition would be considered at the time of hearing and the Regional Provident Fund Commissioner, Employees' Provident Funds Organization, Kolkata, the respondent No. 7, was directed to consider the release of the employees provident fund in accordance with law. Pursuant to the directions affidavits have been filed and are on record.

3. At the very outset Mr. Tarun Kumar Roy, learned senior Advocate appearing for the Bank and its Managing Director submitted as the State has no deep and pervasive financial and administrative control over the bank, it is not a State under Article 12 of the Constitution of India. Moreover, as by West Bengal Cooperative Societies Act, 2006 (for short "2006 Act"), the West Bengal Cooperative Societies Act, 1983 (hereinafter referred to as the "1983 Act") stood repealed and in view of the provisions contained in the 2006 Act, particularly sections 6, 134A, 134(2) and 157 thereof and the West Bengal Co-operative Societies Rules, 2011 ("2011 Rules" for short), both of which simultaneously came into effect from 18th January, 2011, the writ petition is not maintainable. Submission was as the writ petition was filed in 2009 challenging the order passed in alleged violation of Rule 48(f) under the West Bengal Cooperative

Societies Rules, 1987 ("1987 Rules" for short), which stood repealed by the 2011 Rules and as the litigations filed under the 1983 Act are not saved under the 2006 Act, the writ petition cannot be maintained. Moreover, as the said Bank under the 2006 Act has been granted autonomy in all financial and administrative matters and as taking disciplinary action against an employee for maintaining banking discipline is an administrative matter of a banking cooperative society, the writ petition is not maintainable. Submission was as the Constitution (Ninety-seventh Amendment) Act, 2011, which came into effect from 15th February, 2012, amending Article 19(1)(c) and inserting Articles 43B and 243ZI, has given a citizen the right to form Co-operative society and grants complete functional autonomy to such society and as adherence to the principles of natural justice is no longer a statutory requirement, a writ petition does not lie against a co-operative society. However, it was submitted that the bank has no bias against the petitioner which is evident as it had extended financial help during his illness. Submission was in the event the petitioner, through his wife, makes a written appeal before the Board of Directors of the Bank challenging the impugned order, it shall be considered sympathetically.

4. It was submitted that as under the 2006 Act and the 2011 Rules the Board has the autonomy to manage the internal affairs of the Bank, including initiation of disciplinary proceedings against an employee, and as considering the physical condition of the petitioner, exclusionary principles were justifiably adopted and as in the light of the established principles of law charges were examined, documents were considered and thus the principles of natural justice were adhered to, and thereafter, the order of dismissal was passed, the writ petition is also without merit.

5. Learned senior Advocate for the respondent Bank had relied on the following judgments in support of his submission which are-- Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., ; Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, ; State Bank of India and others Vs. T.J. Paul, ; Union of India (UOI) and Others Vs. Flight Cadet Ashish Rai, ; South Bengal State Transport Corpn. Vs. Swapan Kumar Mitra and Others, ; A.P. Dairy Development Corporation Federation Vs. B. Narasimha Reddy and Others, ; Burdwan Central Cooperative Bank Ltd. and Another Vs. Asim Chatterjee and Others, ; Kalinga Mining Corporation Vs. Union of India (UOI) and Others, ; State Bank of India and Others Vs. Narendra Kumar Pandey, ; S.R. Tewari Vs. Union of India (UOI) and Another, ; State of Andhra Pradesh Vs. Sree Rama Rao, ; Hira Nath Mishra and Others Vs. The Principal, Rajendra Medical College, Ranchi and Another, ; K.L. Tripathi Vs. State Bank of India and Others, ; Union of India and Another Vs. Tulsiram Patel and Others, ; Gayatri De Vs. Mousumi Co-operative Housing Society Ltd. and Others, ; Mousumi Bose (Bandyopadhyay) Vs. The West Bengal State Co-Operative Bank Ltd. and Others, and Bhabani Adhikari Vs. West Bengal State Co-operative Bank Limited and Others .

