(2005) 09 PAT CK 0079

In the Patna High Court

Case No : C.W.J.C. No. 4503/2002

Jai Prakash Singh APPELLANT

Vs

Vaishali Kshetriya Gramin Bank and Others RESPONDENT

Date of Decision : 12-09-2005

Acts Referred:

Citation : (2005) 09 PAT CK 0079

Final Decision : Allowed

Judgement

Chandramauli Kr. Prasad, J.—This application has been filed for quashing the order dated June 7, 1999 (Annexure-29) passed by the disciplinary authority whereby, petitioner has been visited with the penalty of removal, which shall not be a disqualification for future employment. Further prayer made by the petitioner is to quash the order dated August 30, 2001 (Annexure-32) whereby, the appellate authority had set aside the order of removal and passed order for re-appointment of the petitioner in Clerical grade with initial pay scale.

2. Shorn of all unnecessary details, facts giving rise to the present application are that while the petitioner was working as Assistant Manager of Sahi Minapur Branch of the respondent, Vaishali Kshetriya Gramin Bank, Muzaffarpur, hereinafter referred to as the Bank, by memo dated November 12, 1997 (Annexure-1) explanation was called from him for his unauthorised absence and other misconduct. Petitioner did not submit any reply and by memorandum dated February 19, 1998 (Annexure-2) the respondent- Bank decided to hold departmental enquiry against him and served the memo of charge containing two charges. According to the memo of charge petitioner is in the habit of remaining, unauthorisedly absent from his duty and did not discharge his duties, even on days he was present. Later on, by letter dated February 23, 1998 (Annexure-3) one Mr. A.P. Choudhary was appointed as the Inquiry Officer. Petitioner filed application for the change of the Inquiry Officer and the disciplinary authority by order dated May 28, 1998 (Annexure-4) changed the Inquiry Officer and appointed Mr. R.S. Lal, Senior Manager as the Inquiry Officer.

The Inquiry Officer gave notice to the petitioner about the date fixed for the enquiry and at the same time requested the petitioner to nominate the Defence Representative, if any. Petitioner appeared before the Inquiry Officer on June 22, 1998 and the inquiry was adjourned to October 6, 1998. On October 6, 1998, the date fixed for enquiry, petitioner filed application before the Inquiry Officer nominating Mr. Sudhir Kumar Singh, Branch Manager (suspended), who also happened to be the General Secretary of the Banks'' Staff Union, as his Defence Representative. Petitioner also produced before the Inquiry Officer his consent letter and accordingly, requested him to permit representation by the said Defence Representative. The Inquiry Officer adjourned the enquiry to October 10, 1998 directing the (Presenting Officer to take instruction as to whether a suspended employee can be permitted to act as a Defence Representative. On October 10, 1998, the Presenting Officer brought to the notice of the Inquiry Officer the letter dated October 9, 1998 of the Management and contended that a suspended or charge-sheeted Officer cannot be allowed to act as a Defence Representative. Taking note of the said plea of the Presenting Officer the Inquiry Officer by order dated October 10, 1998 rejected the prayer of the petitioner seeking permission to be represented by aforesaid Mr. Sudhir Kumar Sinha, holding that a charge-sheeted or a suspended Officer cannot act as a Defence Representative. Petitioner reiterated before the Inquiry officer for permitting said Mr. Singh as a Defence Representative referring to various rules and decisions of the Court. Taking note of the said submission the inquiry Officer adjourned the Enquiry to October 24, 1998 directing the Presenting Officer to take further instruction from the Management. On October 24, 1998 the Presenting Officer took the stand that allowing Defence Assistant in the departmental proceeding is within the discretion of the Bank and in the light of the instruction of the NABARD, a suspended employee cannot be allowed to function as the Defence Representative. The Inquiry Officer considered the plea of the petitioner and the Presenting officer and by order dated October 24, 1998 rejected the prayer of the petitioner for appointment of Mr. Sudhir Kumar Singh as the Defence Representative and adjourned the enquiry to November 2, 1998.

