

(2008) 04 AHC CK 0224
In the Allahabad High Court

Shyam Kumar

APPELLANT

Vs

State of U.P., U.P. Cooperative Institutional Service Board,
U.P. Sahkari Gram Vikas Bank Ltd. and Managing Director,
U.P. Sahkari Gram Vikas Bank Ltd.

RESPONDENT

Date of Decision : 01-04-2008

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2008) 5 AWC 5217

Hon'ble Judges : Sabhajeet Yadav, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sabhajeet Yadav, J.—By this petition, the petitioner has sought relief of writ of certiorari for quashing the order dated 28.9.2006 (Annexure-9 of the writ petition) passed by respondent No. 4 namely Managing Director, U.P. Sahkari Gram Vikas Bank Ltd., Lucknow, whereby petitioner's services have been dispensed with after holding disciplinary inquiry against him and the payment of salary was also denied during the period of suspension except the subsistence allowance already paid to him nothing more paid to him.

2. The relief sought in the writ petition rests on the assertions that while working on the post of Assistant Field Officer in U.P. Sahkari Gram Vikas Bank Ltd., on account of some financial irregularities alleged to have been committed by the petitioner in Pilkhuwa branch, Co-operative Land Development Bank, Ghaziabad, a First Information Report was also lodged against him and he was arrested on 30.10.2004 but was released on bail on 2.11.2004. Thereafter he was placed under suspension on 3.11.2004 pending disciplinary inquiry against him. Thereafter, disciplinary inquiry was initiated and a charge sheet has been served upon him on 3.3.2005 by the Inquiry Officer i.e. Deputy General Manager of the Head Office, Lucknow containing as many as six charges based on the preliminary inquiry report, conducted on 3.11.2004 ex-parte behind the back of

the petitioner. A copy of charge sheet is on record as Annexure-1 of the writ petition. It is stated that from bare perusal of it, it indicates that the charges levelled in the charge sheet were sought to be proved either on the basis of inquiry report of Ajay Pal Singh, Deputy Manager, Head Office, Lucknow dated 17.11.2004 and/or on the basis of joint inquiry report of Additional Collector, (Land Acquisition) Irrigation, Ghaziabad and Regional Manager of the Bank, but material on the basis of which charges levelled in the charge sheet were shown to be proved, were not supplied to the petitioner along with the charge sheet, therefore, the petitioner sought inspection of relevant documents vide his letter dated 9.3.2005, in pursuance thereof he was permitted to inspect the record of Pilkhuwa branch on 25.4.2005 but he could not inspect all the documents, hence sought further time to inspect the same but on 27.4.2005 no further time was given to the petitioner to make inspection of the remaining records. However, some how or other, he submitted his reply to the charge sheet on the basis of available materials denying the charges levelled against him.

3. It is further stated that after submission of reply of the charge sheet, the Inquiry Officer without holding any disciplinary inquiry against the petitioner has submitted inquiry report dated 12.8.2005 against the petitioner. Before submission of said inquiry report no notice regarding the date and place of disciplinary inquiry has been issued and served upon the petitioner by the Inquiry Officer nor he has, in fact, any knowledge about the date and place of holding of inquiry nor he could participate in the said disciplinary inquiry. It appears that the Inquiry Officer has prepared the inquiry report against the petitioner and straight way submitted the same on 12.8.2005 to Disciplinary Authority in fact without holding any disciplinary inquiry, who acting upon the aforesaid inquiry report issued and served a show cause notice upon the petitioner vide order dated 9.3.2006 contained in Annexure-6 of the writ petition proposing the punishment of dismissal of the petitioner from service. On receipt of show cause notice the petitioner has submitted a comprehensive reply on 25.4.2006 pointing out glaring illegalities in holding departmental inquiry against him. Ultimately, the Managing Director, vide order dated 28.9.2006 has dismissed the petitioner from service by taking prior approval/consent from U.P. Cooperative Institutional Service Board as contained in Annexure-9 of the writ petition. Feeling aggrieved against which the petitioner has filed abovenoted writ petition.

4. The submission of Sri K.M. Misra, learned Counsel for the petitioner in nutshell is that after submission of reply of charge sheet since no notice regarding the date and place of inquiry has been communicated to the petitioner and served upon him, therefore, the petitioner could not participate in the said inquiry. The inquiry report submitted by the Inquiry Officer on 12.8.2005 was prepared only on the basis of preliminary inquiry report as revealed from it which was never supplied to the petitioner either along with charge sheet shown as documents in support of charges or thereafter nor it was proved before Inquiry Officer while holding the said disciplinary inquiry in accordance with the provisions of law or