6. Mr. L.K. Gupta, learned senior advocate appearing for the writ petitioner, on

the point of maintainability submitted that though the Bank is not a State under Article 12 of the Constitution, however, being an authority under Article 226 of the Constitution of India, as it is obliged to perform public or statutory duty and as in view of the first proviso to section 6(2) of the 2006 Act Rule 48(f) of the 1987 Rule survives, the writ petition is maintainable. Submission was as the validity of an order is to be judged with reference to the law in force at that relevant point of time and as neither 2006 Act nor the 2011 Rules have been given retrospective effect and the newly enacted legislation cannot validate an action which was illegal at its inception and in view of the savings clause in section 6(2) of the 2006 Act, 1987 Rules framed under the 1983 Act survives. As the impugned order was passed without following Rule 48(f) and as Rules take preeminence over the impugned administrative order, the impugned order is void ab initio and illegal.

7. On merits it was submitted though in view of the physical condition of the petitioner it was not possible to grant hearing and exclusionary principles were adopted, however, it does not confer arbitrary power to pass an order. As no Enquiry Officer and Presenting Officer were appointed and no copy of the documents relied on by the bank was furnished and documents were not disclosed, examined and discussed in the impugned order and no reason has been disclosed why depositors were not summoned and the case was not proved on established legal principles and there is no finding as to the extent of the loss suffered by the bank and as order was passed straightaway without proposing penalty in violation of Rule 48(f), there has been violation of the principles of natural justice. Moreover, as there is no specific finding how the petitioner is guilty, the order is perverse. Submission was 2006 Act and the 2011 Rules framed thereunder cannot legalise an illegal action.

8. The learned senior Advocate for the petitioner had relied on following judgments in support of his submissions, which are: Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, ; Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, ; State Bank of India and others Vs. T.J. Paul, ; S.S. Rana Vs. Registrar, Co-operative Societies and Another, ; Manilal Hiranman Chaudhari Vs. State of Maharashtra, ; State of U.P. and Others Vs. Saroj Kumar Sinha, ; Ramesh Ahluwalia Vs. State of Punjab and Others, ; Union of India and Another Vs. Tulsiram Patel and Others, ; Council of the Institute of Chartered Accountants of India Vs. Somnath Basu, and Bhabani Adhikari v. W.B. State Co-operative Bank Ltd.: 2009(1) CHN 573.

9. Mr. Sailaja Nanda Bhattacharya learned advocate appearing for the State supported the stand of the petitioner both on the ground of maintainability as well as on merit. He had relied on the judgments of the Apex Court in Madhya Pradesh Rajya Sahakari Bank Maryadit Vs. State of M.P. and Others, and in Ramesh Ahluwalia Vs. State of Punjab and Others, in support of his submission.

10. The issues to be considered are--(i) Though section 6(1) of the 2006 Act

repeals the 1983 Act, whether the provisions contained in proviso to section 6(2) saves the action taken under the 1983 Act and if saved whether the writ petition is maintainable; (ii) If maintainable, whether the proceedings were conducted following rule 48(f) and whether the impugned order dated 29th January, 2009 directing dismissal of the petitioner was in accordance with the established principles of law.

11. In order to answer the question relating to the maintainability of the writ petition, it is necessary to refer to the relevant portion of section 6 of the 2006 Act which came into effect on 18th January, 2011 repealing 1983 Act, which is set out hereunder:--

6. Repeal and savings.--(1) The West Bengal Co-operative Societies Act, 1983 (West Ben. Act XLV of 1983) is hereby repealed.

