
(2006) 12 BOM CK 0071
In the Bombay High Court
Case No : Writ Petition No. 742 of 2003

Ramdas Shankarrao Digaskar	Vs	APPELLANT
Union of India (UOI) and others		RESPONDENT

Date of Decision : 05-12-2006

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 309, 311(2)

Citation : (2006) 12 BOM CK 0071

Hon'ble Judges : V.C. Daga, J; A.B. Chaudhari, J

Bench : Division Bench

Advocate : N.S. Deshpande, for the Appellant; R.S. Sundaram, for the Respondent

Final Decision : Dismissed

Judgement

A.B. Chaudhari, J.—By the present petition, the petitioner seeks to challenge the judgment and order dated 19-9-2002 passed in Original Application No. 954 of 1996 by the Central Administrative Tribunal, Circuit Bench, Nagpur, by which the original application filed by the petitioner was dismissed.

2. Factual Matrix

The petitioner was appointed as an Extra Departmental Agent (E.D.A.) at Ramthi, Tahsil Narkhed, district Nagpur on 5-8-1983. Thereafter, on 21-2-1994, he came to be promoted to the post of Extra Departmental Branch Post Master on regular basis. During the course of his service, he was served with a charge-sheet on 23-7-1990 under Rule 8 of E.D.A's (Conduct and Service) Rules, 1964. There was only one charge levelled against the petitioner. The charge was that on 20-1-1990 the petitioner paid withdrawal of Rs. 50/- to the depositor Shri T. C. Khawase but filled up the withdrawal of payment of Rs. 150/- and accounted the same in the B.O. Account and, thus, he utilised the amount of Rs. 100/- for himself and contravened Rule 134 of B.O. Rules.

(ii) It appears that a preliminary enquiry had preceded the Departmental Enquiry

against the petitioner. In the Departmental Enquiry that was conducted, T.C.Khawase- the complainant and Dhanraj Ganesh Chaudhari were examined in support of the charge levelled against the petitioner.

(iii) The petitioner submitted his written brief before the Enquiry Officer. Thereafter the Enquiry Officer prepared his enquiry report and after discussing the entire evidence recorded during the Departmental Enquiry, came to the conclusion that the charge levelled against the petitioner was not proved.

(iv) The Disciplinary Authority issued a notice (undated) to the petitioner, incorporated at Annexure-3, at page 26 of the writ petition. The notice stated that the Disciplinary Authority having gone through the evidence recorded in the Departmental Enquiry came to a conclusion that the charge levelled against the petitioner was proved beyond doubt and, therefore, the Disciplinary Authority recorded a finding that the petitioner was guilty of the charge levelled against

him. The Disciplinary Authority asked the petitioner to make a representation, if he so desired, before finalising the disciplinary action.

(v) The petitioner, accordingly, made a representation dated 10-6-1993 in response to the said notice and submitted, inter alia, that there was no material on record to show that the petitioner had filled in the withdrawal form (SB-7) and, therefore, the Disciplinary Authority was wrong in presuming so. That apart, the petitioner also stated that the evidence of the witnesses examined during the Departmental Enquiry was clearly untrustworthy.

(vi) Thereafter, the Disciplinary Authority made an order on 18-7-1993 removing the petitioner from Government Service with immediate effect.

(vii) The petitioner then filed Review Petition dated 30-8-1994 which was considered on merits by the Reviewing Authority and rejected the same. The petitioner challenged the order of removal as well as the order under review before the Central Administrative Tribunal by filing Original Application No. 954 of 1996 which was dismissed by the Tribunal by the order dated 12-6-2000 on the ground that the same was barred by limitation.

(viii) The aforesaid order of the Tribunal dated 12-6-2000 was challenged before this Court by the petitioner by filing writ petition, bearing W.P. No. 699 of 2001. This Court by the order dated 13-8-2001 set aside the impugned order dated 12-6-2000 passed by the Tribunal and condoned the delay and directed the Tribunal to decide the petitioner's original application on merits.