principles of natural justice, as such the said inquiry report can be said to be no inquiry report in the eye of law and could not have been acted upon by the Disciplinary Authority. Secondly learned Counsel for the petitioner has further submitted that since the aforesaid preliminary inquiry report has never been proved in accordance with the provisions of law before Inquiry Officer, therefore, the same could not be treated to be admissible piece of evidence to be relied upon against the petitioner to prove the charges levelled against him and such preliminary inquiry report could not be made basis in support of the charges levelled in the charge sheet and since except the aforesaid preliminary inquiry report no other material has been shown in support of the charges contained in the charge sheet, therefore, the petitioner could not be connected with the aforesaid charges of misconduct levelled against him, as it would be a case of no evidence to establish the delinquency of petitioner on the basis of admissible evidence on record, therefore, impugned order based on such inquiry report cannot be sustained. In support of his aforesaid submission learned Counsel for the petitioner placed reliance upon the decisions rendered in Shiv Shanker Saxena Vs. The State of U.P., Director, Panchayati Raj Department, Shri R.K. Tiwari, Deputy Director, Panchayat Raj, Kanpur Region and Public Service Commission, Gopal Chandra Sinha v. State of U.P. and Ors. 2005 (4) ESC 2899 , Rajendra Prasad Tripathi Vs. State of U.P. and Others, and Bhupendra Kumar Misra v. M.D., U.P.F.C. and Ors. 2006 (1) SAC 261.

5. Contrary to it, Sri Nripendra Mishra, learned Counsel for the respondents has submitted that before passing the impugned order full opportunity of hearing has been given to the petitioner. In pursuance of earlier direction of this Court Sri Nripendra Mishra has also produced the record before this Court at the time of hearing. On the basis of record produced before the Court Sri Nripendra Mishra has made statement that the petitioner was given opportunity of personal hearing before the Managing Director of the Bank, who was disciplinary authority of the petitioner and he has appeared before the Managing Director on 24.6.2006 before impugned order was passed against him but except to written reply earlier submitted by him, he could not adduce any defence evidence in support of his case. Therefore, the petitioner cannot be heard on that count at this stage before this Court and he cannot blame the Disciplinary Authority on alleged fault in disciplinary proceedings held against him.

6. Heard Sri K. M. Misra, learned Counsel for the petitioner and learned Standing counsel for the State respondents and Sri Nripendra Misra for Land Development Bank, Ghaziabad.

7. Having heard learned Counsel for the parties and on perusal of the records, the question which arises for consideration of this Court is that as to whether before the impugned order was passed against the petitioner he was afforded reasonable opportunity of hearing in consonance with the principles of natural justice or not, if not, what would be its effect?

8. In this connection it is to be pointed out that somewhat similar contention as

raised by Sri Nripendra Mishra had been rejected by Hon"ble Apex Court more than four decades ago in Meenglas Tea Estate Vs. Its Workmen, wherein while stating the import of principles of natural justice in domestic inquiry in para 24 of the decision the Hon"ble Apex Court has held as under:

It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him. In the present case neither was any witness examined nor was any statement made by any witness tendered in evidence. The enquiry, such as it was, made by Mr. Marshall or Mr. Nichols who were not only in the position of Judges but also of prosecutors and witnesses. There was no opportunity to the persons charged to cross-examine them and indeed they drew upon their own knowledge of the incident and instead cross-examined the persons charged. This was such a travesty of the principles of natural justice that the Tribunal was justified in rejecting the findings and asking the Company to prove the allegation against each workman de novo before it.

9. In view of aforesaid legal position enunciated by Hon"ble Apex Court it is clear that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires then he must be given chance to rebut evidence led against him. This is the barest requirement of a domestic enquiry and this requirement must be substantially fulfilled before the result of inquiry can be accepted. A departure from requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him. In instant case there is nothing from the records shown by Sri Nripendra Mishra to indicate that before submission of inquiry report on 12.8.2005 while holding the petitioner guilty of charges levelled against him, Inquiry Officer has ever given any notice to the petitioner indicating the date and place of holding disciplinary inquiry against him, or the petitioner has ever appeared before Inquiry officer and participated in said disciplinary inquiry. Besides this, Sri Nripendra Mishra could not point out any thing from record indicating as to whether Inquiry Officer has ever conducted any disciplinary inquiry before submission of his inquiry report against the petitioner wherein he has ever examined any witness in support of the charges levelled against the petitioner. There is no indication from the record inasmuch as from inquiry report itself as to whether any person was ever examined to prove preliminary inquiry report before the Inquiry Officer, which

was only material in support of the charges levelled against the petitioner. In such a situation it is very difficult to accept the contention of learned Counsel for the respondents that since the petitioner was given opportunity to appear before the Disciplinary Authority in pursuance of which he appeared before him on 24.6.2006 before impugned order was passed against him, therefore, he has been afforded adequate opportunity to defend his case before impugned action was taken against him.