(2) Notwithstanding such repeal anything done or suffered or any action taken including any rule made, and transaction entered into, any notification or notice issued with prospective or retrospective effect, any order passed, any appointment or registration made, any suit or proceeding commenced, any dispute decided or referred to arbitration, any right or title accrued, or any liability or obligation or penalty incurred under the Co-operative Societies Act, 1912 (2 of 1912) or the Bengal Co-operative Societies Act, 1940 (Ben. Act XXI of 1940) or the West Bengal Co-operative Societies Act, 1973 (West Ben. Act XXXVIII of 1973) or the West Bengal Co-operative Societies Act, 1983 (West Ben. Act XLV of 1983) shall be deemed to have been done or suffered or taken under this Act, as if the provisions of this Act were in force at all material times [when such thing was done or suffered or such action was taken, unless otherwise specifically provided in this Act;]"

[Provided that such thing done or suffered or action taken shall not be deemed to have conferred any right which had not vested or accrued before the date of commencement of this Act or have extended any right which had vested or accrued before the date of commencement of this Act, to the board of a Co-operative Society registered or deemed to have been registered under the Co-operative Societies Act, 1912 (2 of 1912), or the Bengal Co-operative Societies Act, 1940 (Ben. Act XXI of 1940), or the West Bengal Co-operative Societies Act, 1973 (West Ben. Act XXXVIII of 1973), or the West Bengal Co-operative Societies Act, 1983 (West Ben. Act XLV of 1983), with the effect of such repeal.]

(3)

12. Since it is alleged that there has been violation of Rule 48(f) of the 1987 Rules, it is appropriate to set out the said Rule which is as under:--

48(f). to appoint, discharge or to dismiss or to remove employees of the society;

Provided that no employee of a co-operative society shall be dismissed or removed from service except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in

respect of those charges, and where it is proposed, after such inquiry, to dismiss or remove him, until he has been given a reasonable opportunity of making representation on the penalty proposed.

13. There is no dispute that the impugned order dismissing the petitioner passed by the respondent No. 5 had taken effect when 1983 Act was in force. Thus the order under challenge was a concluded action under the 1983 Act. As seen, by virtue of section 6(1) of the 2006 Act, the 1983 Act stood repealed. However, as in this writ petition, filed in 2009, the petitioner has challenged the order of dismissal dated 29th January, 2009, complaining violation of the provisions of the Rule 48(f) and the principles of natural justice, the question is whether the rights conferred under Rule 48(f) are saved under proviso to section 6(2) of the 2006 Act. The answer, in my view, is in the proviso to section 6(2) which, though in a negative language, postulates that "Provided that such thing done or suffered or action taken shall not be deemed to have conferred any right which had not vested or accrued before the date of commencement of this Act or have extended any right which had vested or accrued before the date of commencement of this Act,...." As the Board of a Cooperative society is not vested with a right to undo a right already accrued to an employee of a society under the 1983 Act and the 1987 Rules, particularly Rule 48(f) thereof, the writ petition is maintainable. Since proceedings were concluded when 1983 Act was in force and the right of the petitioner, already accrued under the 1983 Act and 1987 Rules, is saved under proviso to section 6(2) of the 2006 Act, the question of applicability of the special provisions, particularly sections 134A and 134C under Chapter XIII A of the 2006 Act, does not arise at all. Therefore, in view of proviso to section 6(2), Rule 48(f) of 1987 Rules survives. That apart, since under the rule of law a vested right cannot be forfeited by a repealing enactment unless the statute expressly makes it clear in plain and simple words the intention of the legislature, the argument regarding maintainability of the writ petition cannot be accepted. As the petitioner has specifically complained of violation of Rule 48(f) of the 1987 Rules in the disciplinary proceedings, the principles of law in *Bhabani Adhikary (supra)*, where the instant respondent bank was the principal respondent, holding that "...The statutory provision and the breach thereof have to be asserted and in such assertion would the Writ Court assume jurisdiction to entertain the petition even against a person who is not a "State" or "other authority" within the meaning of Article 12 of the Constitution. But the issue of maintainability is limited to this that a breach of a statutory provision has to be asserted. Regardless as to whether there is a breach or not, upon the assertion being made it would allow the writ petition to progress beyond the threshold where maintainability has to be addressed and into the zone for consideration on merits", (paragraph 28), are applicable, and the challenge as to the maintainability of the writ petition fails. The judgment in *Mousumi Bose (supra)* relied on behalf of the respondent Bank is inapplicable as therein the petitioner could not demonstrate any breach of statutory rule and the cause of action arose after the 2006 Act had come into force. The judgment of