(ix) Thereafter, the Tribunal heard the original application and dismissed the same by the impugned order dated 19-9-2002, which is impugned in the present writ petition filed under Articles 226 and 227 of the Constitution of India.

3. Heard Shri N. S. Deshpande, learned counsel for the petitioner and Mr. Sundaram, learned counsel appearing for the respondents.

4. Submission of petitioner

The learned counsel for the petitioner submitted :

(i) that the charge against the petitioner was sought to be established mainly on the basis of oral evidence of T. C. Khawase and Dhanraj Chaudhari, whose evidence was wholly untrustworthy;

(ii) that the finding recorded by the Disciplinary Authority in the impugned order dated 18-7-1993 in respect of the sole charge is perverse and contrary to the record and, therefore, it was open to this Court in its extra ordinary jurisdiction to interfere with such finding of fact in order to undo the injustice done to the petitioner;

(iii) that the finding recorded by the Enquiry Officer on the basis of the evidence tendered before him was perfectly justified and was not liable to be interfered with by the Disciplinary Authority;

(iv) that the Disciplinary Authority did not communicate to the petitioner the tentative reasons for disagreeing with the findings of Enquiry Officer so that the petitioner could have an opportunity to indicate the reasons for not interfering with the findings of the Enquiry Officer nor the Disciplinary Authority heard the petitioner before holding that the charge levelled against the petitioner was proved beyond doubt by recording a finding accordingly in the show cause notice (undated) Annexure-3 at page 26 of the writ petition;

(v) that the Disciplinary Authority was required to grant an opportunity of hearing to the petitioner after deciding to disagree with the findings of the Enquiry Officer and that having not been done, the order of removal as well as the disciplinary proceedings were vitiated; and

(vi) that the penalty of removal from service was shockingly disproportionate. The learned counsel for the petitioner relied upon the following judgments :

(i) Yoginath D. Bagde Vs. State of Maharashtra and Another, , (ii) Central Bank of India Ltd. Vs. Prakash Chand Jain,

5. Submission of respondents Per contra, Mr. Sundaram, learned counsel appearing for the respondents submitted :

(i) that the findings recorded by the Central Administrative Tribunal were in accordance with the facts and evidence on record and the law applicable thereto and were not liable to be interfered with by this Court in its extra ordinary jurisdiction;

(ii) that the show cause notice (undated), Annexure-3 issued by the Disciplinary Authority afforded an opportunity of making representation to the petitioner against the findings/observations made by the Disciplinary Authority and, therefore, there was compliance of principles of natural justice;

(iii) that, at any rate, the petitioner has not shown any prejudice even if tentative reasons were not communicated to him and that he was not heard before

recording final findings. In support of this proposition, he relied upon the following decisions ?

(i) State Bank of Patiala and others Vs. S.K. Sharma, (ii) State of U.P. Vs. Harendra Arora and Another, (iii) 2004 (5) Supreme 736, State of Maharashtra and ors. vs. Raghunath Gajanan Waingankar (iv) Union of India and another Vs. G. Ganayutham (Dead) by LRs., and (v) State of U.P. and others Vs. Ashok Kumar Singh and anothers, .

(vi) that Rule 8, which is relevant for the purpose, does not provide for opportunity of hearing before the Disciplinary Authority records findings different from those of Enquiry Officer and, therefore, no such opportunity of hearing could be claimed by the petitioner; and

(vii) that the quantum of punishment cannot be examined by the High Court and in the light of the decisions of Apex Court the only thing that could be done by this Court is to ask the Disciplinary Authority to examine the case on question of punishment, if this Court finds that the punishment was disproportionate.

