

(2005) 11 AHC CK 0125
In the Allahabad High Court
Case No : Special Appeal No. 1299 of 2005

Subedar Pathak

APPELLANT

Vs

General Manager and others

RESPONDENT

Date of Decision : 07-11-2005

Acts Referred:

Citation : (2005) 11 AHC CK 0125

Hon'ble Judges : S.Rafat Alam, J and Sudhir Agarwal, J

Final Decision : Dismissed

Judgement

1. This special appeal, under the Rules of the Court, is preferred against the order of the Hon''ble Single Judge dated 27.9.2005 dismissing Writ Petition No. 30723 of 2002 of the appellant.

2. It appears that the appellant was working as head cashier at Bhawaniganj Branch, District Jaunpur. However, a regular departmental proceeding was initiated against him in respect of embezzlement and other charges. The Inquiry Officer having appreciated the evidence in the inquiry found that all the charges against him are proved. The disciplinary authority thereafter passed order dated 31.8.1999 dismissing him from service. Being aggrieved the appellant preferred an appeal before the appellate authority, which was also dismissed on 7.5.2002, against which this special appeal is preferred.

3. Learned Counsel for the appellant made two fold submissions before us. Firstly, that the appellant has not been given opportunity to crossexamine Sri Nath Sharma, whose statement has been relied upon by the Inquiry Officer in his report. Secondly, there is no conclusive evidence except the statement of Sri Nath Sharma wherefrom it would be inferred that the charges against the appellant is proved.

4. We have heard learned Counsel for the parties and perused the record.

5. In the matter of departmental proceedings judicial review is permissible to

consider whether there is any error in the decision making process or not resulting in denial of adequate opportunity of defence. Further, if there is any violation of substantive provision of law, in such case also the proceedings may be vitiated. The Court will not reappraise the evidence and sit an appeal over orders passed by the departmental authorities. In the case of State Bank of India and others v. S.K. Sharma, JT 1996 (3) SC 722, the Hon''ble Apex Court after considering catena of cases on the issue summarized the principles, which may vitiate the departmental proceeding. Relevant portion of the aforesaid judgment is quoted below :

"(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 provisions has normally to be complied with was explained hereinabove 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 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 form 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 there from, 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 selfevident. No proof of prejudice as such need be called for in such a case. To repeat, the test is on 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) herein below 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 violation of a procedural provision, which is not mandatory character, the complaint of violation has to be examined from the standpoint 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 it or that the provision could not be waived by him, then the Court or the Tribunal should make appropriate directions (including the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in *B. Karunakar*. 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 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 reserved for the authority to take proceedings afresh according to law, i.e. in accordance with the said rule (*audi alteram partem*); (b) but in the latter case, the effect of violation (of a facet of the rule of *audi alteram partem*) has to be examined from the standpoint 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 principles 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 hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule of varying situations that arise before them.

(7) There may be situations where the interest of State or public interest may call for a curtailing 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."

6. In the case in hand, admittedly, copy of the statement of Sri Nath Sharma, recorded during preliminary inquiry, was furnished to the appellant and it was also made an Exhibit. It is not disputed by the learned Counsel for the appellant that during inquiry proceedings before the Inquiry Officer, the appellant did not make any request, either to summon Sri Nath Sharma or to show his desire to cross-examine him. The appellant could have himself produced Sri Nath Sharma, since some of the transaction was entered into with Sri Nath Sharma was set up, as defence, by the appellant. However, he, at all, made no effort at any stage during the course of oral inquiry. The appellant has also neither pleaded nor demonstrated as to how and in what manner he has been prejudiced. It is not a case where the statement of Sri Nath Sharma has been referred or relied by the authorities without apprising the appellant during the course of oral inquiry. Therefore, the contention of the appellant that the proceedings are vitiated in law since Sri Nath Sharma was not examined by the Inquiry Officer, although his statement, recorded during preliminary inquiry, was relied by the department in oral inquiry, cannot be accepted and has rightly been rejected by the Hon'ble Single Judge.

7. The next submission that there is no other evidence except the statement of Sri Nath Sharma and in view of the fact that he was not examined, therefore, his statement could not have been relied, hence it is a case of no evidence, is also misconceived. A perusal of the inquiry report (Annexure 9 to the affidavit filed in support of the stay application) shows that apart from the statement of Sri Nath Sharma there was other documentary evidence as well as circumstantial evidence, which show the involvement of the appellant in the aforesaid act of misconduct. The Inquiry Officer, besides the statement of Sri Nath Sharma, has also referred to the fact that the appellant received Rs. 20,000/- from Sri Nath Sharma and tried to explain the aforesaid receipt by stating that the said amount was received as a loan and was subsequently repaid to Sri Nath Sharma. He has also referred to the transaction of purchase of NSC by the appellant, which was actually purchased after four months from the date of receipt of alleged loan and this shows that the defence taken by the appellant, to explain receipt of Rs. 20,000/- from Sri Nath Sharma, was not believable. The appellant has admitted receipt of Rs. 20,000/- from Sri Nath Sharma in his own statement and, therefore, that was an admitted fact. In view of the aforesaid transactions and statements etc. the aforesaid authorities have formed an opinion, which cannot be said to be perverse, which a person of ordinary prudence may not form on the basis of the material available, as aforesaid.

8. In the matter of disciplinary proceeding, the view taken by the authorities cannot be interfered with merely because the Court may find another view to be

a better view. It is beyond the scope of judicial review in the matter of disciplinary proceeding. Therefore, this contention of the petitioner that there is no other evidence except the statement of Sri Nath Sharma is also incorrect and is accordingly rejected. No other contention has been raised before us.

9. We do not find any reason to interfere with the order passed by the Hon"ble Single Judge. The appeal, therefore, lacks merit and is dismissed. No order as to costs.