the Apex Court in A.P. Dairy Development Corporation Federation (supra) upholding the judgment of the Andhra Pradesh High Court striking down the provisions of the Andhra Pradesh Mutually Aided Cooperative Societies (Amendment) Act, 2006, which is akin to 2006 Act as unconstitutional, cannot be applied to the facts of the instant case as Rule 48(f) of the 1987 Rules framed under the 1983 Act is applicable as discussed. The point of maintainability of the writ petition can also be examined from another angle as to whether the Bank is an authority carrying out public function. Whether a body is performing a public duty and comes within the term "authority", used in Article 226, was considered in *Andi Mukta S.M.V.S.S.J.M.S. Trust* (supra) wherein it was held as under:--

The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied." (paragraph 20). In the said judgment it was also held "Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition" (paragraph 22). Identical view was taken in paragraph 14 of the judgment of the Apex Court in *Ramesh Alhuwalia* (supra). Keeping this proposition of law in mind, as in the instant case the respondent bank was performing public duty, -rendering banking service, in view of law laid in *Andi Mukta S.M.V.S.S.J.M.S. Trust* (supra) and in *Ramesh Alhuwalia* (supra) and in view of the law laid down in *S.S. Rana* (supra) and as the petitioner has complained of breach of Rule 48(f) by the society, the writ petition is maintainable.

14. So far as the merit of the case is concerned, admittedly for alleged financial irregularities, by order dated 17th July, 2007, the petitioner was placed under

suspension. Subsequently, a show cause notice dated 19th September, 2008 was issued by the said respondent. Thereafter by an Advocate's letter dated 4th October, 2008 wherein the physical condition of the petitioner was mentioned in some detail, request was made on humanitarian ground to the bank not to proceed with the show cause notice till he regained his memory.

After receiving the said letter dated 4th October, 2008 an "Order" dated 9th January, 2009 was passed by the respondent No. 5 directing initiation of departmental proceedings, the relevant portion of which is as under:--

And Whereas even after due consideration being given to the humanitarian aspect of the matter it cannot be gainsaid that the same cannot outweigh the administrative and disciplinary responsibilities of the appointing authority to conduct due enquiry and come to a reasoned conclusion in view of huge financial loss the Bank is facing due to the negligent and irregular actions prima facie of Sri Asim Hazra for which the Disciplinary Authority is ready and willing to accord all reasonable opportunity to Sri Hazra to defend himself;

Now, therefore, in due consideration of the facts and circumstances, it has been decided to initiate Departmental proceedings against Sri Hazra and accordingly the Articles of Charge [the Charge Sheet] are framed against Sri Hazra specifying the allegations against him and he is to submit his reply to the said Articles of Charge within seven days from this date and latest by 16th January 2009 to the undersigned. If no reply is received within the said date it will be presumed that Sri Hazra has nothing to say in defense and the Enquiry will proceed accordingly. The Enquiry will be conducted only in respect of those charges, which are not admitted by Sri Hazra.

(....)

Managing Director

Enclosed: 1. Articles of Charge.

2. Imputations.

3. List of documents to be relied on to prove the Charges.

4. List of witnesses to be relied on to prove the charges.

(Emphasis supplied)

15. In the said order a list of documents, in order to prove the charge, included "1) Respective loan documents showing sanction & disbursement etc. 2) Statements of respective loan accounts. 3) Related vouchers of transactions". The list of witnesses to prove the charges were Shymal Kumar Chakraborty, Assistant General Manager who was officiating as Regional Manager, 24 Parganas North Region and any other witness/witnesses as would have been necessary for examination with the permission of the Enquiry Officer.

