
(2018) 12 GAU CK 0010
In the Gauhati High Court
Case No : Writ Petition (C) 409 Of 2014

Kishor Kumar Das

APPELLANT

Vs

Union Bank Of India And 4 Ors

RESPONDENT

Date of Decision : 11-12-2018

Acts Referred:

Citation : (2018) 12 GAU CK 0010

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : V Rajkhowa, Santanu Chakraborty

Final Decision : Partly Allowed

Judgement

1. An Award dated 29.08.2013 passed by the Central Government Industrial Tribunal-cum-Labour Court, Guwahati in Reference Case No.9/2011 upholding a penalty order dated 06.10.2009 passed by the disciplinary authority of the Union Bank of India imposing the penalty of compulsory retirement to the petitioner is the subject matter of challenge in this writ petition.

2. The brief facts of the case are narrated herein below-

3. The petitioner, at the relevant point of time was working as a Head Cashier of the Pathsala Branch of the Union Bank of India (hereinafter referred to as the Respondent Bank). In connection with certain misconduct, vide communication dated 09.08.2008 explanation was called for from the petitioner on six heads. The charges were in connection with shortage of cash amounting to Rs. 1,34,000/- from the safe while the petitioner was handling the same. The petitioner submitted his explanation vide communication dated 28.08.2008 and after consideration of the same, a formal charge-sheet was issued to the petitioner on 09.01.2009. Based on the allegations which were narrated in the charge-sheet, the petitioner was charged with gross misconduct under two heads as well as minor misconduct under one head. For ready reference, the act of misconduct alleged against the petitioner are quoted herein below:

"GROSS MISCONDUCT

1. Doing acts prejudicial to the interest of the Bank involving or likely to involve the Bank in monetary loss.
2. Wilful damage or attempt to cause damage to the property of the Bank.

MINOR MISCONDUCT

1. Breach of rule of business of the Bank or instruction for running of any department."

4. The petitioner submitted his statement of defence and not being satisfied with the same, a departmental enquiry was initiated against the petitioner. The said enquiry was conducted by the Enquiry Officer and on completion of the same, he had submitted a report dated 23.05.2009. The Enquiry Officer came to the conclusion that so far as the first charge was concerned the same was proved to the extent that the petitioner has grossly failed to manage the affairs of the cash department and give room for shortage of cash in the branch and the second charge under the heading gross misconduct has been held not to be proved on the ground that the petitioner took the onus on his head and made good the loss immediately. So far as the findings under the head minor misconduct is concerned, the charge of breach of rule of business of the bank or instruction for running of any department has been held to be proved. Thereafter it appears that the disciplinary authority issued an order dated 31.03.2009 to the petitioner whereby the petitioner was informed that he was given an opportunity of personal hearing before imposition of the punishment proposed as indicated in the said letter. In paragraph 4 of the aforesaid letter the disciplinary authority has in unambiguous terms stated that he has concurred with the findings/views of the Enquiry Officers and has held the petitioner guilty of the charges for proved gross and minor acts of misconduct. The said letter reflects that the disciplinary authority has gone through the charge-sheet, inquiry proceedings, exhibits and findings of the Enquiry Officer.

5. The petitioner responded to the proposal letter dated 31.08.2009 and after hearing the petitioner, the penalty proposed vide the earlier letter dated 31.08.2009 was inflicted upon the petitioner vide the impugned order dated 06.10.2009. The petitioner raised a dispute through the Union before the Central Government Industrial Tribunal-cum-Labour Court at Guwahati in Reference Case No. 9/2011 on the following reference made by the appropriate Government.

"Whether the action of the management in relation to the Union Bank of India, Kolkata, in awarding punishment of compulsory retirement with superannuation benefits from services of the Bank to Sri Kishore Kumar Das, Head Cashier, vide Order No.FGMO:HRM:DA:2627 dated 6th October, 2009, is just and proper? What relief the concerned workman is entitled to?"

6. The learned Industrial Tribunal after hearing the parties and taking into account the materials on record had passed an award dated 29.08.2013 and

answered the reference in favour of the Management and against the Workman. In other words, the penalty imposed upon the workman was not interfered with. It is this award and the penalty order dated 06.10.2009, which are the subject matter of challenge in this writ petition.

7. I have heard Mr. S. Borthakur, learned counsel for the petitioner and Mr. L.P. Sharma, learned counsel for the Respondent Bank assisted by Mr. R. Thakuria.

8. Opening his argument, Mr. Borthakur, learned counsel for the petitioner submits that he is not alleging any procedural impropriety in the enquiry proceedings and his main emphasis is on the proportionality of the penalty imposed. He submits that taking into consideration that no financial loss, whatsoever has been caused to the Respondent Bank, the penalty imposed, on the face of it, is extremely harsh and disproportionate to the gravity of the charge against the petitioner. Mr. Borthakur, learned counsel further submits that the unblemished past services of the petitioner of about 20 years have not been taken into consideration while inflicting the punishment and in absence of mens rea, no ill motive could be attributed to the petitioner and therefore he ought not to have been inflicted the penalty of compulsory retirement. The further submission of the learned counsel is that he still has a long tenure of service and because of the impugned order, he has suffered immensely.