3. Before the next date fixed in the enquiry, petitioner filed application dated October 28, 1998 (Annexure-11) before the Board of Director of the Bank assailing the decision of the Inquiry Officer and requesting to give appropriate direction for appointment of the Defence Representative. Thereafter on November 2, 1998, the next date fixed in the enquiry, petitioner brought to the notice of the Inquiry Officer that he had filed application before the Board of Director refusing to permit Mr. Sudhir Kumar Singh as the Defence. Representative and accordingly, prayed before the Inquiry Officer to stay the departmental proceeding till the decision by the Board of Director on his request. The Inquiry Officer took note of the plea of the petitioner and reiterated that Mr. Sudhir Kumar Singh cannot be allowed to be a Defence Representative and accordingly, directed the petitioner to select any other person as the Defence Representative and adjourned the enquiry to November 9 1998.

4. On November 9, 1998 the petitioner sought adjournment on the ground of his illness and the Inquiry Officer acceded to his request and adjourned the enquiry to November II, 1998. Further on November 11, 1998 the enquiry was adjourned on the ground of illness of the petitioner to November 24, 1998. On November 24, 1998 petitioner did not appear before the Inquiry Officer. However he gave indulgence and adjourned enquiry to December 3, 1998 inter alia observing that in case of failure on part of the petitioner to participate in the enquiry, it may proceed exparte. However the enquiry was adjourned on December 3, 1998 to December 7, 1998.

5. On December 7, 1998 the Presenting Officer brought to the notice of the Inquiry Officer the documents showing unauthorised absence of 180 days, 271 days and 74 days between the period January, 1995 to December, 1995, January, 1996 to December, 1996 and January, 1997 to September, 1997 totalling 524 days. The Presenting Officer also brought on record various communications, and reports showing adverse effect on the Bank''s functioning on account of his unauthorised absence. The Inquiry Officer asked the petitioner to place his view point at which the petitioner reiterated that he had filed application before the Board of Director and the revisional authority aggrieved by the decision of the Inquiry Officer declining to permit Mr. Sudhir Kumar Singh as the Defence Representative and accordingly prayed for stay of the enquiry till the decision by the aforesaid authority. The Inquiry Officer rejected the prayer of the petitioner and adjourned the inquiry to December 8, 1998.

6. On December 8, 1998 petitioner requested for permitting one Shri. Mahendra Prasad Karn, Clerk-Cum-Cashier of the Bank as the Defence Representative. The Inquiry Officer acceded to the request of the petitioner and permitted Mr. Mahendra Prasad Karn as the Defence Representative and adjourned the enquiry to December 11, 1998. However no enquiry was held on December 11, 1998 and the Inquiry Officer by letter dated December 16, 1998 (Annexure-17) wrote to the petitioner that although his prayer seeking permission to permit Shri Mahendra Prasad Karn as the Inquiry Officer was allowed by order dated December 8, 1998 but from the discussion and the instruction which he had received from the disciplinary authority, he had come to the conclusion that only an Officer can be the Defence Representative or another Officer and accordingly, the Inquiry Officer modified the order and informed the petitioner to nominate any other Officer who is neither charge-sheeted nor suspended to be a Defence Representative and to be present on December 23, 1998, the next date fixed in the case. On December 23, 1998 petitioner prayed before the Inquiry Officer to reconsider his decision and permit Mr. Mahendra Prasad Karn to act as Defence Representative but the Inquiry Officer declined to the petitioner''s request and adjourned the enquiry to December 24, 1998. Thereafter the date of enquiry was adjourned from one day to another and the petitioner all the time insisted for permitting him to be represented by the Defence Representative.