10. In this connection I would make the position further clear that even in the ex-parte inquiry, the charges are to be proved before Inquiry Officer even in absence of delinquent employee under the circumstances warranting for holding such ex-parte inquiry such as where despite notice or knowledge about the date and place of disciplinary inquiry, delinquent employee does not participate in such disciplinary inquiry or fails to participate in it, but not in other circumstances like present case where no notice was given to the petitioner indicating date and place of disciplinary inquiry. Hon''ble Apex Court in *The Imperial Tobacco Company of India Ltd. Vs. Its Workmen*, has held that even if an employee refuses to participate in the inquiry, the employer cannot straight way dismiss him but he must hold an ex-parte inquiry where the evidence must be led to prove the charges levelled against him. Therefore, in my opinion a distinction has to be drawn between the cases of "no inquiry" and "ex-parte inquiry". An ex-parte inquiry can be justified on principle of waiver that despite notice and/or knowledge about the date and place of inquiry, the delinquent employee refuses or fails to participate in disciplinary inquiry whereas the case of "no inquiry" can be justified only in a situation where delinquent employee admits the charges before the inquiry officer and not in other situations as dealt with by this Court in quite detail in *Gopal Chand Sinha v. State of U.P. and Ors.* 2005 ESC 2899 (pr. 17,18, 18-A).

11. In view of aforesaid settled legal position, I am of the considered opinion that unless aforesaid minimal requirement of natural justice is complied with and the respondents have made out a case first against the petitioner in the manner aforestated, it is not understandable as to how the petitioner could rebut the evidence which were not led before Inquiry Officer to prove the charges levelled against him and as to how he could repel those charges without being first made out against him even by appearing before the Disciplinary Authority at that stage of disciplinary proceeding. Therefore, in absence of compliance of aforesaid minimal requirement of principle of natural justice, in my opinion, the findings of Inquiry Officer could not be accepted by the Disciplinary Authority and only course which was open to him was either to ask the Inquiry Officer to hold fresh inquiry from the stage of submission of reply of charge sheet or to hold fresh disciplinary inquiry himself from the aforesaid stage.

12. In this connection, at this juncture, it is also necessary to point out that there is a vast and fundamental difference between two stages of disciplinary inquiry, one before the inquiry officer and another before disciplinary authority if

the disciplinary inquiry is conducted by an officer other than the disciplinary authority as found in present case. In the first stage of the proceeding the inquiry officer after conducting such disciplinary inquiry submits his inquiry report to the disciplinary authority by holding the delinquent employee either guilty of charges found fully proved or partly proved or by exonerating him from the charges levelled in the charge sheet. Thereupon at subsequent stage of the proceeding for sake of convenience, I may say second stage, if the disciplinary authority agrees with the findings of inquiry officer, contained in the inquiry report, under which charges are found fully or partly proved against the delinquent employee, he gives show cause notice to the employee along with the findings of inquiry officer contained in the inquiry report asking him to make comments thereon, thereupon passes appropriate final order in the matter. But where he does not agree with the findings of inquiry officer in cases where inquiry officer exonerated or partly exonerated the delinquent employee from the charges levelled, he communicates his tentative opinion of disagreement with inquiry report along with the show cause notice and after seeking comment thereon, takes final decision in the matter. As stated earlier unless first stage of such disciplinary proceeding is conducted before inquiry officer in compliance of aforesaid minimal requirement of principles of natural justice, in given facts and circumstances of the case it is very difficult to comprehend the situation under which the petitioner could repel the charges which were not proved before inquiry officer even by appearing before the Disciplinary Authority at the second stage of the proceeding. At this stage of proceeding unless the Managing Director being disciplinary authority of the petitioner either directs the Inquiry Officer to hold inquiry de-novo from the stage of reply of charge sheet or decides to hold fresh disciplinary inquiry by himself from the aforesaid stage, in my opinion, no useful purpose could be served on mere appearance of the petitioner before the Managing Director, as the fault pointed out by the petitioner in said disciplinary inquiry proceeding are such a fundamental in nature, which could not be repaired by Disciplinary Authority without having recourse of fresh disciplinary proceeding from the aforesaid stage.

13. In this connection I would like to make it further clear that aforesaid division of disciplinary proceeding in two different stages indicated hereinbefore should be understood only in common parlance; it should not be understood in legal parlance as synonymous of two opportunities as were provided under Article 311(2) prior to Forty Second Amendment of the Constitution. After aforesaid amendment the provisions for making representation against proposed punishment has been deleted from the provisions of Article 311(2) of the constitution. The effect of aforesaid amendment under said Article has been examined by the Hon'ble Apex Court in *Associated Cement Companies Ltd. Vs. T.C. Shrivastava and Others*, , *Union of India and Another Vs. Tulsiram Patel and Others*, *Ram Chander Vs. Union of India (UOI) and Others*, *Union of India v. E. Bashya* AIR 1988 SC 1000 , *Union of India and others Vs. Mohd. Ramzan Khan, and Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.*, On such

examination in last two cases Hon''ble Apex Court has held that the right to receive the finding of inquiry officer contained in inquiry report before any action is taken thereon is part of reasonable opportunity of hearing of an employee to defend his case as an integral part of principles of natural justice. This aspect of the matter has been discussed by Division Bench of this Court in quite detail with the assistance of law laid down by Hon''ble Apex Court from time to time in Gopal Chandra Sinha v. State of U.P. (supra).