9. Mr. Borthakur also strenuously argues that the impugned penalty is discriminatory inasmuch as the Assistant Manager of the Branch who was admittedly the joint custodian of the safe has not even been charge-sheeted and the petitioner has been picked-up for the alleged irregularity.

10. On the other hand, Mr. L.P. Sharma, learned counsel for the Respondent Bank has submitted that the ground of proportionality was never urged before the disciplinary authority or even before the learned Tribunal and therefore the petitioner is precluded from urging the said grounds in this petition wherein this Court is required to examine the legality and validity of the award of the learned Tribunal. Mr. Sharma submits that if the petitioner fails to take-up a particular defence, it is not incumbent upon the Tribunal to answer such an issue and therefore no fault can be attributed to the impugned award and the same is required to be sustained. As regards the past service and future prospect, Mr. Sharma, learned counsel has submitted that those factors have been taken into consideration and accordingly the impugned penalty of compulsory retirement with superannuation benefits and without disqualification from future employment has been imposed for gross misconduct and stoppage of one increment for the period of six months has been imposed as a minor misconduct.

11. The rival submissions made by the respective parties have been duly considered.

12. The principal emphasis of the petitioner terming the impugned penalty to be grossly disproportionate was not taken-up before the learned Tribunal and Mr. L.P. Sharma, learned counsel for the Respondent Bank is correct in submitting

that this Court while examining the legality of such award will not go into that aspect of the matter.

13. Even though the learned counsel for the petitioner had fairly submitted that he is not alleging any procedural impropriety in the enquiry, this Court has noticed a point of law which will have a major bearing in the decision of this case. Though the petitioner has brought to the notice of this Court an Order dated 31.08.2009 of the disciplinary authority by which the petitioner was given an opportunity to represent against the proposed order of penalty, the record do not reveal that before such proposal was made, the petitioner was afforded an opportunity to represent against the findings of the Enquiry Officer in the Enquiry Report dated 23.05.2009. While it is not mandatory to seek a response from a delinquent on the proposed penalty, it is a mandatory requirement of law to give the delinquent an opportunity to make his comments/submit a reply against the findings of the Enquiry Officer before the disciplinary authority makes up its mind as to whether the charge against the petitioner was proved in accordance with law. In this case, it is noticed that no such opportunity was granted to the petitioner and on the other hand, in the order dated 31.8.2009 whereby the penalty was proposed, the disciplinary authority had observed that he had concurred with the findings of the Enquiry Officer.

14. For ready reference, the said observation of the disciplinary authority is quoted herein below:

"I concur with the findings/views of the Enquiry Officer and hold Shri K.K. Das guilty of the following charges for the proved gross and minor misconducts."

15. The Hon'ble Supreme Court in the landmark judgment of B. Karunakar v. Managing Director, ECIL, reported in (1993) 4 SCC 727 has held that reasonable opportunity to defend which is mandatorily required to be given to a delinquent continues from the very initial stage of issuing an explanation notice to the stage of consideration of appeal by the appellate authority. Reiterating the decision of Md. Ramjan Khan reported in (1991) 1 SCC 588, the Hon'ble Apex Court has held that non-furnishing of enquiry report would vitiate the proceeding and in the instant case, it is seen that the disciplinary authority had already concurred with the findings of the Enquiry Officer which were adverse to him even before giving him an opportunity to represent against the same and persuade the Disciplinary Authority to take a view favourable to him.

16. Though this point was not urged either before the Industrial Tribunal or before this Court, such infirmity would go to the root of the matter and would render the subsequent action of imposition of penalty non est in law.

17. In view of the aforesaid discussion and following the law laid down by the Hon'ble Supreme Court, this writ petition is partly allowed remanding the matter to the disciplinary authority of the Respondent Bank to give a fresh opportunity to the petitioner so as to enable him to pursue the disciplinary authority not to concur with the adverse findings against the petitioner in the Enquiry Report.

Since the particular Assistant General Manager who had acted as the disciplinary authority in the instant case had already come to a finding of guilt, the proceeding from this stage is to be conducted by another officer of equivalent rank who, as per prescription, can be the disciplinary authority qua the petitioner. The opportunity to the petitioner which is required to be given would be in the stage of enabling him to represent against the Enquiry Report and it is only thereafter that the disciplinary authority would pass an order of acceptance/non-acceptance of the Enquiry Officer's report and thereafter pass consequential finding orders. It is made clear that there is no requirement of issuing any proposed order of penalty after receiving the comments of the petitioner against the enquiry report. The Award dated 29.08.2013 of the learned Tribunal also stands interfered with to the extent as observed above.

18. The entire exercise as directed above is to be completed as expeditiously as possible and in any case within an outer limit of 3 (three) months from the date of receipt of a certified copy of this order. The petitioner is required to co-operate with the aforesaid exercise. It is needless to observe that the petitioner would be at liberty to challenge any orders that may be finally passed by the disciplinary authority in the appropriate forum.