

(2008) 12 CAL CK 0077
In the Calcutta High Court

Case No : G.A. No. 110 of 2007, A.P.O. No. 3 of 2007, G.A. No. 3371 of 2006,

Bhabani Adhikari

APPELLANT

Vs

West Bengal State Co-operative Bank Limited and Others

RESPONDENT

Date of Decision : 23-12-2008

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 311

Citation : (2008) 12 CAL CK 0077

Hon'ble Judges : Surinder Singh Nijjar, C.J.; Sanjib Banerjee, J

Bench : Division Bench

Advocate : Tarun Kumar Roy, Krishnendu Banerjee for the Employer, for the Appellant; Moloy Basu, Subir Sanyal, Sutirtha Das, Siddharta Sankar Mondal for the Employee, for the Respondent

Judgement

Sanjib Banerjee, J.

The Judgment of the Court was delivered by:

1. The employer and the employee are both in appeal from the order disposing of the writ petition. The order impugned upholds the challenge to the order of dismissal passed in the disciplinary proceedings but there is a sting in the tail as it permits de novo enquiry proceedings to be launched on the basis of the charge sheet. The employer insists that the writ petition should not have been entertained as it was not maintainable and there is no discussion in the impugned order in that regard. The employer says that there was nothing remiss about the decision-making process and even if it is held that the writ petition was maintainable the order impugned should otherwise be set aside. The employee claims that considering the basis of his challenge which has been upheld, there was no occasion for a de novo enquiry to be launched.

2. The employer is a society registered under the West Bengal Co-operative Societies Act, 1983 and is engaged in the banking business. The writ petitioner joined as a clerk in the cooperative bank in 1965 and, at the time of the alleged

misconduct in 1998, was posted at the Chetla branch as its manager. In the writ petition it was claimed that the bank was governed by the provisions of the said Act of 1983 and the rules framed there under. The writ petition alluded to the bye-laws of the bank.

3. The articles of charge speak of an incident during the employee's absence during working hours on September 26, 1998, the last working day before six days of Puja holidays. On April 26, 1999, the substance of imputation of misconduct and the statements in support thereof were forwarded to the employee. The three relevant articles of charge, being the second, third and fourth, provided as follows:

Article of Charge - II

That the said Shri Bhabani Adhikary functioning as the Branch Manager, Chetla Branch of the West Bengal State Co-operative Bank Ltd. left the Branch at 15.00 hours on 26.09.98 without handing over the charge of the Branch to the Officer placed as his substitute on acting arrangement basis by the Managing Director of the Bank under Order No. HO/MD/3332 dated 26.09.98 while leaving the Master Key which was already with the Cashier of the Branch and he came back to office at 19.30 hours only on being repeatedly called over phone and ultimately made over charge at 21.00 hours.

The above act of the Shri Bhabani Adhikary constitutes misconduct in terms of Rule 43 of the Service Rule of the Bank.

Article of Charge - III

That the said Shri Bhabani Adhikary while functioning as the Branch Manager, Chetla Branch of the West Bengal State Co-operative Bank Ltd. was the joint custodian of cash and other valuables of the Bank with the Cashier. The day's cash balance after the close of transaction on 26.09.98 according to the Cash Balance Register was Rs. 34,11,838.92 but Shri Bhabani Adhikary as the joint custodian of cash could only produce Rs. 33,11,838.92 which is short of the day's cash balance by Rs. 1,00,000.00.

The above act of the Shri Bhabani Adhikary in violation of office order issued under Memo No. Admn.&Per/6201 dated 24/26.09.1998 stipulating the powers and duties of Branch Managers constitutes misconduct in terms of Rule 46 of the Service Rules of the Bank.

Article of Charge - IV

That the said Shri Bhabani Adhikary functioning as the Branch Manager, Chetla Branch of the Bank in order to cover up the shortage tendered a letter as Chairman of Pranabananda Co-operative Bank that the said Pranabananda Co-operative Bank Ltd. had intended to deposit Rs. 22,75,000/- in its account at Chetla Branch on 26.09.98 but had actually tendered Rs. 21,75,000/- and he insisted on correcting the pay-inslip at the Bank's end without making

arrangement for tendering the amount of Rs. 1,00,000/- as yet.

