

(2012) 06 AP CK 0082
In the Andhra Pradesh High Court
Case No : WP. No. 4584 of 2000

V. Subba Rao

APPELLANT

Vs

Disciplinary Authority Cum Chief Manager Andhra Bank and
Another

RESPONDENT

Date of Decision : 27-06-2012

Acts Referred:

Constitution of India, 1950 — Article 136, 226

Citation : (2013) 1 ALT 494 : (2013) 1 LLJ 364 : (2013) 1 LLN 444 : (2013) 2 SCT 473

Hon'ble Judges : R. Kantha Rao, J

Bench : Single Bench

Advocate : Vedula Srinivas, for the Appellant; K. Lakshminarasimha for Respondent Bank, for the Respondent

Final Decision : Allowed

Judgement

R. Kantha Rao

1. This writ petition is filed seeking writ of mandamus to declare the action of the first respondent in compulsorily retiring the petitioner from service vide order dated 30.08.1999 as confirmed by the second respondent vide order dated 16.02.2000 as arbitrary, unreasonable, unconstitutional and to issue consequential direction to the respondents to reinstate the petitioner into service with all consequential benefits. The brief averments of the writ petition may be stated as follows:

The petitioner joined the service of Andhra Bank in the year 1979 as Clerk-cum-Typist. He got promotion as officer in 1984 and since then, he was working as officer. On his application as Officer of the Bank, two credit cards were issued to him by the bank, i.e. one card known as VISA gold with credit sealing of Rs. 50,000/- and another card known as Visa Classic with a credit limit of Rs. 15,000/-.

2. On 24.10.1997 the petitioner was charge sheeted levelling two charges against him. The first charge was that he had availed excess credit on his two credit cards and failed to pay the amount due to the bank which act amounted to habitual indebtedness. The second charge was that he was unauthorisedly absent for two spells of 48 days and 29 days during the period from May, 1997 to August, 1997.

3. In response to the aforementioned charges, the petitioner submitted an explanation on 10.12.1997 denying the charges. In his explanation, he stated that the credit cards were issued to him just as were issued to any other customer of the bank, the terms and conditions applicable to him are the same which are applicable to any other card holder, his relationship with the bank in respect of the credit cards transaction is the same as an outside customer. It is further submitted in his explanation to the bank that due to some personal necessities, he had drawn excess amount on his credit cards, such an act on his part cannot be treated as misconduct just because he happened to be an officer of the bank. In normal course, he said, the bank could have only proceeded to recover the excess drawing by a customer against the credit card and the same could have been done even in his case also. According to him, it cannot be said that he committed any misconduct of habitual indebtedness or insolvency.

4. He also stated in his explanation that he owned a house property, was in a position to clear the credit card dues by selling away the house and that he has no intention to avoid the payment of credit card dues to the bank. The action of the bank in treating the excess dues on credit card as misconduct according to him is arbitrary, unreasonable and irrational. His main contention thus, in his explanation submitted to the bank was that the bank has to treat him like any other customer insofar as any breach of credit card by the customers and he would not have been subjected to disciplinary action for any violation of the terms and conditions of the credit cards issued to him.

5. In respect of the second charge, he stated in the explanation submitted to the bank that though initially he was unable to attend duty due to ill-health, subsequently applied for leave during the period of May, 1997 to October 1997 and therefore, the question of unauthorized absence does not arise. Thus, according to him both the charges are groundless.

6. The explanation submitted by the petitioner was rejected and a domestic enquiry was conducted against him. At the conclusion of the enquiry, the enquiry officer found both charges proved against the petitioner and accordingly he submitted a report dated 25.03.1999 holding the petitioner guilty of the said two charges. A show cause notice was served on the petitioner, on which the petitioner submitted a reply, but rejecting the same, the bank imposed a punishment on him of compulsory retirement by order dated 30.08.1999.

7. In this writ petition, it is contended by the petitioner that none of the charges, in fact amounts to misconduct, imposing punishment of compulsory retirement is

excessive, harsh and shockingly disproportionate, in his long service of 20 years he never suffered any punishment and not even a single charge sheet was issued to him. He further stated that he was made to work without payment of salary since 1997 till the date of compulsory retirement as the bank adjusted his salary towards credit card dues. Under these circumstances, he stated that having no alternative remedy, he approached this Court under Article 226 of the Constitution of India seeking a writ of Mandamus.

8. In the counter affidavit, the first respondent bank contended that mis-utilizing the credit cards over and above the limits allowed indiscriminately amounts to misconduct under the rules of the bank. It is submitted that the banking business is entirely dependent on public trust and faith and to promote the faith, all the employees of the bank are expected to maintain utmost honesty and integrity. According to the first respondent bank, any act of dishonest even the slightest would be prejudicial to the interest of the bank and also opposed to the cherished objectives of the bank, it will adversely affect the confidence of the customers which gives rise to serious doubts in their minds about the safety of their hard earned money kept in the bank. It is further submitted that being an employee of public sector bank, the petitioner was expected to scrupulously follow the rules and norms, but, the petitioner flouted the norms and used the credit cards indiscriminately and also failed to adjust the bills. Therefore, according to the bank, the act committed by the petitioner by utilizing the credit cards over and above indiscriminately and not adjusting the dues of the bank till imposition of the penalty of compulsory retirement, certainly amounts to misconduct and he was rightly retired from service compulsorily.