16. The said show cause notice was replied to by an advocate's letter written on

behalf of and under instruction of the wife of the petitioner which was delivered to the bank on 16th January, 2009. The relevant portion of the said letter is extracted hereunder:--

I have been instructed to say that when you were well aware the condition of health of Sri Hazra husband of my client as there is no scope to doubt for that I can only state that asking such a person to face disciplinary proceeding is not only arbitrary but inhuman. I have been further instructed to say that admittedly Sri Hazra is on the semiconscious stage who could not move, recognise anybody and could not even speak, you have no right and authority to ask such person to appear before the Enquiry and to face departmental proceeding.

Under such circumstances I on behalf of my client once again request you not to proceed with the said enquiry.

I hope good sense will prevail upon you and you would not pursue the matter in the manner as you are doing now.

In this connection it is worthwhile to mention that my client submitted 6 term deposits which matured long back for the purpose of encashing the same and to pay the matured amount for the treatment of the husband of my client as it appears that your office duly received the original term deposit certificates on 26.3.08 but till date nothing has been informed as to when the matured value would be paid to my client. Since you know the condition of health of your employee Asim Kumar Hazra I hope and expect instead of proceeding with the enquiry you arrange to release the matured sum of 6 term deposit certificates for your ready reference I am enclosing herewith a receipt of term deposit.

17. Thereafter, the impugned order dated 29th January, 2009 was passed by the respondent No. 5. It is evident from the impugned order of dismissal that after the issuance of the letter dated 16th January, 2009, the entire matter was placed before the Board of Directors in its meeting held on 20th January, 2009. The members considered the facts and noted the "grave misconduct" of the petitioner which caused financial loss of "almost" Rs. 1.5 crores (Rs. One crores and fifty lakhs) to the Bank. It appears from the said order that as the "admitted position" was the petitioner was not in a state to reply to the charges of the enquiry proposed, the Board of Directors decided that the case be covered by exclusionary principles. It further appears from the impugned order that the Directors were of the "unanimous opinion" that the petitioner "must be dealt with iron hands and not leniently". The Board found that "The standard proof is required is that of preponderance of probability". Significantly, it was observed in the impugned order that facts and circumstances made "it incumbent upon the Board to dispense with the requirement of appointment of an Enquiry Officer, appointment of Presenting officer and following of such other trappings of an usual departmental proceedings including sending of copy of enquiry report, asking the delinquent to show cause as to why proposed punishment should not be imposed and giving him opportunity to represent against the Enquiry Report

and the proposed punishment". Thereafter, as it appears from paragraph 8 of the impugned order, the Board while delegating the Chairman with all the powers and duties of the Board further resolved unanimously to authorize the Chairman of the bank to "personally assess" the allegations enumerated in each of the Articles of charge framed against the petitioner and to come to an independent finding in respect of each of the charges, thus reversing the "Order" dated 9th January, 2009 directing initiation of departmental proceedings.

18. It appears from the order under challenge that subsequently the Chairman of the Bank had passed the following order:--

(a). Sri Asim Kumar Hazra, Branch Manager, (under suspension), Poura Bhavan Branch of the Bank being found guilty in respect of each of the six Articles of Charge issued vide Memo No. HO/MD/Admn/4575 dated 09.01.2009, is hereby dismissed from service with immediate effect.

(b). All the payments made to Sri Asim Kumar Hazra, Branch Manager, is to be considered as the full and final payment made to him and he shall not be eligible to any other payment from the Bank.

(c) All dues outstanding against Sri Asim Kumar Hazra, Branch Manager, (under suspension), Poura Bhavan Branch of the Bank may be realized by way of adjustment from his accounts standing in his credit, if any, in the bank on exercise of the Banker's lien thereon.

19. It is also evident from the order impugned that the Managing Director of the Bank, the respondent No. 5, while accepting the order of dismissal issued by the Chairman, had also passed an order of dismissal which is as under:--

NOW THEREFORE, I, M.A. Quraishi, the Managing Director of the Bank as directed by the Disciplinary Authority hereby order dismissal of Sri Asim Kumar Hazra, Branch Manager, (under suspension), Poura Bhavan Branch of the Bank from the services of the Bank with immediate effect and order that the subsistence allowances paid to Sri Asim Kumar Hazra, Branch Manager, (under suspension) during his period of suspension shall be treated as the full and final payment made to him and order that all dues outstanding against Sri Asim Kumar Hazra, Branch Manager, (under suspension), Poura Bhavan Branch of the Bank be realized by way of adjustment from his accounts standing in his credit, if any, in the bank on exercise of the Banker's lien thereon.