The above act of Shri Bhabani Adhikary constitutes misconduct in as much as Shri Bhabani Adhikary did not verify the cash balance himself nor did he report the shortage of cash to the Head Office rather tried to suppress the same and reconcile the accounts with the cash balance by attempting to change the bank's portion of the pay-in-slip.

4. Following his reply and representations and the enquiry being conducted, the enquiry officer was of the opinion that the employee had indulged in acts that amounted to serious misconduct and found him guilty in respect of the charges on the aforesaid three counts but relieved him in respect of the first charge. It is not in dispute that on the day that witnesses were examined before the enquiry officer and the proceedings continued, the employee was not represented. It is also not in dispute that in February, 2001 the employee had challenged both the appointment of the enquiry officer and the process that was adopted. After two subsequent ineffective dates in February, 2001, the enquiry proceedings were substantially held on March 8, 2001 following which the report of April 10, 2001 was submitted. The enquiry officer was satisfied that the employee had notice of the enquiry proceedings held on March 8, 2001 when he proceeded to record the evidence of ten witnesses on his perception that the employee had chosen to stay away despite being aware of the proceedings.

5. A second notice followed on September 6, 2001 informing the writ petitioner that as he did not appear in person or through lawyer in the proceedings before the enquiry officer, the enquiry officer proceeded ex parte. The employer called upon the employee "to submit his representation and/or objection, if any, against any of the evidence and/or findings recorded by the Enquiry Officer in the Enquiry Report and/or whether the disciplinary proceeding was faulty in any other respect." There were some letters exchanged between the employer and employee thereafter, one of them being a letter dated June 7, 2002 by which the employee reiterated his prayer for supply of copies of documents that he claimed had been withheld from him and that were relevant for him to give an effective representation on the findings of the enquiry officer. The detailed written representation of the employee dealing with the findings of the enquiry officer was issued on June 13, 2002 in which, inter alia, the following points were asserted:

i. That there was no preliminary investigation into the allegations on which the charges were based.

ii. On merits, there was no foundation of the primary charge of short deposit by a depositor with whom the employee was associated; since such depositor had agreed to a correction in the deposit slip at the first available opportunity which was not permitted by the branch.

iii. It was inconceivable that any detailed report could have been prepared on September 26, 1998 as the reliever at the branch and the writ petitioner left the

branch at the same time and the bank was closed for the next six days.

iv. There was no basis to conclude that the employee had notice of the enquiry proceedings on March 8, 2001 and it was otherwise unfair and harsh that the statements of all witnesses were recorded in his absence and he was not permitted to rebut the same before the enquiry officer formed his opinion on the basis of such statements.

v. The enquiry officer entertained written arguments from the presenting officer without affording the employee an opportunity to deal with such arguments.

vi. Even if it were accepted that the employee willingly absented himself from the proceedings on a day, it would not take away his right to attend subsequent dates of hearing particularly when the evidence had been recorded when he was absent and written arguments against him had been accepted.

vii. The statements given by the witnesses were vague and contradictory and the conclusion in the enquiry report that the petitioner had admitted the factual position was perverse.

6. In the writ petition the employee claimed that he received a communication from the disciplinary authority on February 10, 2003 recording that the board of directors of the bank had resolved on June 6, 2002 that the enquiry report of April 10, 2001 be accepted and the employee be served a second notice to show cause as to why he should not be dismissed. Such notice also permitted the employee to assail the findings of the enquiry officer. This second show-cause notice came to be challenged in WP No. 446 of 2003 that was dismissed in March, 2003 on the ground that the writ petition was premature and the employee was left free to challenge any adverse order that could ultimately have been made against him. 7. The employee issued a reply to the second show-cause notice on February 24, 2003 giving his version of things and also pointing out that the board of directors of the bank had accepted the enquiry report even before the employee's representation of June 13, 2002 had been received. The order of dismissal was issued on April 29, 2003, the material part whereof was as follows:

4. AND WHEREAS on careful consideration of the reply to the Second Show Cause Notice by which he was given an opportunity to represent in regard to the aforesaid punishment and of the entire matter it has been decided by the Board of Directors in its meeting held on 26.03.2003 that the proposed punishment of "dismissal" did not merit any modification and it was decided accordingly to issue the order of dismissal from service to the said Sri Bhabani Adhikary.

