

(2012) 01 AHC CK 0588

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 37121 of 2011

Minshu Saxena

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-01-2012

Acts Referred:

Constitution of India, 1950 — Article 12

State Bank of India (Officers Service) Rules, 1992 — Rule 16(2), 16(3)

Citation : (2012) 2 ADJ 489 : (2012) 4 AWC 3917

Hon'ble Judges : Sunil Ambwani, J; Manoj Misra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Hon'ble Manoj Misra, J.—The petitioner by the instant petition has challenged the order dated 3.5.2011 passed by the General Manager (NW-II), State Bank of India whereby the services of the petitioner has been dispensed with under the provisions of Rule 16(3) of SBI Officers Services Rules, after giving one month salary in lieu of one month's notice period. This order was passed while the petitioner was posted at State Bank of India RCPC, Hapur (UP).

2. Facts in brief are that the State Bank of India by an advertisement invited applications for appointment of Management Executives in different circles of the bank in the country including Delhi circle. The petitioner being eligible, applied for appointment in the Delhi circle. After undergoing written examination, interview and group discussion she was selected and offered appointment vide letter dated 18.3.2010 of the General Manager, State Bank of India, Human Resources Department, Delhi. The appointment was for the post of Middle Management Grade Scale II with probation period of one year from the date of appointment. In the letter of appointment it was mentioned that confirmation in service was subject to the following conditions, which are being quoted herein below:

5. You will be on probation for a period of one year from the date of

appointment. Your confirmation in the Bank shall be subject to :

(a) Satisfactory reports from our own sources as well as from District Authorities regarding your character and antecedents.

(b) Satisfactory completion of the in-service training during probation.

(c) Satisfactory performance in the evaluation tests to be conducted by the Bank during the probation period. Candidates who secure minimum 50% marks (45% marks for SC/ST/PWD) in the written test and minimum 50% marks (45% marks for SC/ST/PWD) in the Group discussion and interview, shall be confirmed as Officer in MMGS-II. Services of the candidates who secure less than 50% marks (45% marks for SC/ST/PWD) will be terminated.

(d) The candidates securing 75% or more marks in the above process (in written test and in the Group discussion and interview) will be considered for placement in MMGS-III on the basis of appraisal of 1 year's job performance after confirmation in MMGS-II.

3. The petitioner joined service in response to the letter of appointment and underwent training at various places / branches of the respondent-bank including the Apex Training Institute at Hyderabad. While the petitioner was undergoing training, by a circular letter dated 26.2.2011 the respondent- bank notified alteration in the policy for confirmation of the Management Executives than what was mentioned in the letter of appointment dated 18.3.2010. The modification in confirmation process as brought about by the circular dated 26.2.2011 is being quoted herein below :

2. The Executive Committee of the Central Board in the meeting held on 18.2.2011 modified the policy of probation and confirmation of those Management Executives, who do not qualify in the confirmation test as under :

(a) The probation period of Management Executives securing less than 50 % marks (45% for SC/ST/PWD) will be extended by six months during which period the candidates will have to write a second test. However, all such candidates who shall be writing second test and securing 50% marks (45% for SC/ST/PWD) or more in the second test will be confirmed in MMGS-II only and they will not be considered for placement in MMGS-III, even if they secure 75% or more marks.

(b) The candidates who are unsuccessful in the second confirmation test i.e. who secure less than 50% marks (less than 45% for SC/ST/PWD) will be confirmed as JMGS-I at the starting of the scale viz. Rs. 14,500/- according to the current scale of salary of JMGS-I officers.

(c) Annual increment dates of the candidates whose probation is extended will be shifted by the extended probation period of 6 months. The service rendered by the officer during the extended probation period of 6 months will also not be counted as eligible service for seniority/next promotion.

The changed terms for confirmation as aforesaid were applicable at the option

of the candidate as would be clear from paragraph 3 of the circular letter, which reads as under:

3. This letter is being sent to you in duplicate. Please return the duplicate copy of this letter immediately to the Bank/branch duly signed at appropriate place indicating whether you are agreeable to the changed/modified policy as mentioned in para 2 above. In case you do not agree to the change of policy as mentioned in para 2 above you will be governed by the policy as mentioned in para 1 above.

