

(1998) 11 CAL CK 0040
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction, C.R. No. 14687 (W) of 1986

Sukesh Ranjan Dutta Chowdhury

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-11-1998

Acts Referred:

Constitution of India, 1950 — Article 226

Hindustan Fertilizer Corporation Limited Employees (Conduct, Discipline and Appeal)

Rules, 1981 — Rule 2, 37

Citation : (1999) 3 CALLT 206

Hon'ble Judges : Gitesh Ranjan Bhattacharjee, J

Bench : Single Bench

Advocate : Mrs. Bebjani Banerjee, for the Appellant; Mr. Alok Banerjee, Mr. Sudhangsu Sil and Mr. Kaushik Mondal, for the Respondent

Final Decision : Dismissed

Judgement

G.R. Bhattacharjee, J.—In this writ petition the petitioner challenges the order of his removal from service as well as the departmental appellate order and review order confirming such removal. He also prays for reinstatement in service.

2. The petitioner was appointed as Sales Officer by the Manager (Administration) of the Fertiliser Corporation of India Ltd. (FCI. for short). Eastern Marketing Zone on 29.6.71. While the petitioner was serving in the Fertilizer Corporation of India Ltd. the said organisation was divided into five different organisations including the Hindusthan Fertiliser Corporation of India Ltd. with effect from 1st April, 1978. The Eastern Marketing Zone of the FCI was allocated to Hindusthan Fertiliser Corporation of India Ltd. (HFC. for short). All the employees working in the Eastern Marketing Zone were asked to give their option if they were willing to be transferred to the HFC with the stipulation that in case no consent was received by the stipulated date from the employee it would be presumed that they had no objection to their being transferred to the HFC. It was further stipulated that the other terms and conditions of their employment under FCI

would remain unaltered on their transfer to HFC. They were however offered certain retiral benefits by way of compensation in case they did not want to be transferred (vide, circular dated 28.3.78. annexure-A to the affidavit-in-opposition). However the petitioner did not opt for retiral benefits and he continued to be in service on transfer to the HFC with effect from the assigned date in terms of the said circular dated the 28th March. 1978. It is evident that the service of the petitioner under the HFC was not a service by fresh appointment but was by way of transfer. In other words, the continuity of his service was maintained with all the benefits and liabilities of service which he might have earned and Incurred for the initial period of his service while he was serving under the FCI. On 13th February, 1981 a disciplinary proceeding was initiated against the petitioner for his alleged misconduct that while he was functioning as Sales Officer during 1975 to 1977 he engaged himself in the business of the firm named and styled as Customs Advisory Service whose nominal proprietor was his wife without obtaining any permission of the management for such engagement in trade or business and thereby contravened Rule 11(1) of the Fertilizer Corporation of India Ltd. Employees [Conduct. Discipline and Appeal) Rules. 1972 (vide, annexure-D to the writ petition). The disciplinary proceeding thus started against the petitioner was conducted and concluded by the enquiry officer and he submitted his enquiry report dated the 18th September, 1984 holding the petitioner guilty of the charge of misconduct brought against him (vide, annexure-W to the writ petition). Agreeing with the findings of the enquiry officer the Deputy General Manager (Marketing), HFC, passed the impugned order dated the 13th September, 1985 removing the petitioner from service (vide, annexure-X to the writ petition). Against that order of removal the petitioner preferred a departmental appeal before the Chairman-cum-Managing Director, HFC on the 14th October, 1985 (vide. annexure-Y to the writ petition) and in due course the appeal was rejected by the Chairman-cum-Managing Director by order dated the 2nd January, 1986, vide annexure-Z to the writ petition. Thereafter the petitioner also made an application on 29.2.86 for review of the order dated 13.9.85 passed by the Deputy General Manager [M] removing him from service and in due course the Board, after consideration, rejected the said application for review (vide, annexure-Z2 to the writ petition). Thereafter the petitioner filed the present writ petition on the 21st November, 1986 challenging his removal from service and praying for reinstatement.

