

(2019) 05 PAT CK 0059

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 869 Of 2018

Kaushal Kishore Thakur

APPELLANT

Vs

Indian Bank Through C.M.D. And Ors

RESPONDENT

Date of Decision : 17-05-2019

Acts Referred:

Indian Bank Officer Employees' (Discipline And Appeal) Regulations, 1976 — Regulation 4(f), 4(h)

Indian Bank (Employees) Pension Regulations, 1995 — Regulation 14, 33, 33(1), 46

Citation : (2019) 3 PLJR 32

Hon'ble Judges : Nilu Agrawal, J

Bench : Single Bench

Advocate : Ashhar Mustafa, Falakyar Askari, Talib Mustafa, Shivendra Kishore, Nishi Nath Ojha

Final Decision : Allowed

Judgement

1. Heard Mr. Ashhar Mustafa assisted by Mr. Falakyar Askari and Mr. Talib Mustafa, learned counsels for the petitioner, and Mr. Shivendra Kishore, learned Senior Counsel duly assisted by Mr. Nishi Nath Ojha, Advocate for the Respondent- Indian Bank (hereinafter referred to as the Bank).

2. The present writ application has been filed for setting aside the order dated 24.05.2017, passed by Respondent No. 2, the Executive Director of the Bank, as contained in Annexure-9, whereby the Respondent-Bank has sanctioned only 67% of full pension to the petitioner and the request for grant of encashment of privileged leave has been declined. Petitioner prays for full pension and leave encashment and also to allow commutation of pension and all arrears with due interest.

3. The present case has a chequered history. The petitioner joined as Probationary Officer in the Respondent- Bank on 01.06.1977. After discharging his duties sincerely he became Senior Management Grade Scale-V Officer in the year 2007. In the year 2009 he became Circle Head of the State of Bihar and

Jharkhand. On charges of irregularities and allegation of commission, the petitioner was placed under suspension on 19.10.2009 for irregularities relating to the period 12.09.2006 to 13.10.2009, during which period he functioned as Assistant General Manager/ Branch Manager and Assistant General Manager/ Circle Head, Patna of the Bank. A charge-sheet through letter dated 02.08.2010 containing altogether 19 charges was issued for imputations of misconduct and after a departmental proceeding having been conducted, the punishment of compulsory retirement was passed on 31.10.2011 in terms of Regulation 4(h) of the Indian Bank Officer Employees' (Discipline and Appeal) Regulations, 1976 (hereinafter referred to as the Discipline and Appeal Regulations, 1976). The petitioner being aggrieved moved in appeal before the appellate authority, which was rejected vide order dated 26.03.2012. Against the said rejection order the petitioner moved this Court in CWJC No. 4148 of 2013, which was decided on 20.01.2014. After quashing of the order of the appellate authority, the matter was remanded back to the appellate authority to decide the issue after taking into consideration certain aspects which were not considered by the appellate authority. However, in the said order passed by this Court no infirmity was found in the disciplinary proceeding so conducted.

4. It has been informed by the petitioner that again the appellate authority has rejected his appeal on 02.06.2014, which has again been challenged in CWJC No. 12365 of 2014, which is still pending adjudication before this Court. However, after the order of compulsory retirement when retiral dues were not paid the petitioner moved this Court in CWJC No. 15264 of 2015 for payment of his retiral dues. During pendency of the writ application all other dues were paid except leave encashment and forfeiture of 1/3rd of his pension by the Bank under Regulation 33 of the Indian Bank (Employees) Pension Regulations, 1995 (hereinafter referred to as the Pension Regulations, 1995). This Court after a detailed consideration under order dated 02.02.2016 held that leave encashment could not be forfeited and the power of the Bank to withhold 1/3rd pension of a delinquent cannot be doubted or curtailed but visiting a person with civil consequences has to be in accordance with law i.e. the loss has to be quantified and provided to the delinquent along with memo of charges so as to give him an effective and meaningful opportunity of hearing. Hence, forfeiture of 1/3rd of pension was struck down and the petitioner was found entitled to full pension and leave encashment. Against the said order the Bank moved in appeal being LPA No. 580 of 2016 and the Division Bench by order dated 28.10.2016 dismissed the appeal. The Bank then moved the Apex Court in SLA (C) No. 620 of 2017 and the Apex Court by order dated 27.02.2017 remanded the matter for a fresh hearing observing that all the contentions of the petitioner would be duly considered by the Bank. After remand, order of forfeiting 1/3rd of the pension and withholding leave encashment was passed by the Executive Director of the Bank dated 24.05.2017, which is under challenge in the present writ application. However, the petitioner does not pray for payment of leave encashment as the claim has now been acceded to by the Bank and leave encashment has been