20. The question is whether the impugned order of dismissal was just and legal. True the rules of natural justice are amenable to changes as the situation demands. In the instant case as the petitioner was unable to respond and is in a paralytic condition, it was not possible for the bank to grant an opportunity to represent. However, the question is whether the decision of the Board of Directors of the bank taken in its meeting held on 20th January, 2009 authorising the Chairman to "personally assess" the charges and in doing away with the earlier decision to initiate Departmental proceedings and in not examining the

witnesses for proving the documents for establishing the charges and in not following the procedure of an usual departmental enquiry, in the context of Rule 48(f), was in accordance with law. It appears from a reading of Rule 48(f) that enquiry proceedings are to be carried out in two stages. In the first stage there will be an enquiry obviously to be done by an Enquiry Officer after informing the delinquent about the charges and after giving him a reasonable opportunity of being heard. It is well settled that during such enquiry there should be a Presenting Officer, and witnesses, if any, are to be examined and the documents are to be presented and proved for establishing the charges. In the event the delinquent is proposed to be dismissed or removed from service, then the second stage of the said rule postulates that a reasonable opportunity should be given to the delinquent to make representation on the penalty proposed. However, the short question is whether the stipulations in Rule 48(f) are mandatory in nature. As seen from the plain language of Rule 48(f) it creates an absolute bar from proceeding in any other manner save and except as stipulated therein. The words in the said Rule that "no employee of a cooperative society shall be dismissed or removed from service except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges, and where it is proposed, after such inquiry, to dismiss or remove him, until he had been given a reasonable opportunity of making representation on the penalty proposed" leave no manner of doubt in that regard. The language of Rule 48 is specific. It is clear that the language of Rule 48(f) makes it mandatory for a society to follow the same in disciplinary proceedings.

21. Now the question is what would be the role of an Enquiry Officer. In this regard it is appropriate to refer to the judgment in *State of U.P. v. Saroj Kumar Sinha* (supra) wherein while dismissing the appeal filed by authority it was held "An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents." (paragraph 28). It was further held "When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service (paragraph 30). Therefore, the settled

proposition of law is that an Enquiry Officer should be unbiased and enquiry proceeding should not be carried out perfunctorily. Hence, it goes without saying, in departmental proceedings, for the ends of justice, Enquiry Officer is required to be appointed. In such enquiry appointment of Presenting Officer is required. In order to establish the charges in Departmental proceedings witnesses and documents are examined to prove the charges. These requirements are sine qua non in departmental proceedings which includes proceedings under Rule 48(f). As seen the said rule confers a statutory right on the delinquent an opportunity of being heard in the first stage and if penalty is proposed, in the second stage to grant an opportunity to the charged employee to make a representation. Therefore, though it is clear from a reading of Rule 48(f) if charges are brought against an employee in that event "inquiry" has to be conducted, however, as noted, the Board of Directors of the respondent bank in its meeting held on 20th January, 2009, while reversing its earlier decision, authorised the Chairman to "personally assess" the charges. Since Rule 48(f) is mandatory in nature and it is incumbent upon the authorities of the bank to appoint an enquiry officer, the decision of the Board to authorise the Chairman to "personally assess" the allegation enumerated in each of the Articles of charge against the petitioner is without jurisdiction, arbitrary and illegal. That apart as the Chairman had also passed the order of dismissal without the charges being proved by examination of the witnesses and without proving the documents, the said order of dismissal is non-est in the eye of law and thus illegal. That the documents were not proved in accordance with the basic tenets of law with regard to the departmental proceedings is clear from the language of the "Findings of assessment of facts on record as per authorisation by the Board of Directors in its meeting held on 20.1.2009 in respect of each of the Articles of charge" against the petitioner as evident from pages 88 to 92 of the writ petition. In fact the findings, if at all, are cryptic and vague. Though it was strenuously argued on behalf of the bank there is no straight jacket formula for compliance with regard to the principles of natural justice, it is to be borne in mind that flexibility does not mean even if the charged officer fails to appear or waives his right to represent or cannot appear, as it has happened in the case in hand, an enquiry officer can prepare a report without examining the witnesses and without having the documents proved. Assuming the Chairman had validly acted as an Enquiry Officer, as he had usurped the power of the disciplinary authority by passing an order of dismissal, the same is wholly without jurisdiction. True, in the first stage of the proceedings considering the physical condition of the petitioner though grant of an opportunity of hearing does not arise and to that extent compliance of the principles of natural justice can be modified, however, that does not mean that the other essential requirements of disciplinary proceedings-appointment of an Enquiry Officer and a Presenting Officer, examination of witnesses and documents for proving the same for establishing the charges-can be ignored. Moreover, as the authorities did not pass an order with regard to the proposed punishment and denied the opportunity to the petitioner to represent even against the punishment, though in view of the physical condition of the