9. As regards the second charge, it is contended that being an officer of the bank, the petitioner instead of being responsible, had absented himself from duty un-authorisedly for a period of 77 days which caused dislocation of work. It is further submitted that it is clear from the evidence brought on record during the enquiry that the petitioner had submitted the leave applications only after six weeks of his reporting duty and that he did not take prior permission or sanction of leave from the competent authority before going on leave. Thus, the bank stated that the act of un-authorized absence also amounts to misconduct under the rules of the bank and therefore, according to the first respondent bank, the petitioner was rightly compulsorily retired from service after initiating domestic enquiry against him.

10. As per the bank's version, the misconduct committed by the petitioner had the following impact on the bank: (a) it affects the reputation of the bank, (b) it makes unsafe for the bank to retain him in its service. (c) the misconduct committed by the petitioner is grossly immoral that any reasonable prudent person would say that he could not be trusted. (d) the misconduct of the petitioner though isolated, tends to cause serious consequences. The petitioner utilized the credit cards indiscriminately, flouted the norms, if such conduct of the petitioner was not viewed seriously and nipped in the bud, it will give scope to

the other employees to commit such things and the same may affect the interest of the bank adversely.

11. According to the bank, the penalty of compulsory retirement imposed on the petitioner was appropriate to the gravity of misconduct committed by him and it cannot be said that the penalty imposed on him is disproportionate to the gravity of the charges alleged and established in the enquiry.

12. Thus, the two charges viz.

(1) that the petitioner had availed excess credit on his two credit cards and failed to pay the amount within the time prescribed, and

(2) that he was unauthorisedly absent on two spells for a period of 77 days were said to be proved and they formed the basis for the compulsory retirement of the writ petitioner.

13. If the findings of the enquiry officer or the disciplinary authority are either perverse or not based on evidence, this Court in exercise of its jurisdiction under Article 226 of the Constitution of India can interfere with the said findings.

14. First I would like to deal with the second charge. It was to the effect that the petitioner was absent from duty under two spells for 48 days and 29 days respectively during the period from May, 1997 to August, 1997. As to this, the explanation offered by the petitioner in the domestic enquiry was that due to ill-health he was unable to attend duty, but subsequently he applied for leave. He contended in the course of the domestic enquiry against him that his absence was not unauthorized and that the charge is groundless. To understand when unauthorized absence would amount to misconduct, we have to examine the circumstances leading to the absence of the charged officer. The absence to become unauthorized must be willful, despite the fact that the absence of the charged officer was without applying for leave in advance. In this context, it would be relevant to refer to the judgment of the Supreme Court in *Krushnakant B. Parmar Vs. Union of India (UOI) and Another*, wherein the Supreme Court held that:

for sustaining the charge of unauthorized absence amounting to misconduct, it must be proved that the unauthorized absence was willful. If the absence is due to compelling circumstances under which it is not possible to report for or perform duty, such absence cannot be held to be willful and the employee cannot be said to be guilty of misconduct.

15. In the instant case, except the mere fact that the appellant did not submit leave application in advance absolutely no material was brought on record during the course of the domestic enquiry that the absence of the appellant was unauthorized and also willful. The respondent bank is under a duty to adduce cogent and convincing evidence that the conduct of the petitioner in absenting from duty is willful and intentional. Subsequent to the absence from duty, the petitioner submitted leave applications and moreover, the leave was also granted

to him. When once his leave is granted, the absence can no longer be said to be unauthorized and amounting to misconduct. Thus, in this case the charge of unauthorized absence of the petitioner as rightly contended by the petitioner himself is groundless and the same is not substantiated during the course of domestic enquiry against him. The finding recorded by the enquiry officer and its approval by the disciplinary authority, therefore, are not based on evidence and are perverse which are liable to be set aside in this writ petition. Accordingly, they are set aside and thus, the second charge no longer forms the basis of compulsory retirement of the petitioner.

16. Now it is to be seen whether the first charge viz. availing credit limit in excess of the ceiling under the two credit cards issued to the petitioner would amount to misconduct. Since there is no denial by the petitioner to the said charge, it is no longer required to examine whether the charge is proved. The petitioner himself admits that he had availed excess credit under the two credit cards taken by him from the respondent bank. What all he contends is that for availing excess credit, the respondent bank can proceed against him for recovery of the amount or can take action against him for breach of the conditions of the credit cards issued to him, but it is no ground to initiate disciplinary proceedings against him, terming the same as misconduct under the regulations of the respondent bank.