deposited in the account of the petitioner on 21.01.2019 during pendency of the present application but without interest. Hence, interest on leave encashment is also claimed by the petitioner.

5. Learned counsel for the petitioner submits that for the unusual and deliberate delay of 8 years as per Regulation 46 of the Pension Regulations 1995 and in view of the settled law in the case of S.K. Dua Vs. State of Haryana and others since reported in (2008) 3 SCC 44 and in the case of Alok Shankar Pandey Vs. Union of India and others since reported in (2007) 3 SCC 545 stating therein that the petitioner is entitled to interest on such unusual delay of 8 years and interest is not a penalty or punishment but is a normal accretion on capital.

6. He further submits that the order of punishment of compulsory retirement for certain irregularities and allegations of commission was passed under Regulation 4(h) of the Regulations, 1976 which deals with disciplinary action against its employees and the punishment order of forfeiting 1/3rd of the pension has been passed under Regulation 33 of the Pension Regulations 1995 which deals with pension of the employees of the Bank and are two distinct and separate Regulations. He submits that even after remand from the Apex Court the impugned order of forfeiting 1/3rd of the pension of the petitioner under Regulation 33(1) by way of penalty is unfounded in law as after remand although the petitioner was given a personal hearing on 20.04.2017 as contained in Annexure 8 series wherein in none of the queries the amount of loss has been quantified and the reply given by the petitioner in the personal hearing was that in all the said accounts either those accounts were closed or there was sufficient landed property by way of equitable mortgage. In the impugned order there is a reference of financial loss of Rs. 4.39 crores in the account of Krishna Fabicons Pvt. Ltd. and a probable loss of Rs. 14.36 crores due to non-adherence of rules and regulations and lapses by the petitioner. He submits that the order of forfeiture of 1/3rd of the pension of the petitioner is a reiterance of the earlier order as the forfeiture is by way of penalty and visiting a person with civil consequences has to be in accordance with law either explicit or implied. The loss of Rs. 4.39 crores, which is stated to be crystallized in the impugned order, was not made available, no documents with regard to the same was supplied to the petitioner at the time of personal hearing after remand from the Apex Court for arriving at a conclusion of a quantified loss. The details/ materials regarding the same ought to have been provided to the petitioner along with memo of charges so as to give him an effective and meaningful opportunity of hearing. The forfeiture of 1/3rd of pension amount is erroneous and against the law as no show cause notice has been issued nor any reply was asked and on allegation of misconduct and non-observance of Bank's guidelines, rules and regulations, the petitioner had already been inflicted with the punishment of compulsory retirement under the disciplinary regulations of the Bank. A further punishment by way of penalty of forfeiture of 1/3rd of pension without any show cause and in the garb of personal hearing without any imputation of the said charge on the basis of which such forfeiture of 1/3rd of pension has been done is not

sustainable as the Bank has reiterated the same and similar order of forfeiture of 1/3rd of pension passed earlier before remand from the Apex Court without any memo of charge and without any opportunity of hearing as to how the Bank had suffered a financial loss of Rs. 4.39 crores. He submits that Regulation 33 although being a discretionary clause, cannot be invoked arbitrarily but has to be exercised judiciously and relies on the judgment of the Apex Court in the case of *Mangi Lal Vs. State of M.P.* since reported in (2004) 2 SCC 447, paragraph 10 whereof is extracted hereinbelow :