7. Ultimately on February 4, 1999 the Inquiry officer closed the enquiry separate,

inter alia, observing that inspite of several opportunities to place his defence, petitioner did not avail the same and all the time made appointment of the Defence Representative as a issue. The Inquiry Officer ultimately submitted his report dated April 4, 1999 (Annexure-26) and found both the charges levelled against the petitioner to have been proved. On receipt of the inquiry report the disciplinary authority issued show cause notice dated May 3, 1999, inter alia, stating that the Inquiry Officer has found the two charges levelled against him to have been proved and it proposes to inflict the penalty of removal from service, which shall not be disqualification for future employment for charge No. (i) and reduction of five increments in the incremental scale for charge No. (ii). Petitioner did not file any show cause but by letter dated May 26, 1999 (Annexure-28) informed to the Disciplinary Authority that on receiving the show cause, he has become mentally distrouble. The Disciplinary Authority ultimately, by order dated June 7, 1999 inflicted the penalty of removal from service which shall not be a disqualification for future employment. Petitioner preferred appeal against the aforesaid order and thereafter chose to file a writ application before this Court which was registered as CWJC No. 4488 of 2001 (Jai Prakash Singh v. Vaishali Kshetriya Gramin Bank and Ors.). This Court by order dated May 8, 2001 (Annexure-31) disposed of the writ application directing the appellate authority to dispose of the petitioner''s appeal within a stipulated period. The appellate authority by order dated August 30, 2001 (Annexure-32) set aside the punishment inflicted by the disciplinary authority and substituted the punishment by directing that the petitioner shall be reappointed in Bank service in Clerical grade with initial pay scale subject to the acceptance of the penalty. Petitioner submitted his joining by letter dated September 25, 2001 reserving its right to challenge the same. However the petitioner joining has not been accepted as the petitioner has not accepted the penalty.

8. Mr. Yashraj Bardhan appearing on behalf of the petitioner submits that the report of the Inquiry Officer is vitiated on the sole ground that the same has been rendered without permitting the petitioner to be represented by his Defence Assistant. He submits that Rule 30(3) of the Vaishali'' Kshetriya Gramin Bank (staff) Service Regulations, 1980, hereinafter referred to as the Regulations, provides that the officer or the employee may not engage a legal practitioner but the same in no way prohibits appointment of an Officer under suspension and another employee of the bank to represent the delinquent employee in the departmental proceeding. He points out that petitioner was not permitted to be represented by Mr. Sudhir Kumar Singh, an Officer and General Secretary of the Banks'' Staff Union on the ground that he was under suspension and Mr. Mahendra Prasad Karn, on the ground that he was a clerk. Mr. Ajay Kumar Sinha appearing on behalf of the respondents does not dispute the aforesaid fact but submits that the Bank is bound by the guidelines issued by the NABARD and in this connection he has drawn my attention to the guidelines dated June 20, 1997 adopted for disciplinary action in Regional Rural Banks. Chapter 10 of the said circular provides for procedure of enquiry and Clause (f) thereof provides for

Defence Representative: Rider-IV under the aforesaid heading reads as follows:

A charge-sheeted official has every right to represent his own case. At his option, he may be allowed to be represented by any other employee of the bank or an office bearer of the trade union of which he is a member. In such cases, the charge-sheeted employee should address a letter to the bank or if an Enquiry Officer is already appointed to the Enquiry Officer concerned, proposing such representative as his nominee and declare that he (the charge-sheeted official) will be bound by all that the nominee does, says or signs. Wherever an office bearer or other member of the Trade Union is deputed by the Union to defend the charge sheeted employee, a formal letter should be addressed by the Trade Union stating that the nominee of the charge-sheeted employee has been disputed as its representative to defend the charge-sheeted employee. It is not necessary that the Union should have been recognised by the Bank. It is sufficient if the Union of the Bank employee is a registered Union.

Generally, the charge-sheeted official is not entitled to be represented by a legal practitioner or an outsider who is not connected with the bank. However, if the Presenting Officer is a legally trained man including a Law Officer or a Legal Adviser of the Bank, the delinquent employee will have a right to be defended by a Lawyer notwithstanding the prohibition contained in sub-regulation (3) of Regulation 30 of the Staff Service Regulations. Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others,

If an employee is charged for a gross misconduct involving criminal offences like fraud, misappropriation, embezzlement of accounts, forgery, theft, etc., and if he so requests to be permitted to be represented by a lawyer in the enquiry, the Enquiry Officer/Disciplinary Authority may notwithstanding the prohibition contained in sub-regulation (3) of Regulation 30 of the Staff Service Regulations, consider such requests in the light of the facts and circumstances of the case and consider allowing the delinquent official to be represented by a legal practitioner or any other outsider of the choice of the delinquent. In such cases, the Bank also may consider getting its case represented by a legally trained person or a legal practitioner or a Law Officer of the Bank.

