

(2013) 10 AP CK 0014
In the Andhra Pradesh High Court
Case No : Writ Petition No. 26784 of 2000

S. Krishna Murthy

APPELLANT

Vs

The Indian Overseas Bank and Others

RESPONDENT

Date of Decision : 03-10-2013

Acts Referred:

Citation : (2014) 3 ALD 687

Hon'ble Judges : B. Chandra Kumar, J

Bench : Single Bench

Advocate : Addepalli Surya Narayana, for the Appellant; A. Krishnam Raju, for the Respondent

Final Decision : Allowed

Judgement

B. Chandra Kumar, J.—This writ petition has been filed to issue a Writ of Mandamus or any other appropriate writ setting aside the order of the 4th respondent dated 06.03.2000 in file No. GM(RN)/AA/IR/1322 by which the order of the 2nd respondent dated 11.03.1998 in letter No. DGM(TRK)/DA/IR/1177 was confirmed and to declare the Enquiry Report dated 29.11.1997 of the 3rd respondent as illegal, arbitrary and against the principles of natural justice and without jurisdiction. The brief facts of the case are as follows:

2. The petitioner joined the service of the 1st respondent-Indian Overseas Bank in the year 1977 as an Agricultural Officer. He was promoted in the year 1991 as Scale-II Officer. He was transferred from Regional Office, Vijayawada to Regional Office, Calcutta by an order dated 29.07.1994 and was relieved on 15.10.1994 with instruction to report at Patna branch.

3. The petitioner's case is that six members of his family died in a road accident and his wife had to undergo major surgery. Due to these problems, he developed high blood pressure coupled with diabetes which lead to severe depression. Since he was holding an important post as Manager in the financial institution involving mental tension, his health started causing problems and he was forced to go on

medical leave under the advice of the Doctor attending on him from 15.10.1994. His further case is that he applied to the Bank Authorities for medical leave duly enclosing medical certificates and extending the leave from time to time and his leave applications were acknowledged from time to time. However, on 07.09.1995 he was informed that his request for leave was rejected and the period of absence was treated as unauthorized absence. The petitioner's case is that the respondent bank has no power or authority to treat the period of his absence as unauthorized absence unless it is established that medical certificates produced by him are not genuine after subjecting him for medical examination. It is also his case that no reasons were assigned for declining his medical leave.

4. The specific case of the respondents is that since the petitioner was relieved on 15.10.1994 with instruction to report at Patna branch, he started sending leave applications to Regional Office, Calcutta from 15.11.1994 and the same was declined on 09.05.1995. Their further case is that in spite of specific instructions to report duty at Patna branch, the petitioner failed to report and therefore, his absence was treated as unauthorized absence. Preliminary enquiry was conducted and a charge sheet on 07.10.1995 was issued to the petitioner for his unauthorized absence. The respondents' case is that the petitioner without submitting his reply to the charge sheet started sending letters asking them to intimate the reasons for declining his sick leave. The respondents' further case is that if the sanctioning authority is not satisfied with the medical certificates, it shall decline the medical leave also.

5. The brief facts of the case as seen from the record are as follows: It appears from the record that the wife and son of the petitioner were sick during the relevant period. The petitioner filed certain medical record of Swapna Nursing Home, Sai Ram clinic, Vijaya Clinic and Apollo Hospital and certain reports of the diagnostic centers in support of his contention that himself, his wife and son were sick. It is not in dispute that the petitioner was regularly sending his leave applications enclosing Doctors' certificates. While the petitioner was sending medical leave applications, the respondent bank issued a letter dated 24.01.1995 advising the petitioner to report at Patna Branch. Request of the petitioner to transfer him to A.P. was pending with Head Office.

6. While things stood thus, the respondent bank by letter dated 09.05.1995 informed the petitioner that his request to sanction medical leave had been declined treating his absence from 15.10.1994 till 09.05.1995 as unauthorized absence. The petitioner was also informed that his not reporting duty at Patna Branch would be viewed seriously. However, the petitioner continued to send leave applications. The petitioner has also addressed another letter dated 25.07.1995 enclosing all his previous copies of leave applications and medical certificates, requesting the respondent bank to sanction him medical leave. The petitioner seems to have sent a letter dated 19.09.1995 to the Executive Director of the respondent bank, requesting to post him at Hyderabad.

7. Then the respondent bank issued charge sheet dated 07.10.1995 alleging that

the petitioner was unauthorizedly absent from duty from 15.10.1994 and not reporting to duty with a view to avoid the transfer and feigning illness and/or malingering since 15.10.1994.

8. By letter dated 23.11.1995, the respondent bank informed the petitioner that his application dated 19.09.1995 requesting transfer to Hyderabad could not be considered and his transfer order posting him to Patna stands good. Thereafter, the respondent bank by letter dated 14.12.1995 informed the petitioner that all his leave applications have already been sent to the Central Office for their perusal and necessary action.

9. It is clear from the record that the petitioner did not submit any explanation to the charge sheet, but had been requesting the respondent bank to assign reasons for non-sanction of his sick leave i.e., he was insisting the respondent bank to assign specific reasons for rejection of his sick leave applications.

10. It appears that in January, 1996 the respondent bank advised the petitioner to report for medical examination before their panel Doctor R. Balasubramanyam. Accordingly, the petitioner reported for medical examination on 28.02.1996. The report of Dr. R. Balasubramanyam is as follows:

After a careful clinical evolution after going through the reports submitted by the officer, I am of the opinion that Mr. S. Krishna Murthy enjoys good health except for his Chronic diabetes, which is under control and which do not require any special medical facility at Hyderabad.