"10. Even if a statute is silent and there are no positive words in the Act or the Rules made thereunder, there could be nothing wrong in spelling out the need to hear the parties whose rights and interest are likely to be affected by the orders that may be passed, and making it a requirement to follow a fair procedure before taking a decision, unless the statute provides otherwise. The principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary. No form or procedure should ever be permitted to exclude the presentation of a litigant's defence or stand. Even in the absence of a provision in procedural laws, power inheres in every tribunal/court of a judicial or quasi-judicial character, to adopt modalities necessary to achieve requirements of natural justice and fair play to ensure better and proper discharge of their duties. Procedure is mainly grounded on the principles of natural justice irrespective of the extent of its application by express provision in that regard in a given situation. It has always been a cherished principle. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive, unless found excluded by express words of statute or necessary intendment. (See *Swadeshi Cotton Mills v. Union of India*) Its aim is to secure justice or to prevent miscarriage of justice. Principles of natural justice do not supplant the law, but supplement it. These rules operate only in areas not covered by any law validly made. They are a means to an end and not an end in themselves. The principles of natural justice have many facets. Two of them are: notice of the case to be met, and opportunity to explain."

7. He submits that a penalty has been imposed on the petitioner under Regulation 33 by withholding of 1/3rd of pension. The discretionary power ought not to have been exercised arbitrarily but judiciously and fair play requires an opportunity of hearing to the petitioner in view of the judgment in the case of *A.N. Puniwala Vs. Bank of India and others* since reported in 2007 SCC Online Gujarat 367, Paragraphs 8 and 9 which are as follows :

"8. At the outset it is required to be noted that disciplinary proceedings were initiated against the respective petitioners under the provisions of the Bank of India Officers Employees' (Discipline and Appeal) Regulation, 1976. The order of penalty of compulsory retirement from the bank's services was imposed upon the

respective petitioners as provided under Regulation 4(f) of the Discipline and Appeal Rules. The order of compulsory retirement has not been challenged by any of the petitioners. Considering Regulation 33 of the Bank of India (Employees') Pension Regulation, 1995, the respondents have passed an order and/or have taken the action of withholding of 25% of the pension. It is required to be noted at this stage that penalty of compulsory retirement is imposed under the Discipline and Appeal Rules while action of withholding of 25% of the pension is taken under the provisions of the Pension Regulation; 1995. Thus, both the actions i.e. imposing the penalty of compulsory retirement and withholding of 25% of the pension are under different Rules and Regulations. One is under Discipline and Appeal Rules and another is under Pension Regulations, 1995. Under the circumstances, the contention of the learned advocate appearing for the respondent bank that the action of the respondent bank in withholding of 25% of the pension is part of discipline proceedings and is not severable and while imposing the penalty of compulsory retirement at every stage, opportunity has been afforded and therefore no further opportunity is required to be given while withholding 25% of the pension cannot be accepted. At this stage, some of the averments in the affidavit-in-reply filed on behalf of the respondent bank are also required to be considered. In paragraph 14 of the affidavit- in-reply, it is submitted that "respondents state that disciplinary proceedings were initiated under the provisions of Bank of India Officer Employees' (Discipline and Appeal) Regulations and disciplinary action proceeding under the provisions of the said regulations has no reason/point whatsoever to refer in any manner whatsoever in respect of payment of pension as competent authority to sanction pension and payment of pension is different under the Bank of India (Employees') Pension Regulations, 1995. Even dealing with the contention on behalf of the petitioners that the appellate authority before whom the order of compulsory retirement was challenged has also opined and/or observed that the petitioners be paid full pension, it is submitted by the respondents in affidavit-in-reply that it is not incumbent upon the competent authority under the Pension Rules to accept anyone or all recommendations made by the appellate authority. Thus, even according to the respondents in affidavit-in-reply, the competent authority under the Pension Rules is different than the disciplinary authority and the appellate authority. Now so far as the contention on behalf of the respondents that as under Regulation 33 of the Pension Regulations, notice and/or hearing is not provided and therefore, opportunity, of hearing is not required to be given is concerned, it is required to be noted that Regulation 33 of the Pension Rules provides that an employee compulsorily retired from service as a penalty may be granted pension at a rate not less than two thirds and not more than full pension admissible to him on the date of his compulsory retirement, even otherwise, they were entitled to such pension on superannuation on that date. The Regulation 33 reads as under:-

"33. Compulsory Retirement Pension.