3. It has been contended on behalf of the petitioner that the charge-sheet was issued to the petitioner under Rule 23 of the FCI Ltd. Employees (Conduct, Discipline and Appeal) Rules, 1972 on the 13th February. 1981 when the petitioner had already ceased to be an employee of the FCI and as such the FCI rules were not applicable in the case of the petitioner. It has further contended that at the time when the charge-sheet was issued the petitioner was an employee of MFC and therefore no disciplinary proceeding could be initiated against him for any alleged misconduct which might have been committed, if at all, while in service under the FCI. In my opinion this is not the correct

proposition. As we have seen, the petitioner came under HFC by way of transfer from FCI and not by way of a fresh recruitment or appointment under the HFC. That being so, all the benefits and liabilities which might have been earned and incurred by him while in service under FCI rather continued and were carried over even after his transfer to the HFC. As regards the contention that the charge-sheet was issued to the petitioner under the FCI Rules, 1972 when the petitioner was serving under the HFC, it has been stated in the affidavit-in-opposition that till the HFC framed its rules it followed the rules of the erstwhile Fertiliser Corporation of India Ltd. Including the service, conduct and appeal rules. The new rules of the HFC relating to conduct, discipline and appeal were circulated by the HFC on 22nd October, 1981 (para 4 of the A/O). It is evident that on 13.2.81 when the charge-sheet was issued to the petitioner the HFC Rules did not yet find the light of the day and on that date the HFC was following the FCI Rules. Consequently there is nothing wrong that in the charge-sheet reference was made to the relevant FCI rules. The fact that subsequently the FCI Rules came into the picture with retrospective effect also does not substantially change the picture because the relevant provisions relating to the disciplinary proceedings in the FCI Rules and the HFC Rules are virtually the same and the procedure of the disciplinary proceedings under both the rules are also virtually the same. It has not been specifically shown on behalf of the petitioner as to in what manner he was deprived of any procedural benefit during the course of the disciplinary proceedings available under the HFC Rules which were not available under the FCI Rules. In my opinion therefore the contention raised by the petitioner concerning the applicability of the Rules is without substance and without merit.

4. It has been contended on behalf of the petitioner that no disciplinary proceeding could have been initiated after the petitioner ceased to be in the employment of the FCI and in this connection my own decision in *Banerjee R.N Vs. State Bank of India and Others*, was relied upon on behalf of the petitioner. In my opinion, the said decision has no application to the facts of the present case. Here the petitioner did not yet retire from service when the charge-sheet was issued to him. We have also found that he was simply transferred to HFC, obviously carrying over all the benefits and liabilities incurred in his past service. That being so, this contention on behalf of the petitioner is also not tenable.

5. The learned Advocate for the petitioner submits that the petitioner was not supplied with necessary documents for the purpose of submitting his defence nor was he allowed to take inspection of the necessary documents and as such the proceeding have been vitiated. In this connection reliance has been made on behalf of the petitioner on the decision of this court in *Sujit Das v. W.B. Board of Secondary Education* 1997 (2) CLJ 497- The documents, annexure-C to the affidavit-in-opposition would however show that the petitioner was given necessary inspection of the concerned documents and he also inspected the same. That the petitioner had no substantial grievance in the matter nor was he prejudiced in any way in the matter of his defence by reason of any such grievance is also apparent and evident from the fact that the written brief dated

28.9.84 which is annexure-B2 to the writ petition, as submitted by the writ petitioner to the enquiry officer, does not contain any grievance of the petitioner in this respect. Also in the departmental appeal preferred by the petitioner against the impugned order of removal passed against the writ petitioner he did not make any grievance in this respect (vide. annexure-Y to the writ petition). That being so, and this being a question of fact or at any rate a mixed question of law and fact and is also related with the question whether the petitioner sustained any prejudice for the lapses. If any, in the matter on behalf of the enquiry officer or of the department, the same cannot be allowed to be agitated by the petitioner before the writ court for the first time when evidently the petitioner did not make any grievance in respect of the same in his written brief submitted to the enquiry officer or in the appeal preferred by him against his order of removal. The contention of the petitioner in this respect in this writ proceeding is therefore negated.