As to the question whether in a given case the charges are of a serious and of a complex nature involving criminal offences or not has to be decided by the Enquiry Officer/ Disciplinary Authority on the basis of the facts and circumstances of the case and if necessary, the Legal Advisor of the Bank may be consulted.

The role of the defence representative is to present the charge- sheeted employee''s case, examine and cross-examine witnesses, raise objections to procedural lacunae, if any, and sum up the case on behalf of the employee. The representative should not be allowed to give oral evidence on behalf of the charge-sheeted employee for should he be permitted to answer questions put by the Enquiry Officer to the charge-sheeted employees. In the case of any enquiry against an officer, the Disciplinary authority may at his discretion allow the officer to be defended by another officer of the bank.

(Italicising mine)

9. Mr. Sinha draws my attention to the last line of the aforesaid guidelines and contends that it is within the discretion of the disciplinary authority to allow the Officer to be defended by another officer of the Bank. Here in the present case he points out that Mr. Sudhir Kumar Singh was not allowed to act as the Defence Representative as he was under suspension and to use his expression "to maintain cordiality" during the course of enquiry. He points out that according to the guidelines issued by the NABARD an Officer can be represented by another Officer and not the Clerical staff.

10. Having considered the rival submission, I am of the opinion that the petitioner was wrongly denied the assistance of the Defence Representative. Rule 30(3) of the Regulations, which is relevant for the purpose reads as follows:

30. Penalties

(3) The inquiry under this regulation and the procedure with the exception of the final order, may be delegated in case the person against whom proceedings are taken is an officer to any officer who is senior to such officer and in the case of an employee to any officer. For purposes of the inquiry, the officer or employee may not engage a legal practitioner.

11. From a plain reading of the aforesaid provision it is evident that what the regulation prohibits is engagement of legal practitioner but the engagement of legal practitioner to act as the Defence Representative is not absolute in terms. As the said question does not arise in the present case. I am not inclined to dilate on this any further. Suffice it to say that in a case in which the management is represented by a legally trained mind the delinquent employee shall have the right to be defended by a lawyer notwithstanding the provisions contained aforesaid.

12. Even if I assume in favour of the respondents that an officer of the Bank can be represented only by another Officer of the bank under the guidelines of the NABARD, the question which falls for determination is as to whether officers under suspension suffer disqualification to act as Defence Representative. Suspension is a concept well known in service jurisprudence and it is trite that by putting a person under suspension the relationship of employer and employee is not snapped. A suspended employee continues to be the employee with only limitation that he may not be allowed to work for the employer and the service condition by which he is governed may provide for less emoluments, commonly known as subsistence allowance. No rule or instruction has been brought to my notice to show that a person under suspension is not entitled to act as a Defence Representative of a delinquent officer in the departmental enquiry. A learned single Judge of the Kerala High Court had the occasion to consider this question in the case of N.P. Padmanabhan v. Superintendent Post Offices 1975 Lab 1140 in

which it has been held as follows:

However the Inquiry Officer informed the petitioner that as Shri Abrahamn Kurian is under suspension he has not been permitted to assist the petitioner in the case by the Senior Superintendent of the Post Offices, Ernakulam. Nor was the petitioner informed that he can get the assistance of any other Government servant. There is no rule which says that a person under suspension is not entitled to assist another Government Servant in Inquiry Proceedings.