(1) An employee compulsorily retired from service as a penalty on or after 1st

day of November, 1993 in terms of Discipline and Appeal Regulations or settlement by the authority higher than the authority competent to impose such penalty may be granted pension at a rate not less than two thirds and not more than full pension admissible to him on the date of his compulsory retirement if otherwise he was entitled to such pension or superannuation on that date.

(2) Whenever in the case of a bank employee the Competent Authority passes an order (whether original, appellate or in exercise of power of review) awarding a pension less than the full compensation pension admissible under these regulations, the Board of Directors shall be consulted before such-order is passed.

(3) A pension granted or awarded under sub- regulation (1) or as the case may be, under sub- regulation (2), shall not be less than the amount of rupees three hundred and seventy five per mensem."

9. Now, considering Regulation 33, it gives authority to the competent authority to withhold pension upto 25% and thus, discretion is vested with the authority to pay pension at a rate not less than two thirds and not more than full pension meaning thereby, the authority can withhold the pension upto 25%. Thus, in an appropriate case, the authority can withhold pension upto 5%, in an appropriate case upto 10%, in an appropriate case upto 20% and maximum upto 25%. When the discretion is given to the authority, in that case: if the opportunity of being heard is given to the concerned employee, in that case, the concerned employee can satisfy the authority that in a given case order of withholding of the pension of 25% is not warranted and that only 5% of the pension may be withheld and/or less than 25% of the pension may be withheld. There is another reason also why in such a situation hearing is required to be given. When the discretion is given see that such discretion is not exercised arbitrarily and is exercised judiciously, the fair play requires that an opportunity of hearing is required to be given.

8. He submits that the mode and manner of deduction/ forfeiture of pension of a compulsorily retired employee has to be specifically mentioned about actual loss suffered, a show cause notice ought to have been issued with particulars of that loss in order to enable the delinquent to meet the same as held in the case of UCO Bank and Ors. Vs. Anju Mathur since reported in 2013 SCC Online P&H 5014, paragraph 22 and 23, extracts of which is reproduced hereinbelow :

"22. After considering these arguments, we find that argument of the learned counsel for the respondent has to prevail. We have gone through charge-sheet as well as enquiry report. No doubt, in the charge-sheet as many as 24 accounts are mentioned where the respondent had given loans or other financial accommodation either beyond her powers or without obtaining proper securities. That would show that certain accounts were overdrawn. Even the operation of these accounts was not satisfactory. However, whether the appellant-Bank ultimately suffered loss and what was the actual loss is not reflected. No doubt, the irregularities committed by the respondent may have exposed the Bank to

such losses. However, that is entirely different from loss having been actually suffered by the bank. Even if some accounts became bad and the Bank had to file suits for recovery concerning those accounts against the defaulting parties, that would not automatically lead to the conclusion that the loss/damage has been suffered. It is possible that Bank is able to recover full money in those proceedings. Whether that happened in fact or not and whether loss is actually suffered or not is not discernible from either the charge-sheet or the enquiry report.

23. It is for this reason that it was incumbent upon the appellant-Bank to mention specifically about the actual loss having been suffered, if it suffered, in the show cause notice itself with particulars of that loss in order to enable the respondent to meet the same. That has not been done even in the final order. Though the figure of Rs. 4 crores is given, in the final order, even that is not substantiated by giving particulars thereof. We are, therefore, of the opinion that the show cause notice or the final orders passed, forfeiting the gratuity, do not meet the legal requirements and have to be set aside."