6. It is the contention of the petitioner that the impugned order of removal from service was passed by the Deputy General Manager (Marketing) who was not the competent authority to pass such order in the matter, inasmuch as he was not the appointing authority. This point has been dealt with by the Board in disposing of the review application made by the petitioner. It is recorded therein by the Board of Directors of the HFC Ltd. that Sri R.N. Prasad, Deputy General Manager (M) has been delegated the powers of General Manager under order No. HFC/C.O/EERS/P-17/237-dt. 19.8.85 with effect from 12.12.84 and he was competent to issue the order of removal of the petitioner. As we have seen the order of removal was passed on 13.9.85 after the order of delegation of power was issued. In paragraph 13 of the affidavit-in-opposition also this point has been traversed and it is stated that the Deputy General Manager was empowered to act as General Manager and was delegated all the powers of General Manager. Delegation of power is envisaged under Rule 2(b) and/or (d) of the HFC Employees (Conduct, Discipline and Appeal) Rules. 1981/FCI Employees [Conduct, Discipline and Appeal) Rules. 1972. That being so there is no scope for holding that the impugned order of removal from service was not passed by the competent authority. The contention of the petitioner in this respect is therefore rejected.

7. It has been the contention on behalf of the petitioner that before the Impugned order of removal no second show-cause notice and copy of the enquiry report were served upon the petitioner. In this connection certain decisions were also referred to by the learned Advocate for the petitioner. The matter however has been set at rest by the well-known decisions of the Supreme Court in Union of India and others Vs. Mohd. Ramzan Khan, , and Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., In the case of Mohd. Ramjan Khan (supra) the Supreme Court observed thus :-

"17. There have been several decisions in different High Courts which, following the 42nd Amendment, have taken the view that it is no longer necessary to

furnish a copy of the inquiry report to delinquent officers. Even on some occasions this court has taken that view. Since we have reached a different conclusion the judgments in the different High Courts taking the contrary view must be taken to be no longer laying down good law. We have not been shown any decision of a coordinate or a larger Bench of this court taking this view. Therefore, the conclusion to the contrary reached by any two Judge Bench in this court will also no longer be taken to be laying down good law, but this shall have prospective application and no punishment imposed shall be open to challenge on this ground"

8. It is therefore now a settled law that any punishment which had been imposed prior to the decision of the Supreme Court in Ramjan Khan will not be open to challenge on the ground that no copy of the enquiry report was supplied before imposing the punishment. The decision in Ramjan Khan was rendered by the Supreme Court on 20th November, 1990 and the punishment upon the petitioner was imposed in the present case by order dated the 13th September, 1985 long before the decision of the Supreme Court in Ramjan Khan. That being so the fact that no copy of the inquiry report was served upon the petitioner before awarding the impugned punishment cannot be entertained as a ground of challenge to the impugned punishment.

9. It has been contended on behalf of the petitioner that the order of the appellate authority in disposing of the appeal preferred by the petitioner against the impugned order of removal is a cryptic one and the same is liable to be quashed for that reason alone. In this connection the learned Advocate for the petitioner has also relied upon the decision in J.C. Mehta v. Post Graduate Institute of Medical Education and Research, Chandigarh 1988(4) SLR 768 (P & H). In that decision the court was considering Rule 27(2) of the C.C.A. Rules as to the manner in which the appellate authority was to consider and decide an appeal against an order imposing penalty. In our present case the relevant provisions are contained in Rule 37 of the Employees (Conduct, Discipline and Appeal) Rules, 1981 of MFC which corresponds to Rule 34 of the Employees (Conduct, Discipline and Appeal) Rules, 1972 of the FCI. Under these rules the appellate authority is required to consider whether the findings of the disciplinary authority are justified and whether the penalty Imposed is excessive, adequate or inadequate. In our present case the order of the appellate authority dated the 2nd January, 1986 is annexure-Z1 to the writ petition. It is true that the said order is not a very long or elaborate order, but even then it contains sufficient Indications that the appellate authority considered the relevant records and the report of the inquiry officer and was satisfied that the finding of misconduct was proved. As regards the punishment also the appellate authority has recorded his opinion. Therefore taking an overall view of the matter it cannot be said that the appellate authority did not apply his mind in the matter or comply with the requirement of the relevant rules relating to appeal. The contention of the petitioner in this respect is therefore found not tenable. It is also to be mentioned here that the order of the disciplinary authority was challenged before

the Board thereafter by the petitioner by way of review and that has been disposed of by the Board by passing quite an elaborate order discussing the relevant aspects of the matter.