Regarding his sons health, I have gone through the medical reports of his son, and found that the boy had only mild Cervical Lymph Adenitis and had treatment for it from 03.02.1995 to 03.06.1995 since the boy aged about 18 years, and can take care of himself and since the treatment is over for above condition, this reason cannot be accepted for his refusal to go to Patna.

His wife had medical examination on 01.10.1994 and found to be had Fibroid Uteris, unfortunately since then he had not planned any treatment medical or surgical for her till today and not planning any treatment in the near future. When I have counseled him that the above reasons cannot be considered for his unwillingness and advised him to report for duty immediately. He vehemently refused to accept the advice.

11. In the meanwhile, the respondent bank had issued another charge sheet dated 06.05.1996 to the petitioner mainly alleging that he managed to get sanction of agricultural loan in the name of his wife, though she was not an agriculturist. Challenging the said charge sheet dated 06.05.1996 the petitioner filed writ petition being W.P. No. 196 of 1996. This Court, by order dated 05.07.1997, allowed the said writ petition mainly on the ground of delay in issuing charge sheet to the petitioner. Though the said order had been challenged in W.A. No. 958 of 1997 by the respondent bank, the respondent bank was unsuccessful. Subsequently, the petitioner filed W.P. No. 8115 of 1996

challenging the charge sheet dated 07.10.1995, which is the basis for the proceedings impugned in this writ petition. This Court dismissed the said writ petition directing the respondent bank to proceed with the enquiry as expeditiously as possible and complete the same within three months from the date of receipt of a copy of the order.

12. The Enquiry Officer issued a notice to the petitioner asking him to attend enquiry on 15.09.1997. The petitioner sought time on medical grounds and also requested the Enquiry Officer to permit him to engage an Advocate to defend him in the departmental enquiry. The respondent bank rejected the request of the petitioner on the ground that the Enquiry Officer is neither a Legal Practitioner nor an Advocate by profession and therefore, the petitioner cannot be permitted to take the services of a lawyer. Then the petitioner addressed a letter dated 23.09.1997 stating that the respondent-bank was not justified in rejecting his request and that he was entitled to engage a defence counsel as per the Indian Overseas Bank Officer Employees? (Discipline & Appeal) and (Conduct) Regulations, 1976 and he has reiterated his request to engage an Advocate. Then the Enquiry Officer again issued a notice dated 23.09.1997 to the petitioner informing him to attend the enquiry, then the petitioner addressed a letter dated 29.09.1997 raising an objection that the Enquiry Officer is a law graduate and served most of his career as a Law Officer and that the Enquiry Officer himself had been discharging the duties of the Presenting Officer and in the above circumstances, he may be permitted to take the services of an Advocate. Again the Enquiry Officer issued another notice dated 10.10.1997 asking the petitioner to attend the enquiry. The petitioner addressed another letter dated 13.10.1997 stating that he was denied permission to engage an Advocate and in the above circumstances, he is justified in not attending the enquiry proceedings. Then the Enquiry Officer again issued a letter dated 25.10.1997 asking the petitioner to attend the enquiry. Later the Enquiry Officer conducted the proceedings in the absence of the petitioner.

13. Mr. Pradeep Kumar Saha, the Chief Manager was examined as MW-1, and Mr. P.V. Subbarao, the Chief Officer, Regional Office, Hyderabad was examined as MW 2.

14. Then the copy of the enquiry proceedings were sent to the petitioner asking him to submit his written brief, vide his letter dated 11.11.1997. Then the petitioner submitted written brief dated 14.11.1997 contending that principles of natural justice have been violated since he was not permitted to engage an Advocate. Then the Enquiry Officer submitted his report dated 29.11.1997, concluding that the charges leveled against the petitioner stand proved. The Enquiry Officer came to the conclusion that the sickness alleged by the petitioner is not genuine.

15. The 2nd respondent passed orders on 11.03.1998 imposing punishment of compulsory retirement from service against the petitioner. The petitioner has sent a representation dated 08.07.1998 to review the order of compulsory

retirement. The petitioner challenged the said order in W.P. No. 10076 of 1999. However, this Court by order dated 04.10.1999 disposed of the said writ petition, directing the 1st respondent to treat the review petition filed by the petitioner as an appeal and to dispose of the same. Then the Appellate Authority issued notice to the petitioner to attend the personal hearing at Chennai on 15.02.2000. The petitioner requested the Appellate Authority to conduct personal hearing at Hyderabad on the ground that he was sick and cannot undertake journey vide his letter dated 19.02.200. Then the Appellate Authority vide letter dated 24.02.2000 rejected the request of the petitioner. Then the petitioner again sought adjournment but the Appellate Authority by order dated 06.03.2000 rejected the appeal of the petitioner.

16. The points that arise for consideration in this writ petition are as follows.

1. Which Regulation, Regulation 13(1) or 13(2) is applicable to the facts of the present case?
2. Whether the respondent is justified in not appointing the Presenting Officer?
3. Whether the petitioner is denied the right to engage a lawyer?
1. Whether there is violation of principles of natural justice and whether non-supply of medical certificate amounts to violation of principles of natural justice?
2. Non-compliance of strict procedure can be ignored following the "Useless Formality Theory"?
3. To what relief the petitioner is entitled?