9. Mr. Shivendra Kishore, learned Senior Counsel appearing on behalf of the Bank, however, submits that as per Clause 3 of the Indian Bank Officer Employees Conduct Regulations, 1976 the officer/ employee of the Bank must maintain devotion of duty and in performance of his duty he must maintain absolute integrity and his conduct must not be one which is unbecoming of an officer/ employee. Due to serious omissions and commissions committed by the petitioner for the period 12.09.2006 to 13.10.2009, charge-sheet was submitted and as many as 19 charges were levelled against the petitioner. Hence, a major penalty of compulsory retirement was imposed under Rule 4(h) of the Discipline and Appeal Regulations 1976. He further submits that in the earlier round of litigation in CWJC No. 4148 of 2013 this Court did not find any infirmity in the disciplinary proceeding. Since on remand from the Apex Court the Executive Director of the Bank vide its order dated 24.05.2017 has quantified the probable loss of Rs. 14.36 crores and Rs. 4.39 crores had already crystallized, which is a serious misconduct on the part of the petitioner, hence, 67% of full pension admissible to him was sanctioned. He submits that Pension Regulations, 1995 does not postulate that every employee is entitled to pensionary benefit. Chapter II of the Pension Regulations, 1995 provides application and eligibility and Chapter IV deals with qualifying service and an employee who has rendered a minimum of 10 years of service and fulfills other conditions only can qualify for pension in terms of Regulation 14 of the Pension Regulations, 1995. He submits that as per Regulation 33 if an employee has compulsorily retired from service as a penalty, the expression 'if otherwise' has overriding effect and since the petitioner was made to compulsorily retire by way of penalty on account of his omissions and commissions and the loss having been crystallized at Rs. 4.39 crores the petitioner is not entitled to full pension. It is submitted that if an employee, who has been compulsorily retired by way of penalty, would be given a blanket 100% pension then Regulation 33 of Pension Regulations, 1995 would

become redundant. He further submits that under the said Regulation 33 no notice about quantified loss prior to deduction of pension is required to be given to the delinquent/ petitioner as provision of pension regulation is silent on notice. In this connection, he relies in the case of Chairman- cum-Managing Director, UCO Bank Vs. P.C. Kakkar since reported in (2003) 4 SCC 364, in the case of Disciplinary Authority-cum-Regional Manager Vs. Nikunj Bihari Patnayak since reported in (1996) 9 SCC 61, in the case of State Bank of India Vs. Bela Bagchi since reported in (2005) 7 SCC 435 and in the case of Baliram Prasad Singh Vs. G.M. (H.R.), Bank of India since reported in 2019(1) PLJR 331 that the Bank employees are required to exercise higher standard of honesty and integrity and when the delinquent employee acted without authority forfeiture of 1/3rd of pension under Regulation 33 of the Pension Regulations, 1995 is just and proper.

10. Heard the parties. The issue at hand is whether in pursuance to the order of compulsory retirement passed against the petitioner by way of penalty, 1/3rd of pension can be forfeited without a notice regarding charges of quantified loss and without opportunity of hearing to the petitioner. After remand by the Apex Court for a fresh hearing, the petitioner was given a personal hearing by the competent authority on 20.04.2017, which is Annexure-8 series to the writ application. The personal hearing was by way of questionnaire wherein the questions asked was; to make submissions on the aspects of pension and leave encashment; some accounts financed in which the petitioner was charge-sheeted were NPA and suits filed, whether extant guidelines were followed or not; what was the recovery in the accounts. To which the petitioner replied that most of the accounts were already recovered and closed or were backed by sufficient landed property by way of equitable mortgage. No notice with regard to probable loss on Rs. 14.36 crores or crystallized loss of Rs. 4.39 crores was ever made known to the petitioner. No show cause was issued with particulars of that loss in order to enable the petitioner to meet the same. It is worthwhile to mention that an order of compulsory retirement was passed under Discipline and Appeal Regulations, 1976, which is not the subject-matter in the present writ application. Forfeiture of 1/3rd of the pension and leave encashment under the Pension Regulation, 1995 by way of penalty after remand is merely a reiterance of the earlier order as the forfeiture of 1/3rd of pension and leave encashment is by way of penalty and visiting a person with civil consequences has to be in accordance with law. No memo of charges of either the probable loss of Rs. 14.36 crores or the quantified loss of Rs. 4.39 crores was ever served on the petitioner so that he could rebut those charges and as held in the case of A.N. Puniwala (supra) the petitioner was not even given an opportunity of hearing as to whether the quantified loss forfeiting 1/3rd of the pension is justified as Regulation 33 of the Pension Regulation, 1995 speaks of imposition of penalty of compulsory retirement which could not be less than 2/3rd and not more than full pension i.e. there was a variable between 1/3rd of pension to full pension and not a blanket order of forfeiture of 1/3rd of pension. Such opportunity for rebuttal and the loss sustained by the Bank was not given to the petitioner. Although, the discretion is