8. The major plank on which the writ petition was founded was that the entire exercise was in breach of the principles of natural justice. It appears from the writ petition and the impugned judgment that the employee suggested that Rule 108 of the West Bengal Co-operative Societies Rules, 1987 had been breached. The learned Single Judge accepted such contention and set aside the order of

dismissal to put the clock back to the stage of the charge-sheet and permit de novo proceedings.

9. The employer assails the judgment first on the ground that there is no discussion therein on the employer's challenge to the maintainability of the writ petition. The employer says that though it used an affidavit in opposition to the writ petition and the employee used a reply thereto, the judgment records that no opposition had been filed. The bank refers to its affidavit and the written submissions filed before the learned Single Judge where several pages are expended on the challenge to the authority of this Court to entertain the writ petition.

10. In support of such preliminary objection, it is the bank's contention that it is not a "State" or "other authority" within the meaning of Article 12 of the Constitution of India and that the State does not exercise any deep or pervasive control over it to the extent that it can be deemed to be a "State" or "other authority" within the meaning of either of such expressions. The bank says that it is not required to discharge any public duty or state function that would make it amenable to a writ of mandamus to discharge its public duty or statutory function. Several judgments have been cited in this regard including the one reported at S.S. Rana Vs. Registrar, Co-operative Societies and Another, .

11. It is not necessary to enter into such preliminary objection upon subsequent concession being made on two counts on behalf of the bank. Counsel for the bank accepts that if a statutory provision is violated in the matter of employment, a writ petition would be maintainable if such statutory violation was challenged even if the violation was alleged to have been made by a person who would not otherwise be amenable to the writ jurisdiction. Counsel for the bank also concedes that if a fundamental statutory rule as envisaged by Rule 48(f) of the said Rules were breached, a writ petition could be entertained irrespective of the fact that the concerned co-operative society had no trappings of "State" or "other authority" within the meaning of Article 12 of the Constitution.

12. In effect, the bank has accepted the dictum of a Division Bench of this Court in a judgment reported at 1990 (2) CHN 284 (Arjed Ali Gazi v. State of West Bengal) that is captured at paragraph 9 of the report.

9. It appears to us that in the instant case, the conditions of service of Sri Gazi as an employee of the Society have not been controlled by terms of contract but in the absence of terms of contract for service, such conditions have been left to be controlled by the said rule 108 which is undoubtedly a statutory rule. The Society has, therefore, an obligation to comply with the said statutory rule in the matter of discipline relating to the employment of Sri Gazi. When a duty flows from the statutory rule in the matter of employment, although such employment may be at the inception a product of private contract between the parties, in the matter of regulation of the condition of service of such employment a duty of a public nature comes into operation. Accordingly, for breach of such obligation

under statutory rules, a writ petition for appropriate writs and/or directions are maintainable. In view of the special facts involved in this case, the decision relied on by Mr. Bhattacharya and Mr. Moitra are not applicable. It, however, must be made clear that Co-operative Society in West Bengal is not a "State" within the meaning of Article 12 and is also not a public undertaking. It is essentially a private body formed at the initiation of private individuals. Hence, if the conditions of service of an employee of the Co-operative Society are not left to be controlled by the said statutory rules but are controlled by the terms of contract of service or bye-laws of the Society which is not a statutory rule, no writ will lie for enforcing any breach of the terms of employment of the employee of the Cooperative Society.

13. The bank's initial challenge to the maintainability of the writ petition is on the basis of the S.S. Rana judgment. The bank has placed the facts and says that the present matter should be governed by the same rule. The writ petitioner in the S.S. Rana case was a manager of a co-operative bank which had been set up under the Himachal Pradesh Co-operative Societies Act, 1968. Disciplinary proceedings were initiated against the writ petitioner in terms of the internal rules of the bank relating to employment and working conditions. The manager was found guilty and his services were terminated in exercise of powers under the rules of the bank. In accordance with the provisions of such internal rules the manager preferred an appeal which the board of directors of the bank dismissed and shortly thereafter the manager reached the age of superannuation. A writ petition was filed on the premise that the bank was a "State" within the meaning of Article 12 which was dismissed as not maintainable. Such order was challenged before the Supreme Court and the fundamental premise of invoking of Article 226 of the Constitution was sought to be buttressed by the additional argument that the nature of activities of the co-operative bank would make it amenable to the writ jurisdiction in view of the principles laid down by the Constitution Bench in the judgment reported at Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, .