6. Consideration

Having considered the rival submissions made at the Bar by the learned counsel for the parties, we find that Wednesbury's test will have to be applied in this case to find out if the impugned decision of removal was illegal or it suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant material had not been taken into account or whether irrelevant considerations had been taken into account or whether the action was not bona fide. The Court will also consider whether the decision was absurd or perverse. As to the Wednesbury's case of 1948, the Apex Court in the case of Union of India vs. G. Ganayutham (supra), in paragraph 12, stated as under:

The Wednesbury case (1948)

This case is treated as laying down- various basic principles relating to judicial review of administrative or statutory discretion. Before summarising the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in Associated Provincial Picture Houses Ltd. vs. Wednesbury Corpn. (KB at p.229: All ER p. 682). It reads as follows :

"....It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology use in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has

to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority.... In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."

Lord Greene also observed (KB p. 230: All ER p. 683)

"... it must be proved to be unreasonable in the sense that the Court considers it to be a decision that no reasonable body can come to it. It is not what the Court considers unreasonable.... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another."

Therefore, to arrive at a decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.

7. We have also examined the applicability of the case of Council of Civil Service Unions vs. Minister for Civil Service, reported in 1985 AC 374 and we find that the ratio of the said case is also attracted in the present case. We quote the relevant paragraph from the aforesaid decision in relation to the said CCSU case (1985) asunder:

"The principles of judicial review of administrative action were further summarised in 1985 by Lord Diplock in Council of Civil Service Unions vs. Minister for Civil Service as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows :

".... Judicial review has I think, developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community;"

Lord Diplock explained "irrationality" as follows:

"By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness". It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." (emphasis supplied)

8. Rule 8 of EDA (Conduct and Service) Rules, 1964 is extracted below for convenience.

8. Procedure for imposing a penalty. - (1) No order imposing a penalty shall be passed except after ?

(a) the employee is informed in writing of the proposal to take action against him and of the allegation on which it is proposed to be taken and given an opportunity to make any representation he may wish to make, and

(b) such representation, if any, is taken into consideration by the appointing authority:

Provided that the penalty of dismissal or removal from service shall not be imposed except after an enquiry in which he has been informed of the charges against him and has been given a reasonable opportunity of being heard in respect of those charges:

Provided further that where it is proposed after such enquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such enquiry.

(2) The record of proceedings shall include :

(i) a copy of the intimation to the employee of the proposal to take

action against him; (ii) a copy of the statement of allegations, along with a list of evidence

in support thereof, communicated to him;

(iii) his representation, if any;

(iv) the records of the enquiry proceedings along with the enquiry report of the appointing authority or enquiry officer, if any, appointed in a case where a formal enquiry is necessary;

(v) findings of the appointing authority in respect of the allegations

with reasons therefor; and

(vi) the order imposing the penalty."

Upon reading of the aforesaid Rule, Mr. Sundaram, learned Central Government counsel submitted that the Rule does not provide for opportunity of being heard before imposing penalty of removal from service of the Government servant and

therefore the opportunity of hearing, as claimed by the petitioner, was not necessary. We reject the contention raised by the learned counsel for the respondents as, according to us, the law laid down by the Apex Court in clear terms say that such a right "to be heard" being a constitutional right of the employee, cannot be taken away by any legislative enactment or service rules including the rules made under Article 309 of the Constitution of India. To afford an opportunity of hearing at the stage when the Disciplinary Authority proposes to disagree with the findings of the Enquiry Officer, in fact, would be in consonance with the requirements of Article 311(2) of the Constitution. The prejudice doctrine invoked by the learned counsel for respondents cannot apply in such an eventuality.

9. The Apex Court in the case of Punjab National Bank and Others Vs. Sh. Kunj Behari Misra, held in para 17 as under :

"It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority."

In paragraph 18, the Apex Court further observed as under:

"When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed."