Point No. 1:

17. The main submissions of the learned counsel for the petitioner, Sri Addepalli Surya Narayana, are as follows: Framing of charge under Regulation-13(1) is totally misconceived and the relevant regulation is Regulation-13(2). The charge is based on the ground that the petitioner was absent himself to duty without having first obtained permission from the competent authority ignoring the fact that the petitioner submitted leave applications, enclosing medical certificates from time to time from October, 1996 till the charge sheet was issued on 07.10.1995. In the circumstances, Regulation 13(ii) is applicable and 13(i) is not applicable since taking prior permission would arise only in cases of an officer is going out of station or applying leave on other ground of non-availability at the Headquarters and not in the case of unexpected illness. Even if it is held that the petitioner had not submitted proper medical certificates, such inaction would attract only Regulation-13(ii) and not Regulation 13(i). The letter dated 14.12.1995 addressed to the petitioner by the respondent bank duly informing him that all his leave letters were sent to Central Office for necessary action reveal that the leave applications of the petitioner have not been rejected and when the request for leave on medical ground is still pending, Regulation-13(i) has no application.

18. Learned counsel for the petitioner further submitted that the Enquiry Officer observed that the petitioner was applying leave though he was not actually sick to avoid reporting duty at Patna and the said observation is absolutely unwarranted for the reason that the charge sheet was not issued alleging that he was not actually sick but pretending illness. The charge is simply based on the ground that the petitioner did not obtain prior permission but not on the ground that the medical leave applied is not genuine. Referring to Ex.ME8 letter dated 09.05.1995, it is submitted the said letter does not indicate any reasons and there is no discussion about the medical certificates submitted by the petitioner.

19. Per contra, Sri Krishnam Raju, learned counsel for the respondent-Bank, submitted that the petitioner was working at Vijayawada and he was transferred to Patna branch as Manager (III) and relieved from Regional Office, Vijayawada on 15.10.1994 and the petitioner was not intending to join at Patna and with a view to avoid the transfer he started sending leave applications enclosing medical certificates. The petitioner was neither bedridden nor admitted in any hospital and he had categorically informed the respondent-Bank that he would join duty if his transfer to Patna is cancelled. Thus, it is clear that the petitioner was intentionally absenting from duty without prior permission of the competent authority and in case of unauthorised absenteeism Regulation 13(i) would apply.

20. It is further argued that on previous occasion also when the petitioner was transferred in 1983 he joined at his new station and worked as Manager only for two days and thereafter remained absent dislocating the work of the branch. The petitioner remained absent for 512 days out of which 378 days were treated as leave for loss of pay and on previous occasion also he was charge sheeted for misconduct of causing dislocation of business. The petitioner worked at Vijayawada for 14 months out of which he was on leave on loss of pay for 7 months 10 days. Whenever he was transferred, he did not move out of Andhra Pradesh and from the day he was relieved at Vijayawada on 15.10.1994 he remained absent unauthorisedly. It is further submitted that all the leaves of the petitioner were exhausted except 105 days of privilege leave and 4 days of sick leave and there was no leave of any kind to his credit and yet he applied for leave on one ground or the other.

21. The learned counsel for the respondent-Bank further submitted that the petitioner was subjected to medical test and the Doctor after examining the petitioner opined that the petitioner was physically fit to perform his duties. The leave applications of the petitioner were rejected and the said fact was intimated to the petitioner and when he was specifically informed that his applications have been rejected he ought to have joined the duty. The petitioner has not denied the fact that he was informed about the rejection of the leave. The petitioner was continuously absent from 15.10.1994, but the respondent waited for a considerable period giving an opportunity to the petitioner to resume duty and since he failed to report to duty for about one year, the charge sheet was issued on 07.10.1995. The respondent-Bank is competent to sanction leave for 360

days only and the matter has to be referred to the Board and the Board of Directors can sanction maximum leave of 720 days. The total period which can be availed on leave is only 360 days and that too no one can avail leave for more than 90 days at a stretch, and that the petitioner had already availed more than 720 days of leave.

22. Learned counsel for the petitioner, in reply, submits that the respondent has neither whispered anything in the charge sheet nor during enquiry that the petitioner had no leaves to his credit and the submissions of the learned counsel for the respondent-Bank are beyond the scope of the enquiry.

23. It is not in dispute that the petitioner was attached to Regional Office, Vijayawada and he was transferred and posted to Patna Branch as Manager (III) and relieved from the Regional Office, Vijayawada on 15.10.1994. It appears from the record that the petitioner had sent a telegram dated 15.11.1994 requesting to sanction sick leave to him. Subsequently, he had sent a letter dated 24.11.1994 in continuation of the said telegram requesting to sanction leave from 15.10.1994 to 14.12.1994. The petitioner enclosed the medical certificate on 18.11.1994 issued by Dr. Sudhaker Chintawar, MBBS advising the petitioner to take rest from 15.10.1994 to 14.12.1994 on the ground that the petitioner was suffering from Anxiety, Neurosis, Peptic Ulcer, Diabetes and Mellitus. Again on 13.12.1994 the petitioner addressed another letter and requested to sanction leave for three more weeks from 14.12.1994. It appears that the same Doctor diagnosed same health problems which he had referred to in the medical certificate dated 18.11.1994. The petitioner also addressed another letter on 16.01.1995 informing that his health is further deteriorated due to Diabetes and Mellitus and he was advised to take rest and to be under medical observation for one more month. He had also enclosed a similar medical certificate issued by the same Doctor. Then the Deputy General Manager has sent a letter on 24.01.1995 to the petitioner informing him that he had not joined at Patna Branch even after lapse of 90 days and relieved from Regional Office, Vijayawada and he was advised to report at Patna Branch immediately. Then the petitioner has sent a letter dated 21.02.1995 seeking extension of the leave by enclosing similar medical certificate dated 20.02.1995.