4. The petitioner, by exercising her option, accepted the changed terms for confirmation, which provided that a candidate securing even less than 50% marks in the confirmation test would be given extension of probation period by six months. It further provided for appointment, as a Junior Management Grade Scale-I, in case the candidate fails to secure 50% marks in the confirmation test held after the extended period of probation.

5. On 6.3.2011, the petitioner gave her first written confirmation examination, which was held at State Bank of India, Learning Center, NOIDA. This written test comprised of two parts. One part related to objective questions whereas the other part related to descriptive questions.

6. The result for the confirmation test was declared on 4.4.2011, but the petitioner's result was withheld. Candidates who secured even less than 50% marks were issued orders extending their probation period by six months whereas those who secured more than 50% marks were provided with confirmation orders. In the case of the petitioner, the appointing authority by his order dated 5.4.2011 extended the probation period by three months i.e. up to 5.7.2011 in exercise of power under Rule 16(2) of the State Bank of India, Officers Service Rules.

7. The petitioner claims that extension of her probation period by three months only was not justified in view of her acceptance to the altered terms of appointment and confirmation as notified by the circular letter dated 26.2.2011.

8. Later, on 3.5.2011, the General Manager (NW-II), without any opportunity of hearing to the petitioner, passed an order thereby terminating the services of the petitioner from the date of the order in exercise of power under Rule 16(3) of SBI Officers Services Rules. The petitioner has assailed this order, inter alia, on the following grounds:

(a) that the order was founded upon an allegation of misconduct by the petitioner relating to use of unfair means during the confirmation test, therefore, the order, though worded as termination simpliciter, was actually an order of punishment, and having been passed without opportunity of hearing to the petitioner, stands vitiated; and

(b) that the use of unfair means during the course of confirmation examination was not substantiated by any material, and there being no assessment, otherwise, relating to the suitability of the petitioner for confirmation, the

decision to dispense with the services of the petitioner was arbitrary.

9. The respondent bank filed a counter-affidavit duly sworn by Sanjay Kumar Singh, Chief Manager, Human Resource Development, State Bank of India, New Delhi. In the counter-affidavit, the contentions are that the petitioner was on probation; the bank under rule 16(3) had right to terminate the services by one month's notice or payment of month's emoluments in lieu thereof; the order of termination casted no stigma; and since no formal fact finding enquiry was held, the order was nothing but termination simpliciter, therefore, the petitioner has no right to maintain the petition.

10. The respondent bank, in response to the specific averment of the petitioner that the order of termination was founded on the alleged use of unfair means by the petitioner during the confirmation test, in paragraph Nos. 42 and 49 of the counter-affidavit stated as follows:

42. That in reply to the contents of paragraph Nos. 23, 24, 25, 26 and 27 of the writ petition, it is submitted that as per report of the IBPS the indulgence of the petitioner in unfair means was suspected during the course of examination and accordingly her services has been terminated in accordance with Rule 16(3) of the SBI Officers Service Rules.

49. That in reply to the contents of paragraphs Nos. 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 46 of the writ petition it is submitted that as per IBPS report, the petitioner alongwith 3 other persons were found to be guilty of use of unfair means and accordingly the services of all 4 probationers have been terminated in accordance with Rule 16(3) of the SBI Officers Service Rules,

11. In the earlier paragraphs of the counter-affidavit, the Bank submitted that for confirmation in service, a probationer was required to undertake a confirmation test of 200 marks consisting of objectives test (multiple choices) and descriptive paper. It was stated that the Institution of Banking Personnel Selection (IBPS) was entrusted to set the questions and evaluate them. IBPS has been following a scientific/theoretical method/consideration for detecting the use of unfair means/malpractices in objective test, by the candidates.