given to the Bank but such discretion is not to be exercised arbitrarily but judiciously and fair play requires that an opportunity of hearing was required to be given to the petitioner of the loss sustained by the Bank due to certain acts of omission and commission by the petitioner. The same view has been held in the case of Anju Mathur (*supra*) wherein it has been held that actual loss and the ultimate loss suffered by the Bank has not been reflected for the irregularities committed by the petitioner. The penalty of compulsory retirement under Discipline and Appeal Regulations, 1976 had already been passed. Even if some accounts turned bad/ NPA and Bank has to file suits for recovery concerning those accounts against the defaulting parties that would not automatically lead to the conclusion that loss/ damage has been suffered. It is possible that the Bank is able to recover full money in those proceedings. Neither the departmental proceeding conducted against the petitioner quantified any loss nor while forfeiting 1/3rd of the pension and leave encashment any charge quantifying the loss in a particular account was served on the petitioner so that he could rebut the charges.

11. It is relevant to mention here that during personal hearing by the competent authority on 20.04.2017 the petitioner had specifically submitted that almost all account have been closed and further remaining accounts sufficient landed property by way of equitable mortgage/ FDs were present. Thereafter without quantifying the loss by way of show cause or an opportunity of hearing or memo of charges having been served on the petitioner, the impugned order of forfeiting 1/3rd of the pension and leave encashment has been passed, although, during pendency of the writ application leave encashment has been sanctioned and deposited in the account of the petitioner on 21.01.2019. The contention of the counsel for the Bank that under Regulation 33 of the Pension Regulations, 1995, no notice about quantified loss prior to deduction of pension is required to be given to the delinquent as provision of Pension Regulation is silent on notice, in view of the judgment in the case of Mangi Lal (*supra*) it has been held that the principles of natural justice irrespective of express provision in that regard in a given situation, such statutory silence is taken to imply compliance with the principles of natural justice where substantial rights of the parties are considerable affected. Its aim is to secure justice or to prevent miscarriage of justice. Principles of natural justice do not supplant the law, but supplement it. These rules operate only in areas not covered by any law validly made. They are a means to an end and not an end in themselves. These two cardinal principles of natural justice is notice of the charges to be met, and opportunity to explain. Unfortunately, compliance of both these facets are found absent before passing the impugned order dated 24.05.2017.

12. So far as the contention of the petitioner for interest on leave encashment, that the order of compulsory retirement, which has been passed on 31.10.2011 and upheld by the appellate authority on 26.03.2012, which was again rejected on appeal by the appellate authority on remand by this Court on 02.06.2014 and the petitioner is ventilating his grievance for leave encashment for the last eight

years after the order of compulsory retirement, which was ultimately paid on 21.01.2019 during pendency of the present writ application, the petitioner is entitled to interest on leave encashment, in my opinion, since there is no specific rule providing for interest on leave encashment and on certain charges of omission and commission the petitioner was compulsorily retired from service and all through the Bank was pursuing the matter right up to the Apex Court. Hence, in the facts and circumstances, the petitioner is not entitled to interest on leave encashment. However, the impugned order dated 24.05.2017, passed by Respondent No. 2, as contained in Annexure-9 sanctioning only 67% of full pension to the petitioner is quashed as the same has been passed without adhering to the principles of natural justice, no memo of charges have been served quantifying the loss to the petitioner nor an opportunity of hearing has been given to the petitioner.

13. Accordingly, in view of the discussions made hereinabove, this writ application is allowed to the extent that the petitioner is entitled to full pension and also commuted value of pension, which would be paid to the petitioner along with arrears within a period of six weeks from the date of receipt/ production of a copy of this order by the Respondent Nos. 2 and 3.

14. No order as to costs.