24. It appears that the wife of the petitioner also became sick and she was undergoing treatment in a private Nursing Home at Hyderabad. It appears that the son of the petitioner was also sick and was undergoing treatment. It is also not in dispute that the petitioner had been requesting to retransfer him to Hyderabad. It is also not in dispute that the petitioner after relieving from Vijayawada had been continuously sending letters for sanction of medical leave enclosing medical certificates. The management issued charge sheet alleging that the petitioner has committed misconduct under regulation 13(i) read with regulation 24.

25. Regulation 13(i) and 13(ii) reads as follows:

13. ABSENCE FROM DUTY:- (i) No officer employee shall absent himself from his duty or be late in attending office or leave the station without having first obtained the permission of the competent authority. Provided that in the case of unavoidable circumstances where availing of prior permission is not possible or is difficult such permission may be obtained later subject to the satisfaction of the competent authority that such a permission could not have been obtained.

(ii) No officer employees shall ordinarily absent himself in case of sickness or accident without submitting a proper medical certificate. Provided that in the case of temporary indisposition or sickness or casual nature, the production of medical certificate may, at the absolute discretion of the competent authority, be dispensed with.

26. Thus, it appears that regulation 13(i) is applicable when an employee is absent from duty without the leave or the permission of the competent authority. Regulation 13(ii) envisages that no officer/employee shall ordinarily absent himself in case of sickness or accident without submitting a proper medical certificate. The main submission of the learned counsel for the petitioner is that regulation 13(ii) is applicable to the facts of the present case and not 13(i). Admittedly, the petitioner had sent applications for sanction of medical leave. The stand of the Bank is that only to avoid transfer the petitioner was resorting to medical leave. The questions before the competent authority were whether the medical certificates furnished by the petitioner were genuine or not, whether he had been really suffering from ill-health or not. There cannot be any doubt to say that it is the discretion of the competent authority to sanction the leave. However, discretion vested with any authority has to be exercised fairly and reasonably. The doubt of the disciplinary authority that the petitioner's claim is not genuine may be right, but the authority cannot act on mere suspicion. In the circumstances, the authority ought to have directed the petitioner to undergo medical examination by a panel Doctor of the respondent/Bank. Admittedly, as per the charge sheet dated 07.10.1995, the allegation is that the petitioner had been absent from 16.10.1994 to 17.09.1995. Admittedly, the petitioner was not subjected to any medical examination prior to the date of issuing charge sheet, even though he was claiming that he was sick and enclosed medical certificates. His leave applications were rejected by a letter, dated 09.05.1995. After issuing charge sheet, he was subjected to medical examination on 20.02.1996. Dr. Balasubramanyam examined him and issued a medical certificate on 28.02.1996 i.e., four months after issuing charge sheet. Admittedly, the said Dr. Balasubramanyam had not conducted any test and nor obtained separate clinical reports. The certificate further shows that the Doctor advised the petitioner to go to Patna and the same was not acceptable to the petitioner. The enquiry officer has mainly relied on the letter of Dr. Balasubramanyam, panel Doctor of the Bank, without considering the fact that the said doctor was examined the petitioner much after of the date of issuing charge sheet to the petitioner and copy of the report of the said doctor was not furnished to the petitioner. Basing on the report of Dr. Balasubramanyam, it cannot be definitely said that the

medical certificates produced by the petitioner are not genuine.

27. Anyhow, having regard to the facts and circumstances of the case, it appears that regulation 13(ii) is applicable to the facts of the present case, even if the contention of the respondent is accepted that the petitioner had not submitted proper medical certificates.

28. One of the contentions of Sri Krishnam Raju, learned standing counsel for the Bank is that the petitioner had exhausted all his leaves and there was no leave credit to his leave account. The learned counsel for the respondent-Bank has referred to the judgment of this Court in W.P. No. 8115 of 1996, in support of his contention. Admittedly, no such allegation has been made in the statement of imputation of misconduct or in the charges levelled against the petitioner, when it is not a part of charge sheet and no material is placed before the enquiry officer to say that the petitioner had no leave credit and when the enquiry officer has not discussed this point the learned standing counsel for Bank cannot press that point for the first time before this Court.

29. The learned standing counsel for the Bank has relied upon a judgment reported in B.C. Chaturvedi Vs. Union of India and others, the Apex Court observed as follows:

When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to reappraise the evidence and to arrive at its own independent finding on the evidence.

In a disciplinary enquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence of reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal.

The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

30. Unless the conclusions of the enquiry officer are perverse and based on no evidence or no reasonable person would have ever reached to such findings, normally the Court should not interfere with the findings of enquiry officer. In this case, it is not the issue of appreciation of evidence. The issue is which regulation whether 13(i) or 13(ii) is applicable. The next issue is whether the report of Dr. Balasubramanyam, copy of which is not supplied to the petitioner, could be relied upon. When framing of charge itself is defective and material document is not

supplied to the petitioner and when the enquiry officer had based his findings on such report, the principles laid down in above referred decision in my considered view do not apply to this case on hand.

31. Sri Krishnam Raju, learned standing counsel for the Bank, submits that the letter filed by the petitioner dated 19.09.1995 itself shows that the petitioner admitted that he was resorting to sick leave because his request for transfer is not yet finalized.

32. In his letter, dated 19.09.1995 the petitioner stated as follows:

.....In this connection please note that the leave on loss of pay has been resorted to by me as my transfer request is pending with the Central Office authorities for consideration. Had they taken any decision in this regard, I would have decided as to whether I should report for duty notwithstanding my sickness or to decide otherwise.