12. The respondent bank with its counter-affidavit enclosed a copy of the letter dated 6.4.2011 written by the Chief General Manager (HR), SBI to the Chief General Manager, SBI, local head office, New Delhi. In this letter, it has been stated that the IBPS has submitted a report giving a list of candidates who had used unfair means during the confirmation test. By the said letter, it was advised that the probation period of these candidates be extended by three months only on terms and conditions envisaged by Rule 16(2) of the SBI Officers Service Rules, and that appropriate proceedings be completed within the extended probation period in terms of Rule 16(3). In paragraph 3 of this letter it has been mentioned that as the statistical and additional corroborative evidences are against these candidates, as an examination conducting body, the candidature of those candidates for the confirmation test, was cancelled. In paragraph 4 thereof

it is mentioned that all these officers are on probation for a period of 1 year from their date of joining therefore keeping in view the unsatisfactory conduct of these officers during the probation period they cannot be deemed fit for confirmation.

13. Alongwith the aforesaid letter dated 6.4.2011, the respondent-bank enclosed a table prepared by IBPS, Mumbai which gives a comparative analysis of the answers to the objective questions given by the petitioner (Minshu Saxena) with that of another candidate Onkar Prasad (Role No. 18795035). As per the chart the identical wrong answers (IWW), between the two candidates, are nine whereas mismatches are three. The chart indicates that the category under which these two candidates were placed was "use of unfair means is suspected".

14. We have heard counsels for the parties and perused the record.

15. The counsel for the petitioner relying on the statements made in the counter-affidavit has contended that the respondent-bank has not assessed the suitability of the petitioner in service on the basis of her performance as probationer, but has terminated the service on the basis that the petitioner used unfair means during the confirmation test. Since there was no direct evidence of use of unfair means by the petitioner except for the report of IBPS, which itself was based on suspicion, and there being no opportunity of hearing to the petitioner to prove her innocence, the order of termination being punitive stood vitiated. The counsel for the petitioner further submitted that even the methodology adopted by the respondent-bank, which was developed by IBPS for Detection of Use of Unfair Means/Malpractices in Objective Tests by the Candidates, was not completely followed inasmuch as in a case of suspicion of use of unfair means the answers to the descriptive questions ought to have been evaluated, which was not done in the instant case. Thus, the action of the respondent bank in terminating the services of the petitioner, by following only half of the procedure adopted by it to ascertain use of unfair means, was arbitrary.

16. In reply, the counsel for the respondent-bank has contended that there was material on record to judge that the petitioner was not a suitable candidate for confirmation, therefore, the termination of her service during the period of probation was not arbitrary, and in any view of the matter it was not stigmatic as neither fact finding enquiry was conducted nor harsh words were used in the order of termination. It has also been submitted that an order of termination, which if otherwise valid, cannot be invalidated by reason of any statement made in any affidavit seeking to justify the order. Reliance has been placed by him on three decisions of the Apex Court namely, Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, ; Krishnadevaraya Education Trust and Another Vs. L.A. Balakrishna, and Progressive Education Society and Another Vs. Rajendra and Another, .

17. From the arguments advanced by the counsels for both the parties two issues arise for adjudication: (a) whether the order of discharge from service was termination simpliciter or being punitive stood vitiated for having been passed

without opportunity of hearing to the petitioner; and (b) whether the action of the respondent bank in terminating the services of the petitioner was arbitrary, as the bank did not assess the suitability of the petitioner with reference to her past performance in service, as also her performance in the confirmation test with regard to the descriptive questions.

18. Before we proceed to decide the first question it is necessary for us to discuss the law on the point. In the case of *Radhey Shyam Gupta Vs. U.P State Agro Industries Corporation Ltd. and Another*, , the Apex Court after discussing a series of decisions concluded that if the misconduct was the motive, the order of termination would be simpliciter but if it was the foundation, it would be punitive. In this case the apex Court noticed an earlier decision in the case of *Anoop Jaiswal Vs. Government of India and Another*, . In paragraph 12 of *Anoop Jaiswal*'s case (supra) it has been stated as under:

It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.