petitioner it would have been idle formality, there was non-compliance of the second part of the said Rule 48(f). In view of the existence of statutory Rule 48(f), which cannot be given a go by, the sudden turnaround of the Bank in deciding to authorise its Chairman to "personally assess" the charges against the petitioner makes the decision making process totally flawed. It is noteworthy that in view of the existence of Rule 48(f), any deviation therefrom, except to the extent indicated in the facts of this case, is arbitrary and illegal. Further the action of the Board of Directors of the Bank in adopting a resolution on 20th January, 2009 in rescinding the decision to initiate disciplinary proceedings and not communicating the same on the petitioner is deprecated. In fact, the petitioner came to know about the adoption of such a resolution on 20th January, 2009 only from the impugned order of dismissal.

22. There is another aspect of the matter. Though from the impugned order it is evident that the loss caused by the petitioner was "almost" Rs. 1.5 crore, and thus the exact loss, if any, could not be quantified, yet in the impugned order it was directed that "All dues outstanding against Sri Ashim Kumar Hazra, Branch Manager, (under suspension), Poura Bhavan Branch of the Bank may be realized by way of adjustment from his accounts standing in his credit, if any, in the bank on exercise of the Banker's lien thereon". In my view, since the financial loss allegedly caused by the petitioner could not be specified, such adjustment is unjust, malafide, arbitrary, highhanded and illegal. It also reveals that the entire exercise of the bank leading to the dismissal of the petitioner was a casual effort.

23. That apart, it appears that the petitioner had invested money in six cash certificates with the bank. During his suspension those had matured. By a letter on behalf of the petitioner furnished on 16th January, 2009 request was made to disburse the amount. However, for some inexplicable reason the said request was not acceded to. It is unfortunate that even the Board of Directors looked the other way. In my view, as withholding of the matured amount has nothing to do with the departmental proceedings, it is nothing but an arbitrary exercise of power by the bank. In fact the unanimous decision of the Board of Directors of the Bank to authorise the Chairman to "personally assess" the allegations as resolved in its meeting held on 20th January, 2009 while reversing the order dated 9th January, 2009 for initiating Departmental proceedings and withholding disbursement of the matured amount of six cash certificates indicate that the Bank, its Board of Directors, the Chairman and its Managing Director had proceed with a predetermined mind.