33. In the above letter, the petitioner stated that he would join service notwithstanding his sickness i.e., in spite of his ill-health provided he is retransferred to Hyderabad, that does not mean that he was resorting to leave though he was not ill or only because his request for transfer is not considered.

34. There is another mistake. Admittedly, the Bank in its letter, dated 14.12.1995, informed the petitioner that all his leave applications had already been sent to Central Office for their perusal and necessary action. Having rejected the leave applications of the petitioner by letter dated 07.09.1995 and having issued charge sheet dated 07.10.1995, there was no need for the Bank to inform the petitioner that all his leave applications had already been sent to Central Office for their perusal and necessary action by letter dated 14.12.1995. It appears that no proper exercise was done by the discipline authority before rejecting the leave applications of the petitioner and before framing the charges.

35. In the above circumstances, there appears to be a defect in framing a charge under regulation 13(i), the point is decided accordingly.

Point No. 2:

36. The learned counsel for the petitioner submitted that as per Regulations, the respondents ought to have appointed a Presenting Officer to present the case on his behalf in support of the articles of charge, but, admittedly, no Presenting Officer was appointed and non-appointment of the Presenting Officer by the Disciplinary Authority would be fatal to the enquiry proceedings. The Enquiry Officer cannot play dual role, both as Enquiry Officer and Presenting Officer at the same time in the same enquiry.

37. It is further submitted by the learned counsel for the petitioner that no proceedings were issued permitting the Enquiry Officer to act as Presenting Officer and when there is no Presenting Officer, the Enquiry Officer ought to have addressed a letter to the Disciplinary Authority for appointment of a Presenting

Officer. It is further submitted that the Enquiry Officer should not act as a Prosecutor as well as Judge and he is not supposed to be a Representative of the Department and in support of the said contention he relied on the decision reported in *State of U.P. and Others Vs. Saroj Kumar Sinha*,

38. The learned counsel for the respondent-Bank submitted that the Enquiry Officer did not play any active role and unless it is shown that any prejudice is caused to the petitioner for non-appointment of Presenting Officer, no credence can be given to the contention of the petitioner and in support of the said contention, reliance is placed on the decision reported in *Workmen in The Workmen Employed in B and C Mills, Madras Vs. The Management of B and C Mills, Madras, Mulchandani Electrical and Radio Industries Ltd. Vs. The Workmen*, .

38. In the above 3rd cited case, a mill-manager authorized a Senior Labour Officer to record the evidence in the domestic enquiry. The Senior Labour Officer recorded the evidence and reasonable opportunity was given to the workmen to cross-examine the witnesses and to adduce his evidence. The Senior Labour Officer did not express any view, he had simply forwarded the evidence to the mill-manager who recorded the finding. There was no officer separately conducting the prosecution on the side of the management. Basing on the said judgment, it is submitted that there is no need to appoint presenting officer in this case. In that case, the Senior Labour Officer who simply recorded the evidence did not express any view as he was not acting as the enquiry officer. He simply forwarded the recorded evidence to the enquiry officer. The main point that came up for consideration was whether the Mill Manager was authorized to delegate his powers to the Senior Law Officer to record evidence. The facts of that case seems to be different to the facts of the present case.

39. In the above 4th decision, the allegation against the employee was that he threatened another employee with assault and there was no presenting officer, however the workman had an opportunity to cross-examine the witnesses. One witness who had signed the memorandum stated before the enquiry officer that he had not signed any such memorandum. The enquiry officer made a note that the said witness had turned hostile and proceeded to put certain questions to the witness to resolve the apparent conflict between his statement at the enquiry and what the memorandum purported to show. The said witness admitted that he had signed the memorandum. It was argued that the enquiry officer cross-examined the witnesses of the management, the Apex Court observed that the witnesses cross-examined on behalf of the workmen and the enquiry officer had put certain questions to the witnesses by way of clarification and it could not be said that he had done something that was not fair and proper. In the above circumstances, the Apex Court held that the enquiry was not vitiated merely because the enquiry officer had put some questions to the witnesses by way of clarification. Thus the point that arose for consideration in that case was whether the enquiry officer had power to seek some clarification from the witnesses?

40. Sri Krishnam Raju, learned counsel for the Bank, has relied upon a judgment reported in *M. Rama Warriar Vs. Coir Board* LAWS (KER)-1988-11-9. In that case the enquiry officer was not appointed. The workmen during the enquiry ever complained about the failure to appoint a presenting officer or requested for the appointment of a presenting officer and full opportunity was given to the workmen to cross-examine the witnesses and to peruse the documents relied on by the management. The facts of that case appears to be different.

41. The learned counsel for the petitioner has relied upon a judgment reported in *State of U.P. and Others Vs. Saroj Kumar Sinha*, . With regard to the role of the enquiry officer, the Apex Court observed as follows:

An enquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The enquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service.

42. Thus, it is clear that the enquiry officer should be wholly unbiased. He is not supposed to be a representative of the Disciplinary Authority. He is in the place of a Judge to decide the matter fairly, justly in accordance with the principles of natural justice. Where in a case the Enquiry Officer has to act as a Presenting Officer, it will be a difficult situation for such an enquiry officer. Of course, he is entitled to elicit the truth. He is also entitled to put questions to any witness, but not with an idea to elicit information favourable to a party. Where the version of a witness is not clear or where the witness seems to have not understood the question, or where he appears to be in confusion, the enquiry officer may put questions to such witness.