10. It is the grievance of the petitioner that at the last stage of the inquiry proceedings the inquiry officer held the hearing ex parte without giving necessary opportunity to the petitioner to defend himself. It appears from the recorded proceedings of the enquiry. annexure-V to the writ petition that on 21.8.84 which was the date fixed for further hearing the charged officer (C.O. the petitioner herein) was absent and sent a letter supported by a medical certificate through his defence assistant seeking time on the ground that he was suffering from sudden attack of dysentery and the medical certificate, it seems from the order sheet itself, recommended rest for the petitioner for two weeks. The inquiry officer refused to grant adjournment and in this connection he made the following observations:-

" I do not think even if he had dysentery he would be so immobilised that he would not be able to attend the hearing. The complaint of dysentery has come to me all too sudden. His defence assistant Sri D.R. Dutta Chowdhury although present stated that he would not like to take up this case. Since the reason for absence given by the C.O. Is all too sudden and since he could have attended the hearing, it is apparent that he is absent without sufficient reasons. The hearing against him, is therefore, held ex-parte."

11. It has been submitted by the learned Advocate for the petitioner that the above quoted observations of the inquiry officer in rejecting the prayer for adjournment made on the ground of attack of dysentery projects a perverse approach in the matter on the part of the inquiry officer. It is indeed true that if the petitioner had sustained sudden attack of dysentery and needed rest as advised in the medical certificate enclosed with the letter of request for adjournment the inquiry officer should not have lightly brushed it aside by observing that the petitioner was not so immobilised that he would not be able to attend the hearing. Nothing is indicated in the order of the inquiry officer as to wherefrom he got it that the petitioner inspite of sudden attack of dysentery and inspite of medical advice, was fit enough to appear before him for hearing on that date. It is also not expected that dysentery will come with sufficient advance notice. It is quite possible that one may have sudden attack of dysentery thereby rendering him unfit for the time being to attend outside assignments. The medical certificate was there and to inquiry officer without having sufficient contrary materials should not have refused the prayer for adjournment of the petitioner made on the ground of medically certified illness. It rather seems that the enquiry officer was not justified in holding the inquiry at that stage ex parte ignoring the prayer of the petitioner for adjournment on medical ground supported by medical certificate. It also appears that on that date, that is, on 21.8.84 the deposition of two more witnesses, namely, SW 11 and SW 12 was recorded by the inquiry officer ex parte and the prosecution case was closed and

the hearing was adjourned to the next date, that is, 22.8.84 on which date however the C.O was absent and no defence witness was also produced. On 24.8.84 the case was closed as the C.O was absent. The enquiry officer then directed the presenting officer (P.O) to submit his brief by 28.8.84 and the C.O to submit his brief by 3.9.84. It thus appears that deposition of two witnesses for disciplinary authority, namely. SWs 11 and 12 was recorded ex parte and the petitioner did not get chance to cross-examine them or to adduce defence evidence because of rejection of the prayer for adjournment. The rejection of the prayer for adjournment made on medical ground supported by medical certificate was also not justified, as we have seen. Therefore on the facts 011 record it is apparent that at the last stage of the proceeding the petitioner was not given opportunity to cross-examine the last two witnesses or to produce defence evidence. This might have caused some prejudice to the petitioner in the matter of his defence, at least theoretically. It may be pointed out here that although the Inquiry officer allowed time to the P.O to submit his brief by 28.8.84 the P.O submitted his brief on 10.9.84. The petitioner (C.O) was granted time to submit his brief by the 3rd September. 1984. But the petitioner submitted his brief on 26.9.84 when the inquiry officer had already recorded his report on 18.9.84.