While noticing the decision in *Anoop Jaiswal*'s case (supra), the Apex Court in the case of *Radhey Shyam Gupta* (supra), in paragraph 28, observed as under:

In *Anoop Jaiswal v. Govt. of India*, it was held while quashing the order of termination that it was open to the Court to go behind the order and find out if the report/recommendation of the superior authority was a camouflage and if that was the basis or foundation for the order, then the report/recommendation should be read alongwith the order for the purpose of determining the true character of termination. If on a reading of the two together, the Court reached the conclusion that the alleged finding of misconduct was the cause or basis of the order, and that but for the report containing such finding, the order would not and could not have been passed, the termination order would have to fall to the ground as having been passed without the officer being afforded a reasonable opportunity of hearing. It was also held that it was wrong to presume that an order would be punitive only if a regular enquiry was conducted ex parte or behind the back of the officer. Even if it was not a regular enquiry, any other enquiry where evidence was taken and findings were arrived at behind the back of the officer, would make the subsequent termination bad.

This principle of "motive" and "foundation", as aforesaid has been followed in the case of *Dipti Prakash Banerjee Vs. Satendra Nath Bose National center for Basic Sciences, Calcutta and Others*, . Again the aforesaid principle has been affirmed in a recent three judges' bench decision of the Apex Court in the case of *Union of India (UOI) and Others Vs. Mahaveer C. Singhvi*, . Another test to

ascertain whether the order of termination is simpliciter or punitive has been adopted by Courts. This test has been termed as the "form" and "sub-stance" test. By this test, if by the "form" of the order, it is stigmatic then it would be punitive. But if by the "form" the order does not cast stigma, then the "substance" of the order is to be found out, which implies that the Court from the material placed before it can discover whether the order in substance was punitive or not. This principle is also deducible from para 28 of the judgment of the apex Court in the case of Pavanendra Narayan Verma (supra) cited by the counsel for the respondent. The judgments relied upon by the counsel for the respondent, as referred to in paragraph 16 of this judgment, do not lay down any law contrary to the principle already discussed by us, accordingly, we do not propose to deal with those judgments separately. The law, thus, as on date, is that if the foundation of an order of termination of the services of the probationer is based upon a misconduct and not general unsuitability of the candidate, then it is open for the Court to ignore the form of the order and conclude that the same is punitive. If the Court comes to the conclusion that the order is punitive, then in absence of opportunity to the officer concerned to disprove/dispel the allegations against him, the order of termination would be liable to be set aside.

19. Applying the law as it stands, from the record we find that the respondent-bank has not stated anywhere in its counter-affidavit that they assessed the service record of the petitioner during the probation period to come to the conclusion that she was unsuitable for confirmation. Rather, the only reason disclosed for discharge is the alleged use of unfair means by the petitioner during the confirmation test. Paragraph 49 of the counter-affidavit spells out the foundation for the order of termination. There, in unequivocal terms, it has been stated that the petitioner was guilty of using unfair means therefore her services was dispensed with under the rules. This being the position, whether we apply the "foundation" or the "substance" test the result would be the same. Even otherwise from the record we find that the petitioner was not even allowed to continue till the end of the probation period. Rather she was terminated with one month's pay in lieu of notice. Therefore, it is apparent that having concluded that the petitioner was involved in the use of unfair means the respondent bank was not interested in assessing her suitability for confirmation. Thus, we have no hesitation to hold that the order of discharge was a camouflage to punish the petitioner for her alleged use of unfair means during the confirmation test. Since there is no dispute that opportunity of hearing was not provided to the petitioner, the order of discharge, being punitive in substance, stands vitiated.

20. Further, in order to substantiate that the action of the respondent-bank in terminating the service of the petitioner was arbitrary, the petitioner's counsel has placed before us the complete copy of the methodology adopted by the IBPS for the Detection of Use of Unfair Means/Malpractices in Objective Tests by the Candidates. This has been brought on record as Annexure 1 to the rejoinder-affidavit dated 6.11.2011. It is noteworthy that IBPS is the agency appointed by the respondent bank to evaluate the answers, as also to assess the use of unfair

means. Paragraph 4 of the methodology adopted by IBPS, being important, is quoted herein under:

4. Based on the above consideration while establishing a case for use of unfair means, we consider the following two important criteria:

(A) 1. The pair of candidates has 12 or more questions with identical wrong answers in a test. (i.e. IWW 12 or more).