14. In the S.S.Rana case, the Supreme Court noticed the statutory rules made under the Himachal Pradesh Co-operative Societies Act, particularly Rule 56 thereof, and repelled the argument of the writ petitioner on the ground that it had not been demonstrated either that the State exercised any direct or indirect control over the affairs of the co-operative bank nor was it shown that the bank in that case discharged any governmental function or function of public importance. In conclusion, and despite holding that the co-operative bank in that case was not a "State", the Supreme Court made the following observations at paragraphs 18 and 19 of the report:

18. Sabhajit Tewary Vs. Union of India (UOI) and Others, was decided by the same Bench on the same day as Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers,

Shyam Lal, Industrial Finance Corporation, . The contention of the employee was that CSIR is an agency of the Central Government on the basis of the CSIR Rules which, it was argued, showed that the Government controlled the functioning of CSIR in all its aspects. The submission was somewhat cursorily negated by this Court on the ground that all this "will not establish anything more than the fact that the Government takes special care that the promotion, guidance and cooperation of scientific and industrial research, the institution and financing of specific researches, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study of problems affecting particular industry in a trade, the utilisation of the result of the researches conducted under the auspices of the Council towards the development of industries in the country are carried out in a responsible manner". (SCC p. 487, para 4)

19. Although the Court noted that it was the Government which was taking the "special care" nevertheless the writ petition was dismissed ostensibly because the Court factored into its decision two premises:

(i) The society does not have a statutory character like the Oil and Natural Gas Commission, or the Life Insurance Corporation or Industrial Finance Corporation. It is a Society incorporated in accordance with the provisions of the Societies Registration Act" (SCC p. 486, para 4), and

(ii) This Court has held in *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, , *Heavy Engineering Mazdoor Union Vs. State of Bihar and Others*, and in *Dr. S.L. Agarwal Vs. The General Manager, Hindustan Steel Ltd.*, that the Praga Tools Corporation, Heavy Engineering Mazdoor Union and Hindustan Steel Ltd. are all companies incorporated under the Companies Act and the employees of these companies do not enjoy the protection available to government servants as contemplated in Article 311. The companies were held in these cases to have independent existence of the Government and by the law relating to corporations. These could not be held to be departments of the Government." (SCC p. 487, para 5)

15. The bank in the present case says that though Rule 48(f) of the West Bengal Co-operative Societies Rules was not cited before the learned Single Judge, if a writ petition was founded on the violation of the principles of natural justice embodied in such rule, then without regard to any other fact such petition would be entertained; but the maintainability would depend on the court's satisfaction that there was a breach of the principles of natural justice recognised by such provision. The submission on such score is that a tentative satisfaction as to the merits of a charge of violation of principles of natural justice would first be required to be recorded before other counts of merit could be gone into.

16. In view of the bank's acceptance that the breach of a statutory rule would entitle an employee to bring a petition under Article 226 of the Constitution, the challenge to the maintainability of the writ petition in which the impugned order

came to be passed has to fail. The fine point made that merely by citing the violation of a statutory rule would not give the writ petitioner a handle to embark an attack on other counts of merit, is an entirely different matter. But before such fine point is discussed, the fundamental basis of the writ petition and its maintainability has to be appreciated for even though the bank concedes, the matter pertains to the jurisdiction of the court over the subject-matter of the lis and mere concession would not be enough.

17. The tests as to when a person or body could be said to be a "State" or "other authority" within the meaning of Article 12 of the Constitution has fallen for consideration in a number of matters. The S.S. Rana judgment refers to the celebrated *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and the *Pradeep Kumar Biswas* case. In the *Pradeep Kumar Biswas* matter the reference to the Constitution Bench was as to whether the law had been correctly laid down in the *Sabhajit Tewary Vs. Union of India (UOI) and Others*, judgment. On a reading of the authorities it appears that a writ petition would be maintainable against a person if such person either were indisputably a "State" or "other authority" within the meaning of Article 12 or against an instrumentality if there was deep and pervasive State control over the instrumentality or such instrumentality enjoyed State conferred monopoly status or it discharged governmental functions or functions of public importance resembling governmental functions. Thus, a writ petition can be launched not only against an instrumentality which is obviously a "State" or "other authority" but against other persons or bodies which are elevated to the status of a "State" or "other authority" by reason of their nexus with the State or on account of the functions that they discharge.