13. The status of the employee under suspension was considered by the Supreme Court in case of Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, in the following words at p. 1101 of LLJ:

27. The order of suspension does not put an end to an employee''s service and he continues to be a member of the service though he is not permitted to work and is paid only subsistence allowance, which is less than his salary. (See: The State of Madhya Pradesh Vs. The State of Maharashtra and Others,

14. The aforesaid analysis leads me to conclude that the petitioner was wrongly denied assistance of Mr. Sudhir Kumar Singh, an Officer of the Bank only on the ground that he was under suspension.

15. Having said so, the next question which falls for determination is as to whether the action of the respondent Bank in not permitting the petitioner to be represented by said Mr. Sudhir Kumar Sinha, shall have bearing on the ultimate decision and punishment inflicted on the petitioner.

16. Mr. Sinha submits that the inquiry cannot be said to have vitiated only on the ground that the petitioner was not allowed to be represented by any other officer. He points out that the charge is not of such a nature that the petitioner could not have defended himself. He points out that denial to engage another officer as defence representative, in the facts and circumstances of the case, has not caused any prejudice to the petitioner and as such, the order of punishment cannot be said to have been vitiated on account of infraction of the principle of natural justice in support of the submission, he has placed reliance on a Division Bench decision of this Court in the case of Arvind Kumar v. Nalanda Gramin Bank through its Chairman 2004 (4) PLJR 837 and my attention has been drawn to the judgment which read as follows:

thus it is held that the delinquent employee has no right to be represented by counsel or agent in the departmental proceeding unless the rules governing the service provide so. However, if the allegations are intricate and complicated or if the Presenting Officer is a Legally trained prosecutor then the Disciplinary authority should permit the delinquent employee to engage a counsel or agent in the departmental proceeding failure to provide such opportunity would be violative of principles of natural justice.

17. Having considered the rival submission, I do not find any substance in the submission of Mr. Sinha and. the authority relied on is clearly distinguishable. In

my opinion, right to be represented by a counsel is not a substantive right but a procedural right governed, restricted and controlled by the statute. At the same time, representation by another officer is the command of fair play and flows from the principles of natural justice and the statute, which governs the field, may directly or by necessary implication curtail this right. In the absence of any prohibition directly or by necessary implication, refusal to allow a delinquent employee to be represented by another officer shall be in the teeth of the principle of fair play and shall be in violation of the principle of natural justice. Here, the regulation and the instruction governing appointment of the defence representative has in no way prohibited appointment of an officer to be represented by another officer in the departmental proceeding. In fact, the only prohibition is the engagement of a legal practioner. The instruction relied on by Mr. Sinha itself clearly contemplates that in the case of any inquiry against an officer, the disciplinary authority may at a discretion allow the officer to be defended by another officer of the Bank.

18. It is well settled that when an authority is conferred with the discretion, the said discretion has to be exercised on sound principle. Here the petitioner was not allowed to be represented by another officer only on the ground that he was under suspension. Said ground has been found to be illegal and hence, there is no escape from the conclusion that the petitioner was not given opportunity to be represented by another officer in the departmental proceeding, which is in teeth of the natural justice. In my opinion, the question of prejudice shall arise only when a delinquent employee is not allowed to be represented by a legal practioner in terms of the rule but when a delinquent employee is not allowed to be represented by another officer, although the statute by which the departmental proceeding is governed permits so. The principle of natural justice is plainly violated and the delinquent employee in such circumstance is automatically prejudiced.

19. Now, referring to the decision of this Court in the case of Arvind Kumar (supra), same is clearly distinguishable. In the said case, the Court was considering the right of an employee to be represented by a legal practioner. From the discussion aforesaid, it is evident that the petitioner was wrongly denied the assistance of another officer to be represented in the departmental proceeding and same has caused prejudice to him. This has vitiated the entire departmental proceeding and the ultimate punishment.

20. Respondents, if so advised, may proceed against the petitioner subsequent to the stage of framing of the charge. In case the respondents chose to do the same, same be concluded within a period of four months from the date of receipt/ production of a copy of this order.

21. In the result, the writ application is allowed. The impugned orders are quashed and the petitioner is directed to be reinstated in service. Consequential benefits shall abide by the said decision. In the facts and circumstances of the case, there shall be no order as to cost.