43. In this case, admittedly, the Discipline Authority has passed the order of compulsory retirement of the petitioner from service. Regulation 4 prescribes penalties, A to E of Regulation 4 prescribe minor penalties, F to J prescribe major penalties, whereas compulsory retirement is referred under Regulation 4(h), it is a major penalty. Regulation 6 prescribes procedure for imposing major penalties,

6(1) is as follows:

No order imposing any of the major penalties specified in clauses (f), (g), (h), (i) and (j) of Regulation 4 shall be made except after an inquiry is held in accordance with this regulation.

44. Regulation 6(5)(vi) envisages that the Discipline Authority shall forward a copy of the order of appointing the Presenting Officer in terms of sub-regulation (6). Regulation 6(6) envisages that the disciplinary authority may by an order, appoint a public servant known as the Presenting Officer to present on its behalf the case in support of the articles of charge.

45. In this case, no presenting officer was appointed and no specific reasons have been shown for non-appointment of the presenting officer in terms of Regulation 6(6). Thus, there is violation of specific Regulations in this case. Consequently, the enquiry officer had neither the assistance of the presenting officer nor the assistance of the delinquent officer in this case. In view of the above discussions, it appears that the respondent/management is also not justified in not appointing any presenting officer and thereby compelled the enquiry officer to act as the presenting officer.

Point No. 3:

46. The learned counsel for the petitioner argued that the Enquiry Officer is a law graduate and the respondent ought to have permitted the petitioner to have assistance of a lawyer in the enquiry.

47. The learned counsel for the respondent-Bank further submitted that where the process of framing charges and enquiry is complicated then it is the discretion of the disciplinary authority to permit any employee to engage an advocate, but in this case the charge is very simple such as absenteeism and no complications are involved and there is no need to permit the petitioner to engage an advocate. In support of his contention, reliance is placed on the decisions reported in *Bharat Petroleum Corporation Ltd. Vs. Maharashtra General Kamgar Union and Ors*, (1) *M/s Cipla Ltd. and Others Vs. Ripu Daman Bhanot and Another*, and *D.G. Railway Protection Force and Others Vs. K. Raghuram Babu*,

48. The learned counsel for the petitioner has relied on a judgment reported in *J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. and others*, referring to the relevant Rule 7(5) of the Haryana Civil Services (Punishment and Appeal) Rules. The Apex Court observed that the said Rule recognizes that where the charges are so serious as to entail a dismissal from service the Enquiry Authority may permit the services of a lawyer. It is further observed that this Rule vests discretion. In the matter of exercise of discretion one of the relevant factors seems to be whether there is likelihood of the combat being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable opportunity for defence by reason of the appellant being pitted against a

Presenting Officer who is trained in law. In that case, the Presenting Officer was a person with legal attainments and experience. Similar view was taken by the Apex Court in case between The Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, and also the Delhi High Court in a judgment N.K. Sareen Vs. Punjab National Bank and Another, .

49. Regulation 6(7) envisages that an employee may take assistance of any other officer employee but may not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the Disciplinary Authority is a legal practitioner or the Disciplinary Authority having regard to the circumstances of the case so permits. Thus, it is the discretion of the disciplinary authority to permit the officer to engage a legal practitioner to defend his case. The petitioner's specific case is that the enquiry officer himself is acting as the presenting officer, the enquiry officer is a law graduate and worked as law officer and that he is a lay man and needs professional guidance to defend his case effectively. According to the enquiry officer the request of the petitioner to defend by an advocate was not in accordance with the regulations and as no complications are involved in the imputations of misconduct, there was no need to appoint a presenting officer.

50. The learned counsel relied on a judgment reported in Bharat Petroleum Corporation Ltd. Vs. Maharashtra General. Kamgar Union and Ors, . In the Draft Standing Orders of an industrial establishment, the right of representation of workman was restricted to engage the services of fellow workman of his choice from amongst the employee of the establishment under which he is serving. Those Draft Standing Orders were questioned in the Apex Court and it was held that an employee has no right of representation in the departmental proceedings by another person or a lawyer unless the Service Rules specifically provide for the same. Reliance is placed upon the judgment reported in M/s Cipla Ltd. and Others Vs. Ripu Daman Bhanot and Another, . In that case the employee was a medical representative. In the daily report dated 31.08.1989, he indicated that he had visited one Dr. K.R. Singla at Ropar, it was later discovered that Dr. Singla had already died on 07.08.1989. Departmental enquiry was ordered against the medical representative. He was permitted to defend by a co-representative of his choice and was not allowed the assistance of an advocate, referring to the earlier judgment of Bharat Petroleum Corporation Limited, the Apex Court held that a delinquent employee has no right to be represented by an advocate in the departmental proceedings and that if a right to be represented by a co-workman is not given to him, the departmental proceedings would not be bad only for the reason that the assistance of an advocate was not provided to him. The same view was confirmed by the Apex Court on a judgment reported in D.G. Railway Protection Force and Others Vs. K. Raghuram Babu,). In view of the above discussions, the latest view of the Apex Court appears to be, it is the discretion of the employer to allow the employee to engage any service of lawyer to defend his case, there is no absolute right of an employee to engage a legal practitioner to defend his case. But in this case, admittedly, no presenting officer was

appointed. Consequently, the enquiry officer himself was compelled to act as presenting officer. The enquiry officer is a law graduate. He worked as a law officer. Regulation 6(7) referred above envisages that an employee may not engage a legal practitioner unless the presenting officer appointed by the Disciplinary Authority is a legal practitioner. The Disciplinary Authority ought to have considered that in case of imposition of major penalty the above referred regulations i.e., Regulations 6(5)(vi) and 6(6) have to be complied with. The Disciplinary Authority ought to have considered that since no presenting officer was appointed, the enquiry officer himself was compelled to act as presenting officer. The Disciplinary Authority seems to have not passed any order stating that since no complications are involved, there is no need to appoint a presenting officer. When major penalty of compulsory retirement is passed, it cannot be said that no complications are involved. Since, the enquiry officer who also was acting as the presenting officer was a law graduate, it appears that the respondent ought to have permitted the petitioner to engage a lawyer.