18. To this general rule there appears to be an adjunct which, in the present context, may be restricted to matters relating to employment. It has now come to be accepted that notwithstanding a person not answering the description of a "State" or "other authority" within the meaning of Article 12 of the Constitution by virtue of its composition or by dint of the nature of duties and functions that it discharges, a writ may be issued against it if a violation of a statutory rule relating to employment was made the basis of a petition under Article 226 of the Constitution of India. It is not necessary in this context to look at the larger scope of the rule as to whether the breach of a statutory rule would ipso facto make the person accused of the breach amenable to the writ jurisdiction even beyond the field of employment; or to explore the fundamental rationale of such extended operation of the rule. For the present purpose it would suffice that in the matter of employment if a statutory rule is said to have been breached, the challenge against such action can be entertained under Article 226 of the Constitution.

19. Such principle can be culled out from three of the decisions relied on by the parties in the present case. S.S. Rana recognises the same rule as had been referred to by the Division Bench of this Court in the *Arjed Ali Gazi* case and the

Supreme Court in the judgment reported a Supriya Basu and Others Vs. West Bengal Hsg. Board and Others, . Paragraph 8 of the Supriyo Basu judgment elaborates on the principle in the following words:

8. The rival stands need consideration on the core issue of maintainability of the writ petition, though several other issues were raised by learned counsel for the appellants. It is undisputed that the respondent Society is a cooperative society constituted on agreement between members thereof who had agreed to abide by the provisions of the West Bengal Cooperative Societies Act, 1983, the Rules framed there under or the bye-laws framed by the Society. The Society is undisputedly not a department of the State and is also not a creature of a statute but merely governed by a statute. Only if it is established that a mandatory provision of a statute has been violated, could a writ petition be maintainable. Before a party can complain of an infringement of his fundamental right to hold property, he must establish that he has title to that property and if his title itself is in dispute and is the subject-matter of adjudication in proceedings legally constituted, he cannot put forward any claim based on the title until as a result of that enquiry he is able to establish his title. It is only thereafter that the question whether the rights in or to that property have been improperly or illegally infringed could arise. The dispute as noted by the High Court essentially related to the claims of two rival groups of private individuals in relation to common car parking spaces. The learned Single Judge gave certain directions, which even touched upon the legality of the sale deeds. It was not open to be dealt with in a writ petition. As observed by this Court in U.P. State Coop. Land Development Bank Ltd. v. Chandra Bhan Dubey in relation to the question whether a writ petition would lie against a cooperative society the question to be considered is what is the nature of the statutory duty placed on it and the Court is to enforce such statutory public duty. The question as to entitlement of the members was to be discussed in the annual general body meeting. The writ petitioners could not have questioned the decision of the Society to discuss the matter in the annual general body meeting. We, therefore, find no merit in this appeal. The Society is free to convene a general body meeting and to discuss the rival claims regarding entitlement. We make it clear that we have not expressed any opinion on that aspect of the matter. The appeal fails, but without any order as to costs.

20. Contrary to the submission made on behalf of the bank, the learned Single Judge did take the bank's challenge to the writ petition into consideration. His Lordship did not entertain the matter on the premise that the co-operative bank was a "State." The undisputed facts as to the constitution and business of the bank would not permit it to be viewed as a "State" or "other authority" by virtue of its composition or on account of the nature of its activities. The learned Single Judge, however, relied on the proposition that upon breach of a statutory rule being made the basis of the writ petition, the matter could be entertained. The learned Single Judge held that a writ petition could be filed by an aggrieved employee against a co-operative society even though such co-operative society

was not a "State" within the meaning of Article 12. His Lordship noticed the Arjed Ali Gazi judgment and the Supreme Court reasoning in the decision reported at U.P. State Cooperative Land Development Bank Ltd. Vs. Chandra Bhan Dubey and Others, But in the U.P. State Co-operative Land Development Bank Ltd. matter, it was held that the employer was an instrumentality of the State and amenable to writ jurisdiction and "it may not be necessary to examine any further the question if Article 226 makes a divide between public law and private law" (Paragraph 27). Though the Supreme Court also noticed that the service conditions applicable in that case were statutory in nature, the fact that the employer was found to be an instrumentality of the State was the deciding factor.

21. But the Arjed Ali Gazi and the S.S. Rana pronouncements clearly say that even if the employer were not otherwise amenable to the writ jurisdiction under Article 226 of the Constitution, a case of a breach of a statutory rule or provision could be brought by way of a writ petition.