24. So far as the judgments cited are concerned though it is well settled that the rules of natural justice are flexible, however, the judgments in K.L. Tripathi (supra), in Hari Nath Misra (supra), in Managing Director ECIL, v. B. Karunakar (supra), in Burdwan Central Coop. Bank Ltd. (supra) in State of Andhra Pradesh v. Sree. Rama Rao (supra), in South Bengal State Transport Corporation (supra), in Union of India v. Flight Cadet Asish Rai (supra), in Kalinga Mining Corporation (supra) and in S.R. Tewari (supra) are not applicable in view of Rule 48(f) and

the factual background as the bank even after deciding to hold departmental enquiry had subsequently turned back and authorised its Chairman to "personally assess" the charges and the Chairman himself had also acted as disciplinary authority by directing dismissal of the petitioner from service. That the authorities have to conduct disciplinary proceedings in accordance with law by appointing a Presenting Officer to produce the documents and have to prove the charges before awarding punishment is well settled in view law laid down in *SBI v. Narendra Pandey* (supra,) relied on behalf of the respondent bank, wherein it was held that the "The inquiring authority has examined each and every charge levelled against the charged officer and the documents produced by the presenting officer and came to the conclusion that most of the charges were proved" (paragraph 23). The principles of law laid down in paragraph 28 in *S.R. Tewari* (supra), though relied on behalf of the respondents, furthers the case of the petitioner as the conscience of the Court is shocked as to why the Board had reversed the earlier decision to hold a formal departmental enquiry, and as the reasons in the impugned order in support thereof are far from convincing. Similarly in view of the law laid down in paragraph 56 in *Mohinder Singh Gill* (supra) and as the reasons in the impugned order for adopting the exclusionary principles are far from cogent, the entire proceeding suffers from infirmity. Though in *Union of India v. Tulsiram Patel* (supra) it has been held that the principles of natural justice cannot only modified but in exceptional cases they can be excluded and "it is well established that where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded" (paragraph 101), however, as the suspension of the petitioner took place in the year 2007 and the impugned order of dismissal was passed on 29th January, 2009, virtually on the eve of his superannuation, in utter disregard of Rule 48(f), it does not fall in the category of exceptional cases where natural justice can be modified except to the extent as indicated in this judgment due to the physical incapacity of the petitioner. In such view of the matter it is not necessary to deal with the other judgments cited on behalf of the parties.

25. Therefore, as the decision to initiate Departmental proceedings was rescinded by the Board of the Bank by authorising the Chairman to "personally assess" the charges and as evidently witnesses were not examined and documents were not presented and proved to substantiate the charges and though the loss, if any, suffered by the bank was not quantified, yet direction was issued in the impugned order to realise the dues from the petitioner by adjustment from his accounts, the impugned order dated 29th January, 2009 cannot be sustained and is thus set aside and quashed. Hence, the writ petition is allowed. Accordingly, the West Bengal State Cooperative Bank Limited, the Board of Directors, West Bengal State Co-operative Bank Limited, the Chairman, West Bengal State Co-operative Bank Limited and the Managing Director, West Bengal State Co-operative Bank Limited, the Respondent Nos. 2, 3, 4 and 5 respectively are directed to pay the full wages of the petitioner till 31st January,

2009, that is the day he would have superannuated, after subtracting the amount already paid. Moreover, though no formal prayer has been made in the petition for release of the six term deposits, for the ends of justice the said respondent Nos. 2, 3, 4 and 5 are also directed to release the matured amount of the said certificates along with interest accrued thereon and also granting further interest on the total matured sum to be calculated from the date of maturity of the said certificates till the date of actual payment to Anjali Hajrah, the wife of the petitioner. These directions are to be carried out by the respondent Nos. 2, 3, 4 and 5 within eight weeks from the date of presentation of a copy of the certified copy of this order. In the facts and circumstances of the case, the West Bengal State Cooperative Bank Limited and the Board of Directors of the said Bank, the respondent Nos. 2 and 3 respectively, each are directed to pay costs of Rs. 5100/- to the petitioner.

Urgent photostat certified copy of this judgment, if applied for, be furnished to the appearing parties on priority basis.

Later

After judgment is delivered the learned Advocate for the respondent Bank prays for stay of the order which is opposed by the learned advocate for the petitioner and the State. Considering the facts and circumstances of the case the prayer for stay is rejected.