12. Be that as it may, we are now required to consider whether the petitioner is entitled to get any relief in this writ petition by reason of the fact that the enquiry officer held the hearing ex parte at the last stage by rejecting the prayer for adjournment without Justifying reason and thereby denying opportunity to the petitioner to adduce defence. In this connection if it is held that the petitioner should be given fresh opportunity to participate in the hearing from the stage at which the hearing was held ex parte by the inquiry officer certainly the Court can do that. But before taking a decision on the point the Court also has to take notice of certain facts involving the conduct of the petitioner in the matter as discussed hereafter. We have seen that the order of removal of the petitioner was passed on 13.9.85 (annexure-X to the writ petition). From the annexure to the supplementary-affidavit affirmed on behalf of the respondents it appears that the petitioner, after receiving the order of his removal from service along with the copy of the enquiry report, wrote a letter to the Deputy General Manager (Marketing). HFC on 25.9.85. In that letter the petitioner at first expressed his thanks to the Deputy General Manager (M) for the order of removal which was accompanied by a copy of the inquiry report and then requested him to arrange to release his upto date dues forthwith. The language of the letter written by the petitioner to the Deputy General Manager (Marketing) Is also so clear and unequivocal in its purport and import that the same deserves attention and is therefore quoted below:-

Thank you very much for your order no. HFC/MD/BIG/49/168 dated 13.9.85 enclosing therewith a copy of the enquiry report.

I shall be grateful if you kindly arrange to release my dues (upto date) forthwith and oblige me".

13. It is therefore evident that on receipt of the order of his removal along with a copy of the enquiry report the petitioner rather thought it fit to accept the same and accordingly wrote to the concerned authority to release his upto date dues in the background of the removal order passed against him. At that stage plainly he had no grievance against the order of his removal and he rather voluntarily chose to accept the same and asked for releasing his upto date dues in the background of the order of his removal. It was not that he asked for his upto date dues without prejudice to his rights and contentions against the order of removal or against the inquiry report. At that stage he also did not file any appeal against the order of removal. The appeal was filed subsequently. It is also to be noted that pursuant to the said letter of the petitioner the Chief Financial Manager of the HFC by his letter dated 6/8.11.95 wrote to the petitioner requesting him to collect the cheque for Rs. 31,152.94 from his office at an early date in full and final settlement of his provident fund dues. Pursuant to that, the petitioner also collected the cheque for the amount towards full and final settlement of his provident fund dues by signing necessary receipt on 13.11.85. It is also to be noted here that subsequently by a letter dated the 7th December. 1985 addressed to the Regional Manager. HFC the petitioner requested the authorities concerned to settle his certain other dues mentioned therein in the background of the removal order passed against him. Although this point was not taken in the original affidavit-in-opposition by the respondents yet in course of the hearing the respondents, with the leave of the court, filed a supplementary affidavit bringing those facts to the notice of the court. In view of such facts it is submitted on behalf of the respondents that the petitioner having prayed for settlement of his upto date dues in the background of the order of his removal and also having accepted his P.P dues by way of full and final settlement as a sequel to such order he cannot now challenge his removal from service as it is not permissible to approbate and reprobate. It is to be noted here that the question of asking for payment of provident fund dues by way of full and final settlement cannot arise unless the petitioner accepts that he is no more in service. A person who accepts full and final settlement of provident fund dues obviously cannot do so without accepting the position that he is no more in service and without submitting and consigning himself to that position. The learned Advocate for the petitioner however submits that the withdrawal of the P.F dues by way of full and final settlement in the background of the removal order does not debar the petitioner from pursuing his remedies against the order of his removal and in support of his such submission reliance has been made on a Division Bench decision of this court in Union of India v. Ajit Kr. Agarwala. 1997 (1) CHN 440. The facts of that case and the background in which the said appeal was decided are however totally different. It is only to be pointed out that in the said Division Bench decision the Supreme Court decision in Bhaji Ram v. Baij Nath. AIR 1961 SC 1327 was followed.