22. The additional argument that the bank makes in this case is not appealing. If there is a breach of a statutory duty which is made the foundation of a writ petition against an employer which is not otherwise amenable to the writ jurisdiction, then the writ petition would be entertained and it has to be assessed on merits as to whether there is any breach or not. If it is found that no case of breach of a statutory provision is made out, an order of dismissal of the writ petition on merits would ensue. There is a distinction between an action not being maintainable and an action being liable to be dismissed. In the first case the court cannot assume jurisdiction; in the second the court has to adjudicate on merit, whatever may be the degree, to arrive at a conclusion. It is not necessary in the present circumstances to address a hypothetical situation where a challenge is made by an employee based on the allegation of a breach of a statutory provision coupled with other minor challenges on counts which do not amount to the breach of any statutory provision. If the argument of the bank here is that only upon the breach of a statutory provision being established could the other minor challenges be gone into, it is not a matter which is relatable to the facts or grounds of challenge in the present case.

23. On a reading of the writ petition it is apparent that the challenge therein was fashioned on Rule 108 of the West Bengal Co-operative Societies Rules, 1987. The argument before the learned Single Judge also appears to have been made in respect of such rule and the Conditions of Service which form Appendix VI to the said Rules and are included under Rule 108. Clause 14 of the Conditions of Service covers misconduct and disciplinary action. It enumerates the various acts that would amount to misconduct and sets down the penalties that may be imposed on an employee for such instances of misconduct as are covered thereby. Strictly speaking, there is nothing in clause 14 that could have been made the basis for the writ petition as it was neither the writ petitioner's contention that an act not falling within the scope of misconduct in the rule had been made the basis of the disciplinary proceedings, nor was it the writ

petitioner's case that the penalty imposed was beyond the scope of the rule. The substantive challenge in the writ petition was on the breach of the principles of natural justice and the writ petitioner does not show anything from the statutory Conditions of Service that expressly makes such principle applicable or sets down any detailed procedure for disciplinary proceedings.

24. An argument not made before the learned Single Judge has now been advanced by the writ petitioner to support the judgment. The writ petitioner says that implicit in the challenge on the grounds of violation of principles of natural justice taken in the writ petition is a reference to Rule 48(f) of the statutory rules. Such provision reads as follows:

48. Powers of the board. - The board of a co-operative society shall have full control over the administration and the business of the society and shall exercise all or any of the following powers as may be provided in the by-laws: -

...

(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,

...

25. The learned Single Judge recorded that the bank "did not produce any document in order to show that the service of the petitioner is governed by private service conduct." It was held that in the absence of any specific contract governing the service of the writ petitioner it could not be said that the bank was not required to follow the provisions of Rule 108 of the said Rules. The learned Judge thereafter held that the holding of the enquiry on March 8, 2001 was "in clear violation of the principles of natural justice as no notice was served upon the petitioner regarding holding of enquiry on March 8, 2001." There is no reference to any statutory provision which had been breached except a mention of Rule 108.

26. Rule 108 of the said Rules provides as follows:

108. Conditions of service of the employees of co-operative societies. - The conditions of service of the employees of co-operative societies shall, subject to the terms of specific contract enforceable by law and the provisions of any law for the time being in force, be as enunciated in the Appendix to this Chapter.

27. On a plain reading of such rule it is evident that a co-operative society can contract out of the conditions of service as set out in the Appendix referred to in that rule. In other words, the conditions of service laid down under the Appendix

to Chapter VI of the said Rules would apply unless a co-operative society within the meaning of the said Act of 1983 had provided a separate set of conditions of service. The obvious question that arises is whether upon a co-operative society under the said Act that is not a "State" or "other authority" within the meaning of Article 12 of the Constitution formulating conditions of service which are at variance with those found in the Appendix to Chapter VI of the said Rules, it could ward off a writ petition as being not maintainable. It is necessary to notice such question as one of the arguments put forth by the writ petitioner is that so long as alternate conditions of service are not put into place, the statutory conditions of service would prevail and the breach of the statutory conditions of service can be made the basis of a writ petition against a co-operative society which is not a "State" or "other authority" within the meaning of Article 12 of the Constitution. It would have been incumbent to address such issue if a specific breach of any of the conditions of service had been stressed upon, but the charge in this case is of breach of Rule 108 without reference to any clause in the conditions of service that has been violated. Counsel for the writ petitioner has not pointed out any clause of the statutory conditions of service that may be said to have been breached in the facts of the case.