Point No. 4:

51. The learned counsel for the petitioner submitted that the respondent issued charge sheet dated 07.10.1995, but obtained medical report on 20.02.1996 i.e., nearly six months after the date of issuing charge sheet. The Doctor who issued the said medical report had not conducted any clinical tests and therefore, the said medical report Ex.ME16 has no authenticity. It is further argued that the said report gives an impression that it was deliberately obtained by the bank to strengthen the case of the respondents.

52. It is further submitted that above referred medical certificate was not even served on the petitioner and the ex parte enquiry conducted without supplying the important documents relied on by the respondent-Bank would amount to violation of principles of natural justice and in support of his contention he relied on a decision reported in Union of India (UOI) and Others Vs. S.K. Kapoor, . It is also submitted that the material, which is not placed before the enquiry, cannot be looked into and in support of his contention he relied on the decision reported in Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others,

53. The learned standing counsel for the Bank argued that the scope of judicial review is limited and the Court cannot substitute its view when the Enquiry Officer and the Disciplinary Authority have already taken a view unless it is shown that the principles of natural justice have been violated, and in support of the said contention reliance is placed on the decisions reported in State of Orissa Vs. Bidyabhushan Mohapatra, and B.C. Chaturvedi Vs. Union of India and others, It is further submitted that the findings of the Enquiry Officer cannot be disturbed unless it is shown that those findings are perverse and based on no evidence or contrary to the evidence.

54. Whether there is any violation of principles of natural justice?

55. As seen from the report of the enquiry officer, the enquiry officer had mainly relied on the medical report Ex.ME.16 issued by the Dr. Balasubramanyam. Admittedly, the petitioner was subjected to medical examination after issuing charged sheet and after appointing the enquiry officer. There cannot be any doubt to say that the petitioner himself did not participate in the enquiry on the ground he was not permitted to defend by an advocate. Be that as it may, when the enquiry officer has relied on the report of Dr. Balasubramanyam, it was obligatory on part of the Disciplinary Authority or at least enquiry officer to furnish copy of the same to the petitioner. Regulation 6(3) envisages that the discipline authority itself frame definite and distinct charges on the basis of the allegations against the delinquent, and the articles of charge, together with a statement of the allegations, list of documents relied on along with copy of such documents and list of witnesses along with copy of statement of witness, if any, on which they are based, shall be communicated in writing to the delinquent. Regulation 6(5)(iii) envisages that the discipline authority itself, where it is not the enquiring authority, forward to the inquiry authority a list of documents by which and list of witnesses by whom the articles of charge are proposed to be substantiated. Regulation 6(10) gives an opportunity to the enquiring authority to furnish the documents to the officer which are not furnished to the delinquent by the Disciplinary Authority.

56. The learned counsel for the petitioner has relied on a judgment reported in State of U.P. and Others Vs. Saroj Kumar Sinha, it was categorically held by the Apex Court that the copies of the documents which form the foundation of the charge sheet against the employee have to be supplied to him, and non-supply of such documents may cause prejudice to the employee.

57. Now, it is to be seen whether the documents are crucial for determination of the charge. In this case, the report of Dr. Balasubramanyam appears to be crucial, because basing on the said documents only it is determined that the medical certificates furnished by the petitioner are not genuine.

58. Sri Krishnam Raju, learned standing counsel for the Bank, has relied on several decisions, in support of his contention that in case of non-compliance of any procedure or non-supply of any documents, the employee has to plead and prove that prejudice has been caused to him. The learned counsel has relied on a judgment reported in Union of India (UOI) and Others Vs. Alok Kumar, , it was observed as follows:

In a departmental enquiry, where the department relies upon a large number of documents majority of which are furnished and an opportunity is granted to the delinquent officer to defend himself except that some copies of formal documents had not been furnished to the delinquent, the onus upon the employee to show that non-furnishing of these formal documents has resulted in de facto prejudice and he has been put to a disadvantage as a result thereof.

Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion. Element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default which relates to statutory violations. It will not be permissible to set aside departmental enquiries in any of these classes merely on the basis of apprehended prejudice.

59. The learned standing counsel for the Bank has relied on a judgment reported in *Burdwan Central Cooperative Bank Ltd. and Another Vs. Asim Chatterjee and Others*, 1, the Apex Court held that the order of punishment should not be set aside mechanically on the ground that the copy of the enquiry report had not been supplied to the employee. The learned standing counsel has relied on a judgment reported in *State Bank of Patiala and others Vs. S.K. Sharma*, , wherein it was observed as follows:

The principles of natural justice will, therefore, depend upon the facts and circumstances of each particular case. The principles of natural justice cannot be reduced to any hard and fast formulae. Their applicability depends upon the context and the facts and circumstances of each case. The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected.

In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under - "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined.

In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment).