14. Let us therefore see what was the decision of the Supreme Court in Bhau Ram v. Baij Nath (supra). There was a decree of preemption. The matter went up

to the Supreme Court by special leave. Subsequent to the grant of special leave to appeal to him the appellant/pre-emptee withdrew the price of pre-emption which was deposited by the preemptor in the court below. It was contended that by withdrawing the pre-emption price the appellant must be deemed to have accepted the decree which alone entitled him to the amount: and therefore he cannot be heard to say that the decree is erroneous and cannot be allowed to approbate and reprobate. The Supreme Court in that decision took notice of certain earlier decisions where the doctrine of approbate and reprobate was applied, and noted that in all such cases the benefit conferred by the order was something apart from the merits of the claim involved in those cases. One instance was that the dismissed suit was directed to be restored on the plaintiff paying the costs of the opposing party and the party challenging restoration accepted the costs. Obviously the benefit of receiving the costs for restoration was something apart from the merits of the claim involved in the case. In this connection the Supreme Court in *Bhau Ram v. Bay Nath* made the following observations:-

"5. Upon the principles underlying the aforesaid decisions a person who takes benefit under an order de hors the claim on merits cannot repudiate that part of the order which is detrimental to him because the order is to take effect in its entirety. How can it be said that a vendee in a pre-emption suit against whom a decree is passed takes any "benefit" thereunder? No doubt, he has a right to be paid the preemption price before the pre-emption decree becomes effective but the price of pre-emption cannot be characterised as a benefit under the decree. It is only in the nature of compensation to the vendors for the loss of his property. For this reason the principle of the aforesaid decision would not apply to such a decree."

15. It has been also indicated in paragraph 12 of the said decision that the mischief of the rule regarding approbate and reprobate is limited only to those cases where a person has elected to take a benefit otherwise than on the merits of the claim in the lis under an order to which benefit he could not have been entitled except for the order. It was further held in the said case that the appellant by withdrawing the pre-emption price had not taken a benefit de hors the merits. The legal position therefore, as propounded by the Supreme Court, seems to be that the mischief of the rule regarding approbate and reprobate will be attracted where benefit of an order de hors the merit of the claim has been taken but the same shall not apply where such benefit is not de hors the merit of the claim as it is in the case of withdrawal of pre-emption price in connection with a pre-emption order in a pre-emption suit.

16. Now let us examine how far the above-mentioned principle as enunciated in the Supreme Court decision in *Bhau Ram v. Bay Nath* (supra) that the rule regarding approbate and reprobate is limited only to those cases where a person has elected to take a benefit otherwise than on the merits of the claim in the lis under an order to which benefit he could not have been entitled except for the

order, is applicable to (he facts of our present case. In this connection we may also refer to the Division Bench decision of this court in *Union of India v. Ajit Agarwal* (supra) as relied upon by the learned Advocate for the petitioner. The Division Bench in that case was dealing with two orders passed by a learned single Judge, one dated the 21st May 1996 and the other dated the 30th May, 1996. In substance, by the first order, the learned single Judge laid down the manner in which the investigation (Interrogation !), in accordance with law, was to be carried out by directing, inter alia, that the time for such investigation. on Mondays, Wednesdays and Fridays would be between 11 a.m. and 4 p.m. and that the petitioners would be at liberty to take assistance of an Advocate of their own choice who would be present to over-see the interrogation going on without interfering with the same. There were also certain other directions and also a subsequent order dated the 30th May, 1996 on an application for clarification/ modification of the order dated the 21st May, 1996. An appeal was taken against the said orders at the instance of the investigating Agency, namely, the Customs authorities, in the appeal a preliminary point of objection was taken against the maintainability of the appeal on the ground that in compliance with the initial order passed by the learned trial Judge on the 21st May. 1996 Interrogation had already commenced and that after having conformed to the said order dated the 21st May. 1996 it was not open to the appellants to assail the same in the appeal and ask the court to set aside the same. The Division Bench negatived that objection on the authority of the Supreme Court decision in *Bhau Ram v. Baij Nath* (supra). In paragraph 4 of its decision in *Union of India v. Ajit Agarwalla* (supra) the Division Bench took note of the important feature of the relevant facts in the case that the appellants did not take advantage, by election, of anything which could not accrue to them de hors the claim of merit, but what the appellants had implemented was part of what they would have been entitled to ordinarily. This clearly indicates the scope of application of the principle of approbate and reprobate in terms of the Supreme Court decision in the case of *Bhau Ram*. For attracting the mischief of the rule of approbate and reprobate the advantage or benefit taken under an order is required to be de hors the claim of merit. The facts in the Division Bench decision were such that by making interrogation in conformity with the order of the court the concerned authorities did not take any advantage, by election, of anything de hors the claim of merit because what they Implemented, namely, interrogation, was part of what they would have been entitled to ordinarily, and accordingly by conforming to the order of the Court relating to interrogation the concerned authorities did not take any advantage or benefit de hors the claim of merit. In the circumstances the Division Bench overruled the objection against maintainability of appeal based on the plea of approbate and reprobate.