10. Now referring to the decision of the Apex Court in the case of Yoginath Bagde's case, supra, we think the aforesaid point can be answered by quoting paragraphs 28, 29 and 31 of the said judgment, which read as under :

"28. In view of the provisions contained in the statutory rule extracted above, it is open to the disciplinary authority either to agree with the findings recorded by the enquiring authority or disagree with those findings. If it does not agree with the findings of the enquiring authority, it may record its own findings. Where the enquiring authority has found the delinquent officer guilty of the charges framed against him and the disciplinary authority agrees with those findings, there would arise no difficulty. So also, if the enquiring authority has held the charges proved, but the disciplinary authority disagrees and records a finding that the charges were not established, there would arise no difficulty. Difficulties have arisen in all those cases in which the enquiring authority has recorded a positive finding that the charges were not established and the delinquent officer was recommended to be exonerated, but the disciplinary authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officer was liable to be punished. This difficulty relates to the question of giving an opportunity of hearing to the delinquent officer at that stage. Such an opportunity may either be provided specifically by the rules made under Article 309 of the Constitution or the disciplinary authority may, of its own, provide such an opportunity. Where the rules are in this regard silent and the disciplinary authority also does not give an opportunity of hearing to the delinquent officer and records findings different from those of the enquiring authority that the charges were established, "an opportunity of hearing" may have to be read into the rule by which the procedure for dealing with the enquiring authority's report is provided principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be "not guilty" by the enquiring authority, is found "guilty" without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not guilty" has already been recorded. 29. We have already extracted Rule 9(2) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 which enables the disciplinary authority to disagree with the findings of the enquiring authority on any article of charge. The only requirement is that it shall record its reasoning for such disagreement. The rule does not specifically provide that before recording its own findings, the disciplinary authority will give an opportunity of hearing to a delinquent officer. But the requirement of "hearing" in consonance with the principles of natural justice even at that stage has to be read into Rule 9(2) and it has to be held that before the disciplinary authority finally disagrees with the findings of the enquiring authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the enquiring authority do not suffer from any error and that there was no occasion to take a different view. The disciplinary authority, at the same time, has to communicate to the delinquent officer the "TENTATIVE" reasons for disagreeing with the findings of

the enquiring authority so that the delinquent officer may further indicate that the reasons on the basis of which the disciplinary authority proposes to disagree with the findings recorded by the enquiring authority are not germane and the finding of "not guilty" already recorded by the enquiring authority was not liable to be interfered with.

31. In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the enquiry officer into the charges levelled against him but also at the stage at which those findings are considered by the disciplinary authority and the latter, namely, the disciplinary authority forms a tentative opinion that it does not agree with the findings recorded by the enquiry officer. If the findings recorded by the enquiry officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the disciplinary authority has proposed to disagree with the findings of the enquiry officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the disciplinary authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the disciplinary authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or service rule including rules made under Article 309 of the Constitution."

11. In the instant case, admittedly, no tentative reasons were communicated to the petitioner by the Disciplinary Authority for disagreeing with the findings of the enquiry officer nor he was offered any opportunity of hearing as to why the finding of "not guilty" already recorded by the enquiry officer should not be overturned into the finding of "guilty". Perusal of the notice (undated), Annexure-3, issued by the Disciplinary Authority in unequivocal terms indicate that the Disciplinary Authority recorded a final finding holding that it did not agree with the findings of the Enquiry Officer and that the charge against the petitioner was proved beyond doubt. It is a further admitted position that before passing the final order dated 18-7-1993 again no opportunity of hearing was given to the petitioner by the Disciplinary Authority. As observed by the Apex Court in the case of Yoginath Bagde, *supra*, where the rules are silent in respect of providing an opportunity of hearing, an opportunity of hearing may have to be

read into the rule. We, therefore, hold that in Rule 8, quoted supra, opportunity of hearing will have to be read. Consequently, we record a finding that there is violation of principles of natural justice in the instant case as no opportunity of hearing was afforded to the petitioner, thereby depriving him of his constitutional right.

12. When the learned counsel for the petitioner insisted upon us to go through the oral evidence recorded during the Departmental Enquiry held against the petitioner, initially we were hesitant to do so in our extra-ordinary writ jurisdiction. However, we were taken through the entire oral evidence as well as the Enquiry Report of the Enquiry Officer in order to show that the action of Disciplinary Authority passed the Wednesbury's test or not. We must record that having taken us through the evidence of the two witnesses, namely T. C. Khawase and Dhanraj Chaudhari, we find that their evidence is untrustworthy and wholly unreliable and perverse. It appears that the post office being located in a village, the Post Master for the benefit of the villagers, himself fills up the deposit/withdrawal forms and this appears to be an established practice. The evidence of the complainant T. C. Khawase clearly establishes this fact, inasmuch as, according to him, on all 23 occasions earlier when he had withdrawn the amount from the post office, he had never filled in the withdrawal slips but merely had signed the same and that he had never experienced any such incident in the past.