14. Before concluding the issue, it would also be useful to refer a decision of Hon''ble Apex Court rendered in State Bank of Patiala and others Vs. S.K. Sharma, , wherein after making survey of entire case law on the question in issue in para 32 of the decision (at page 1683-84 of the Report) the Hon''ble Apex Court has summarised the principles holding that these principles are not exhaustive rather illustrative in nature which are as under:

32. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary inquiries and orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character,

(2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provision 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", "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 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 Inquiry 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. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the stand point of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) 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), keeping in mind the approach adopted by the Constitution Bench in B. Karunakar AIR 1994 SCW 1050. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice- or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action- the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and "no adequate opportunity", i.e. between "no notice"/ "no hearing and no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be resented for the authority to take proceedings afresh according to law, i.e. in accordance with the said rule (audi alteram partem) has to be examined from the stand-point of prejudice, in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to

be made shall depend upon the answer to the said query. (It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere).

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz,, to ensure a fair bearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest may call for a curtailment of the rule of audi alteram partem. In such situations the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision.

15. Although while stating the aforesaid principles Hon"ble Apex Court itself has observed that they are not exhaustive, rather illustrative in nature, but principles enunciated hereinbefore have covered almost all the situations which may arise in such disciplinary inquiry, therefore, the facts of the case has to be tested on the aforesaid principles. While doing so I find that the case in hand would come to a category of case akin to case of "no notice", "no opportunity" and "no hearing" before submission of inquiry report by the Inquiry Officer which was acted upon by the Disciplinary Authority. In view of aforesaid legal position it cannot be held to be merely a case of "no adequate opportunity" or "no fair hearing" requiring the action to be tested further on the touchstone of prejudice caused to the employee on account of violation of rules or any facet of principles of natural justice for the simple reason that it is neither a case of mere denial of cross-examination of any witnesses, who were examined in support of the charges nor the case of non-supply of inquiry report along with show cause notice, contrary thereto it is a case where no notice about the date and place of inquiry was given to the petitioner and in fact neither any inquiry nor even ex-parte inquiry was held before inquiry officer as neither any witnesses were examined nor any material shown in support of the charges levelled against the petitioner in the charge-sheet were proved according to law or in consonance with the principles of natural justice before Inquiry Officer even in absence of the petitioner. Therefore, question of any cross-examination or denial of opportunity of such cross-examination by Inquiry Officer does not arise in the instant case.

16. As distinguished from ex-parte inquiry, as stated earlier, it is case of "no inquiry" wherein the inquiry officer did not examine any witness and any material in support of the charges. At any rate, in my considered opinion, the case in hand is a case where there is violation of principles of natural justice of such a fundamental character, whose violation itself is a proof of prejudice which is self evident and court is not required to insist for further proof of prejudice. As held earlier that the fault found in disciplinary inquiry is such a fundamental character which cannot be repaired, without having recourse of holding fresh inquiry from

the stage of submission of reply of the charge-sheet. Therefore, the impugned order passed by the Respondent No. 4 has to be held nullity and void ab-initio which cannot be sustained. Accordingly the same is hereby quashed. In the result the petitioner is reinstated in service only for limited purpose of holding fresh disciplinary inquiry from the stage of submission of reply of the charge sheet.

17. However, during the period of such inquiry to be held against the petitioner, the petitioner shall be deemed to be placed under suspension and be paid his subsistence allowance, since deemed suspension would relate back from the date of initial order of suspension, therefore, the petitioner shall be paid his subsistence allowance from the date since when his services were dispensed with, as earlier to it he was paid subsistence but on dismissal he could be paid such subsistence allowance during the pendency of writ petition till now but by virtue of this order since his suspension would be deemed to be revived from initial date of suspension, therefore, he is entitled for Subsistence allowance for the aforesaid period as admissible to him under rule. The arrears of subsistence allowance for the aforesaid period shall be paid to him within one month from the date of production of certified copy of this order before the Disciplinary Authority and only on payment of arrears of subsistence allowance fresh disciplinary inquiry shall be held against the petitioner as indicated in this judgement. However, such subsistence allowance shall be continuously paid to him till the conclusion of inquiry. With the aforesaid observation and direction, writ petition succeeds and is allowed to the extent indicated hereinabove.