28. Even though it is not necessary to answer the ancillary question that has arisen, it is plain to see that a mere allegation of the breach of a statutory provision without spelling out the particular breach of a specific provision would ordinarily not do for a writ petitioner to maintain proceedings under Article 226 of the Constitution founded only on such count. 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. The writ petition in this case did not clearly point out the breach of the statutory provision though it referred to Rule 108 and there is nothing in the impugned judgment to inform which limb of the Rule 108 was alleged to have been infringed. The writ petition was founded on the breach of the principles of natural justice and nothing in Rule 108 recognises that the principles of natural justice are required to be followed.

29. The matter is of some significance. If the principle is that a writ petition founded on the breach of a statutory rule or provision relating to employment can be entertained against a person or body which is not an instrumentality of the State within the extended meaning assigned to such instrumentality by the *Ajay Hasia* and the *Pradeep Kumar Biswas* judgments, the mandatory provision has to be there in the statute or statutory rules and its breach has to be alleged. Though the writ petitioner here did not indicate Rule 48(f) by name nor brought it to the notice of the learned Single Judge, he referred to the substance of the

Rule all over his petition. And Rule 48(f), and not Rule 108, recognises the principles of natural justice that the writ petitioner says were breached in his case. If Rule 48(f) were not in existence then the writ petition would not have been maintainable against this private co-operative bank. It would not do to merely cite a statutory rule without demonstrating which part of such rule had been breached. It is the premise on which the writ court would assume its authority. A petition under Article 226 of the Constitution has to be based on the status or deemed status of the respondent complained against or, in the matter of employment (which is the only aspect relevant to this case) as the authorities suggest, on the substance of the breach complained of. If the writ petition is not founded on the status or deemed status (all-pervasive control or nature of activity of the respondent complained against), the substance of the breach in a matter pertaining to employment has to be traced to a mandatory statutory provision. The writ petitioner here scrapes through only because he had cited the substance of Rule 48(f) in his writ petition and had generally said therein that the cooperative bank employer had violated the statutory rules.

30. Since the writ petitioner manages to get a look in, it is now the merits of the matter that needs to be assessed. Rule 48(f) of the statutory rules requires a procedure to be followed and at the heart of the procedure is the affording of a reasonable opportunity of being heard to the employee who is likely to be dismissed or removed from service on the basis of a charge. The principles of natural justice as they have now come to be recognised require a meaningful chance of representation and a process of consideration of such representation to be complied with. The various judgments that the employer brings speak of the salutary principle that the reasonableness of the opportunity of being heard has to be assessed on facts. Implicit in the principle of "opportunity of being heard" is the recognition of the fact that what is said in defence needs to be considered and an application of mind must be apparent. If such is the test, it has now to be ascertained whether the employer passed it.

31. The relevant facts have been noticed in the judgment under appeal and need not be repeated. There is first a doubt as to whether the writ petitioner had due notice of the enquiry proceedings held on March 8, 2001. There is then a question as to whether an invitation of an ex-post facto representation putting the onus on the writ petitioner to unsettle the findings of the enquiry officer was a reasonable opportunity of being heard. Even assuming against the writ petitioner on both counts - though there is little basis there for that appears from the records - his elaborate representation of June 13, 2002 was not before the board of directors when it considered the enquiry report on June 6, 2002 and opined that the matter should progress to action against the perceived delinquent. The communication of February 10, 2003 citing the board decision of June 6, 2002 did not spare a thought for the writ petitioner's representation of June 13, 2002 nor cited the delay in the representation as ground for its non consideration. The disciplinary authority's show-cause notice at the second stage referred to the decision of the board of directors at its meeting of June 6, 2002

and its consequential decision to require the employee to explain why the proposed punishment of dismissal from service should not be handed down.

32. Without going into the propriety of the ex-post facto opportunity afforded after the enquiry officer's report, if it was felt that an ex-post facto representation was called for, such representation had to be dealt with upon application of mind. The disciplinary authority's second show-cause notice issued on February 10, 2003 makes no reference to the petitioner's representation of June 13, 2002. Again, the petitioner's detailed explanation on merits of February 24, 2003 does not appear to have been deliberated upon except in what can be made out from the words of the order of dismissal of April 29, 2003 that "it has been decided by the Board of Directors at its meeting held on 26.03.2003 that the proposed punishment of "dismissal" did not merit any modification and it was decided accordingly ...