2. The number of questions with different responses is small i.e. less than 5 in the test. (Mismatch 5 or less)

The above criteria leaves out some candidates who might have resorted to unfair means but may have very high score on the test. For example, a pair scoring 39 or above in a test of 50 items will have 11 or less questions wrongly answered. In this case IWW cannot exceed 11. In order to examine whether high scoring candidates have resorted to unfair means, different criteria are used. Those pairs of candidates are picked up who have 90% or above questions (45 out of 50) with matching answers. This group is considered on the following two criteria:

(B) 1. IWW 5 or more (for 50 items test)

2. IWW 7 or more (for 75 items test)

3. Mismatch 5 or less (for 50 items test)

4. Mismatch 7 or less (for 75 items test)

The candidates under criteria (A) are established cases of use of unfair means beyond all reasonable doubts.

In the cases of candidates under criteria (B) use of unfair means is suspected. The Board/Organisation may further scrutinise these cases on the basis of:

1. Performance in the Descriptive Paper (If any)

2. Performance in interview.

21. Relying on the aforequoted paragraph No. 4 (B), the counsel for the petitioner contends that since the identical wrong answers (IWW) were less than 12, therefore, the Board / Organisation ought to have scrutinised the cases of those candidates on the basis of performance in descriptive paper, as also in interview, if any. The contention is that no such exercise was conducted with regard to the petitioner, therefore, the action of the respondent-bank in terminating the service of the petitioner was arbitrary.

22. Having given our anxious consideration to the aforesaid submission we find that the conclusion arrived at by the respondent bank that the petitioner was guilty of use of unfair means is not based on any direct evidence, but only on a methodology based on probability by comparison of answers to objective

questions. From the own methodology adopted by the respondent-bank, in a case of suspected use of unfair means, which has been inferred from comparison of objective type answers, it was incumbent upon it to scrutinize the case of the petitioner on the basis of her performance in the descriptive paper.

23. It is established from the uncontroverted statements made in paragraphs 18 and 19 of the writ petition that the confirmation test / written examination comprised of objective and descriptive types of questions. Therefore, it could be presumed that the respondent-bank had the opportunity to examine/scrutinise the answers to descriptive questions. Whereas, in the instant case there is no material to suggest that any effort was made by the respondent-bank to scrutinize the case of the petitioner on the basis of her performance in the descriptive paper. Hence, we find that the respondent-bank was guilty of deviating from its own adopted procedure.

24. If the respondent-bank, which is a "State" within the meaning of Article 12 of the Constitution, adopts a procedure to conclude that a person is unsuitable for the job because he/she is suspected of using unfair means, then the respondent-bank is also under an obligation to follow the same procedure completely so as to exclude the possibility of an erroneous conclusion based on suspicion/presumption.

25. Since in the present case the procedure was not completely followed, the conclusion, on the basis of incomplete procedure, was erroneous and resulted in arbitrary decision. Therefore, we have no hesitation in holding that the action of the bank-respondents in dispensing with the services of the petitioner, on assumption that she was guilty of using unfair means during her confirmation test, is arbitrary.

26. In the result, the petition succeeds and is allowed. The order relating to discharge of the petitioner from service passed by the General Manager (NW-II), State Bank of India, Human Resources Department, 13 Floor, local Head Office 11, Sansad Marg, New Delhi on 13.5.2011 (Annexure 9 to the writ petition) is hereby quashed. A direction is issued to the respondent-bank to examine and evaluate the descriptive paper of the written examination of the petitioner and to scrutinize the case of the petitioner for confirmation on the basis of her performance in the said descriptive paper and interview, if any. Till a fresh decision is taken in this regard, the petitioner shall be allowed to continue in service with continuity, on the post of Probationary Officer and be paid emoluments, as would have been payable to her, had her services not been discharged. As far as back wages are concerned, the petitioner would be entitled to 50% of the back wages, which shall be paid to her within one month of the production of certified copy of this order.

27. There shall be no order as to costs.

Hon"ble Sunil Ambwani, J.

I agree.