17. In this connection we may also refer to the Division Bench decision of the Patna High court in *Shri Prafulla Chandra Sinha and Others Vs. Chotanagpur Banking Association Ltd.*, where also the decision of the Supreme Court in *Bhau Ram v. Baij Nath* (supra) was considered in connection with the question of

applicability of rule of approbate and reprobate to the particular facts of the case before the Division Bench. That was an appeal before the Division Bench against an order dated the 21st August, 1958 passed by a single Judge of the Patna High Court directing winding up of a bank, named the C.B. Association Ltd. There also in the appeal a preliminary objection was taken on behalf of the respondent that having received dividend after the order of winding up was passed the appellants had lost the right of appeal and on this ground alone the appeal was liable to be dismissed. For resisting the said preliminary objection the appellants relied upon the decision of the Supreme Court in the case of Bhau Ram v. Baij Nath (supra). The respondents also relied upon the same decision of the Supreme Court in support of their objection based on the rule regarding approbate and reprobate. The Division Bench in considering the matter took note of the fact in paragraph 5 of its decision that the majority judgement of the Supreme Court in Bhau Ram says that the appellants by withdrawing the preemption price did not take a benefit de hors the merits, in paragraph 6 of its decision the Division Bench also look note that after reviewing several English and Indian decisions the Supreme Court in Bhau Ram v. Baij Nath laid down that the doctrine of approbation and reprobation, which has a Scottish origin is akin to the law of election, and estoppel applies to those cases where a person has elected to take benefit otherwise than on merits of the claim in the litigation under an order to which benefit he could not have been entitled except for the order. The Division Bench on the facts of the case before it found that the appellants voluntarily accepted the dividend which they could not have been able to receive but for the winding up order. It was also noted by the Division Bench that the payment of the dividend was due to the result of the winding up order and but for the said order the appellants could not have drawn the amount as a matter of right. In the circumstances it was held that the acceptance of the dividend precluded the appeal. The facts involved in ourt present case do also have striking similarity with the facts before the Division Bench of the Patna High Court in the said decision. Here in our present cae also the petitioner, but for the order of his removal from service, was not entitled to obtain his provident fund dues at the time when he received the same by way of full and final settlement. He rather voluntarily chose to take the benefit of the order of his removal from service and accept his provident fund dues by way of full and final settlement which he would not have been entitled to at that time but for the order of his removal. His claim of merits now however is that the order of his removal is illegal and not sustainable in law. Evidently, the benefit which he voluntarily chose to obtain under the order of his removal from service by way of full and final settlement of P.F. dues in plainly apart from and de hors the merits of his claim in the lis and therefore his voluntary choice to obtain a benefit which he was not entitled to on the basis of the merits of his claim attracts the mischief of the doctrine of approbate and reprobate so as to debar him from challenging his removal from service after he voluntarily chose to obtain the benefit of the order of his removal which benefit he would not have been entitled to on the basis of the merit of his claim in the litigation. Therefore it must be held rather on the authority of the

Supreme Court decision in Bahu Ram v. Baij Nath (supra) that the petitioner cannot approbate and reprobate by challenging in this writ petition the order of his removal from service after he has chosen voluntarily to obtain a benefit under the said order of removal which benefit is evidently de hors the merits of his claim in the case. Accordingly, I hold that the petitioner cannot succeed in this writ petition by reason of the mischief of the doctrine of approbate and reprobate attracted in the facts of the case. The writ petition is accordingly dismissed. The parties are however directed to bear their own costs.

18. Petition dismissed