60. What is to be seen is whether the documents are crucial or not? When it appears that the documents are crucial, it is obligatory on part of the disciplinary authority to supply the copies of said documents to the delinquent and non-supply of documents which are crucial and which are the basis of the finding of the enquiry officer would certainly cause prejudice to the delinquent. Non-supply of such documents amounts to violation of principles of natural justice. In a case where the documents are the basis of the finding of the enquiry officer, the delinquent employee need not prove and plead that prejudice has been caused to him for non-supply of such documents. In this case, non-supply of report of Dr. Balasubramanyam appears to be crucial and therefore I hold that there is no need to plead and prove that the prejudice has been caused for non-supply of such documents.

Point No. 6:

61. The learned counsel for the petitioner submitted that normally the major penalty of compulsory retirement will be passed against dishonest and corrupt officer and the action of the respondent in imposing such punishment against the petitioner when there is no proper evidence on record is mala fide one. The punishment of compulsory retirement on the charge of absenting without prior permission is highly excessive and disproportionate to the charge levelled against the petitioner. In support of his contention he relied on the decision reported in Sukhdeo Vs. Commissioner Amravati Division, Amravati and Another,

62. The learned counsel for the respondent-Bank further submitted that even if for any reason the Court comes to the conclusion that the order of compulsory retirement is bad in law, the Court should consider the facts and circumstances of the case, particularly the circumstance that the petitioner had already availed all the leaves to his credit and that he was not entitled to any leave and therefore he was not justified in applying leave and in view of the past conduct of the petitioner, the order of compulsory retirement should be upheld. Even if there is any violation of any formality, the Court should apply the principle of "Useless Formality Theory" and reject the case of the petitioner. The respondent-Bank, by letter dated 09.05.1995 specifically asked the petitioner to report for duty immediately. The petitioner, in spite of giving reply to the charge sheet, was asking to furnish the reasons for non-sanction of his sick leave and the reasons

for rejecting the sick leave. If at all the petitioner felt that the duties of Manager were difficult for him he could have sought for alternative duty.

63. It is also submitted that minor lapses or irregularities cannot be the sole ground to set aside the enquiry proceedings unless it is proved that prejudice is caused to the delinquent and in support of the said contention he relied on the decisions reported in Union of India (UOI) and Others Vs. Alok Kumar, , Burdwan Central Cooperative Bank Ltd. and Another Vs. Asim Chatterjee and Others, , State Bank of Patiala and others Vs. S.K. Sharma, and The Chairman, Board of Mining Examination and Chief Inspector of Mines and Another Vs. Ramjee,

64. It is further submitted that the petitioner had been continuously absent to his duty. His previous history also reveals that on earlier occasions also charge sheets were issued for his unauthorised absence and in the circumstances the punishment of compulsory retirement is proportionate to the proved misconduct and he relied on Maan Singh Vs. Union of India (UOI) and Others, , in support of the said contention. It is further submitted that the order of compulsory retirement can be passed even without holding enquiry and Regulation 20 of Service Regulations of the Indian Overseas Bank authorise the Disciplinary Authority to pass such orders and in support of the said contention he relied on the decision reported in Canara Bank Vs. V.K. Awasthy, , wherein it is observed that unless it is necessary to follow the formalities, the principle of "Useless Formalities Theory" has to be applied. It is further observed as follows "where from the facts and circumstances of the case it appears that the employee deserves the punishment, the other procedural irregularities, if any, need not be given any importance."

65. Having gone through the entire material, it appears that the respondent has not followed the required procedure. It is not the case of respondent that it passed impugned orders under Regulation 20 of the Service Regulations of the Bank. It is not their case that the punishment was imposed considering the previous record of the petitioner. In this case there is violation of principles of natural justice. Of course, the petitioner also did not participate in the enquiry on the ground that he was not permitted to engage a lawyer. However, it was obligatory on the part of the respondent-Bank to supply the copies of material documents. Admittedly, the report of Dr. Balasubramanyam was not furnished to the petitioner. It is also clear that the enquiry officer has mainly relied upon on the report of Dr. Balasubramanyam and in the circumstances, it appears that it is the material document and when a crucial report which has become the basis of the findings of the enquiry officer is not furnished to the petitioner, it cannot be said that no prejudice is caused to the petitioner. It cannot be said that there is violation of simple formality of procedure. Even, it is said that non-furnishing of copy of the enquiry report and not seeking the comments/objections of the charged officer may be treated as a mere formality, but non-furnishing of a material document such as a report of Dr. Balasubramanyam, in this case it certainly amounts to violation of principles of natural justice.

66. Therefore, the impugned order has to be set aside. However, the fact remains that the petitioner did not make any efforts to join the duty and pendency of disciplinary proceedings would not have come in his way to join the duty. It also appears that the respondents should have considered the request of the petitioner to transfer him to Hyderabad having regard to his personal difficulties. It also appears that the respondent ought to have considered the procedure prescribed by the Regulations in furnishing the documents and in appointing of presenting officer and in permitting the petitioner to engage a lawyer. Since, it appears that there are laches on the side of both the parties, just and reasonable order has to be passed.

67. Having regard to the all facts and circumstances of the case, the Writ Petition is allowed with the following directions:

- 1) The impugned order of compulsory retirement dated 11.03.1998 is set aside;
- 2) The respondent-Bank is directed to issue proceedings treating that the petitioner continued to be in service till he attained the age of superannuation.

In the circumstances, it is made clear that the petitioner shall be entitled for only 25% of back wages. However, he is entitled for the benefit of continuity service, pay scales and other service benefits deeming as if he continued to be in the service till the date of superannuation.