33. An opportunity given by calling for an explanation or a representation is meaningless and no opportunity at all unless such explanation is considered. It may be possible in a given case that a representation is a mere repetition of an earlier statement that had already been considered and rejected; in such a case a cryptic rejection of the second representation would suffice. But if a representation is made in respect of a matter that touches upon the life or livelihood of a person, a curt reply that the representation had been considered and rejected would ordinarily not pass muster. Given that the employer felt that it was incumbent for the employee to be permitted a chance to explain his position since he did not present himself at the appropriate time before the enquiry officer, it was consequently incumbent on the employer to consider the employee's version of things. There is nothing to show that the representation made on June 13, 2002 came to be considered for the subsequent cryptic rejection of the representation following the second show-cause notice to be upheld. There was clearly a breach of the statutory provision engrafted in Rule 48(f) of the said Rules in the matter of a reasonable opportunity of being heard being afforded to the writ petitioner. The impugned order, insofar as it relates to such aspect of the matter, is affirmed but on the reading of a different rule than the one cited therein.

34. The several judgments that the employer brings to bear on the aspect of natural justice do not detract from the fundamental test applied in assessing the facts. The judgment reported at Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., speaks of the rules of natural justice not being overstretched to make their application antithetical to justice, that they are not incantations to be invoked nor rites to be performed on all and sundry occasions. But it also speaks of guarding against prejudice being caused to the employee on the facts and circumstances of the case. The judgment in S.K. Singh Vs. Central Bank of India and Others, was rendered on appreciation that no prejudice was caused to the employee by reason of the enquiry report not being furnished to him. In State of U.P. Vs. Harendra Arora and Another, the Constitution Bench

judgment in the ECIL case was quoted and it was concluded that the test was as to whether any prejudice had been suffered upon a report or a document not being made available. In *State Bank of Patiala and others Vs. S.K. Sharma*, , the basic facet of the principles of natural justice - the concept of fair play in administrative action - was adverted to and it was opined that the application of the principles would depend on the facts of a case. In the judgment reported at *Deputy Registrar, Cooperative Societies, Faizabad Vs. Sachindra Nath Pandey and Others*, what weighed with the Supreme Court was that the employee had failed to avail of the numerous opportunities afforded to him for making his representation. It was again the failure of the delinquent to avail of an opportunity at the second show-cause stage that the Supreme Court did not condone in the judgment reported at *W.B. State Cooperative Bank Ltd. and Others Vs. Paritosh Bagchi and Others*, . It was the same reason - that of the delinquent not making use of the opportunity given to him - that was the basis for the Supreme Court judgment in *Karnataka State Road Transport Corporation and Another Vs. S.G. Kotturappa and Another*, .

35. The only remaining aspect is the employee's appeal against that part of the order that permits the de novo conduct of the proceedings from the stage of the charge-sheet. This employee reached the age of superannuation in 2005. The facts reveal that not only did the employer not consider the employee's version of things but showed no willingness to consider the same. The inordinate time between the date of the alleged incident and the order of dismissal, the consequential agony of the employee who now stands vindicated and the fact that the most grievous charge did not really amount to defalcation since the depositor immediately offered to have the deposit slip corrected to reflect the lower deposit, are factors that should preclude the writ petitioner being subjected to the agonies of a further protracted process.

36. The impugned order is modified accordingly. The quashing of the order of dismissal remains and the direction permitting de novo proceedings is set aside. The writ petitioner will be entitled to all consequential benefits of his reinstatement with full back wages. Though the writ petitioner can no longer get back his job but he should get all the monetary benefits by treating his service as continuous and uninterrupted till his date of retirement in 2005. He will also be paid all retrial benefits which he would have been entitled to in the event he had continued in service till the date of his retirement. The entire dues of the petitioner in terms of this order, after adjusting the subsistence allowance already paid to him, should be paid within a period of three months from date.

37. The appeals and the connected applications are disposed of accordingly. There will be no order as to costs.

38. Urgent certified photostat copies of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

39. A prayer for stay is made which is declined.

Surinder Singh Nijjar, C.J.