13. In his evidence he has stated that he is well educated and doing business in sound service and cloth. He claimed that he had gone alone to the post office at about 09-30 a.m. for withdrawing the money. He stated that he signed the withdrawal form and was given Rs. 50/- along with the pass-book and thereafter he left the post office. He returned after five hours to the post office to make a complaint to the petitioner that it was not clear to him as to what was the balance amount to his credit after withdrawal. In the cross-examination he contradicted himself by saying that about 2-00 p.m. i.e. after about five hours, he had gone to the petitioner at his residence for clearing his doubt about the entry in the pass-book after withdrawal, but the petitioner was not available at his house and, therefore, he had again gone in the evening to his house.

14. Witness Dhanraj Chaudhari in answer to Q. No. 2 stated that at about 9-30 a.m. he was present with the complainant T. C. Khawase when the amount was withdrawn and paid to the depositor in his presence. As earlier pointed out, the complainant in answer to Q. No. 15 stated that he was alone in the morning for withdrawing the amount and nobody was with him. However, witness Dhanraj Chaudhari mentioned the arrival of the complainant for withdrawing at about 8-00 a.m. in his statement in the preliminary enquiry. It is pertinent to note that Dhanraj claims that the petitioner had counted the currency notes before giving the same to the complainant Khawase and in answer to Q. Nos. 6 and 7 he stated that only one currency note of denomination of Rs. 50/- was given to the complainant. Therefore, there was no question of counting the currency notes,

since according to the complainant he was paid only one currency note of Rs. 50/.

15. Now testing the evidence of the above two witnesses in the light of the fact that the complainant allegedly returned back to the post office five hours after collecting Rs. 50/- and keeping in mind the nature of banker's business and the duty of the depositor to leave the counter only after satisfying as to the correctness of the entries in the pass-book of the amount withdrawn, we have no hesitation in holding that the evidence of both these witnesses is wholly perverse, unreliable and untrustworthy. We find that the ultimate inference drawn by the Enquiry Officer on the strength of the above evidence that there must be more than one currency note, i.e. three currency notes of Rs. 50/- which were counted and given to the complainant, is highly probable and there was no occasion for the Disciplinary Authority to take a different view of the matter.

16. In the light of the above, we have come to the conclusion that the charge against the petitioner was not at all substantiated and consequently was not proved. Even otherwise the Disciplinary Authority acted in violation of principles of natural justice, as observed hereinbefore. The Central Administrative Tribunal unfortunately has not taken pains, though the same being the first court, to consider the entire evidence, enquiry report and the related documents minutely.

17. We, therefore, quash and set aside the impugned order dated 19-9-2002 passed by the Central Administrative Tribunal, Nagpur, in Original Application No. 954 of 1996. Since the petitioner has been prosecuting his litigation since August, 1996, interest of justice would be met if we allow only 50% of the back wages to be paid to the petitioner by the respondents and grant him continuity of service.

18. Conclusion :

The impugned order dated 19-9-2002 passed by the Central Administrative Tribunal, Nagpur, in Original Application No. 954 of 1996 as well as the order dated 18-7-1993 passed by respondent No.3 are quashed and set aside and consequently we direct the respondents to reinstate the petitioner forthwith with continuity of service and also pay him 50% back wages from the date of dismissal till the order reinstatement within a period of four months from today failing which the amount of Back wages shall carry future interest at the rate of 10% per annum till the date of payment in full and final. Rule is made absolute in above terms with costs quantified in the sum of Rs. 5000/- payable to the petitioner within four weeks from today.