17. In support of the contention of the respondent bank, the learned counsel appearing for it, relied on some decisions; they are:

(1) State of Madras Vs. A.R. Srinivasan, wherein it is held that:

a public servant can be punished even without proof of any corrupt practice if the cumulative evidence that he was suspected in a number of instances to be corrupt or is generally believed to be a corrupt officer, is available against him.

(2) State Bank of Bikaner and Jaipur and others Vs. Prabhu Dayal Grover, wherein it is held that:

the disciplinary authority, while concurring with the enquiry officer, is not required to give reasons and it must be presumed that the disciplinary authority had examined the entire proceedings and applied its mind thereto before concurring with the enquiry officer, the order of removal passed by it could not be held to be bad.

(3) M.M. Malhotra Vs. Union of India (UOI) and Others, wherein it was held that

when a charge of cohabiting with a woman who was not a legally wedded wife or with another woman during subsistence of marriage and treating such woman with cruelty and torturing her is proved it is unbecoming and disgraceful on the part of the charged officer and the order of compulsory retirement is not shockingly disproportionate.

(4) P.D. Agrawal Vs. State Bank of India and Others, wherein it was held that:

where punishment of removal from service was inflicted treating all the charges as proved, but in appeal under Article 136, one of the said charges which was severable from the other charges was found unproved, the discretionary jurisdiction under Article 136 not exercised to interfere with that punishment.

(5) State Bank of India and Others Vs. Ramesh Dinkar Punde, wherein it is held that :

in a case where the bank officer found to be connected with the issue of STD Rs in the name of certain individuals against clearing cheques received from various trusts/boards and found to have got overdraft limits sanctioned for the said individuals and committed said misconduct for his personal ends and against the interest of the Bank and the depositors, his case must be dealt with iron hands and not leniently and the plea of leniency on the ground of long years of service rendered by him is rejected.

18. All the afore-referred judgments relate to the charges of corrupt practices and hence they are not applicable to the facts of the present case. Further, Sri Vedula Srinivas, learned counsel appearing for the petitioner specifically stated that the petitioner has not urged in his writ petition that the punishment imposed against him by the respondent bank is either excessive or shockingly disproportionate which requires to be altered. Learned counsel states that the petitioner approached this Court seeking issuance of writ of mandamus contending that using the credit cards in excess of their limit is not a misconduct enumerated in the rules of the bank, it does not even a misconduct generally against which disciplinary proceedings can be initiated. According to the petitioner, the respondent bank issued credit cards to him just as it issued to the other customers, for any violation or breach of terms of the said credit cards action can be taken against him just as in case of any other customer, but it cannot be a ground to initiate disciplinary proceedings against him viewing it as a misconduct. In support of his contention, the learned counsel relied on the following decisions:

(1) Rasiklal Vaghajibhai Patel Vs. Ahmedabad Municipal Corporation and Another, wherein the Supreme Court held as follows:

It is well settled that unless either in the Certified Standing Order or in the service regulations an Act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct as misconduct and punish the workman even though the alleged misconduct would not be comprehended in any of the enumerated misconduct.

(2) A.L. Kalra Vs. Project and Equipment Corporation of India Ltd., in which case:

The officer of the public sector found to have committed lapse in not returning the house building advance and vehicle purchase advance. He was removed from service after initiating domestic enquiry against him by viewing the said lapse as misconduct. The Supreme Court held that failure to return advance for house

building and for purchasing vehicle cannot be viewed as misconduct since the remedy for breach was provided in the relevant rules and the removal of the officer from the service is not proper.

19. The Supreme Court enunciated the legal position on the issue in the following terms:

What in a given context would constitute conduct unbecoming of a public servant to be treated as misconduct would expose a gray area not amenable to objective evaluation. Where misconduct when proved entails penal consequences, it is obligatory on the employer to specify and if necessary define it with precision and accuracy so that any ex post facto interpretation of some incident may not be camouflaged as misconduct.

If the rules for granting the advance themselves provided the consequence of the breach of conditions, it would be idle to go in search of any other consequence by initiating any disciplinary action in that behalf unless the 1975 Rules specifically incorporate a rule that the breach of House Building Advance Rules would by itself constitute a misconduct.

20. Turning to the case on hand, the petitioner, officer of the bank charged under Regulation 19 of the Andhra Bank Officer Employees' (Conduct) Regulations, 1981 which deals with "indebtedness", reads as:

An officer employee shall so manage his private affairs as to avoid habitual indebtedness or insolvency. An officer employee against whom any legal proceedings are instituted for the recovery of any debt due from him or for adjudging him as an insolvent shall forthwith report the full facts of the legal proceedings to the Bank.

21. The regulation thus obviously deals with habitual indebtedness, but not with excessive indebtedness. In Ramnath Ayer's Law Lexicon habitual is defined as constant customary or repeatedly. Except the allegation of using the credit card in excess of their ceiling no instance of indebtedness of the petitioner was brought on record by the respondent bank against him in the domestic enquiry. On account of using credit cards in excess of the ceiling limits, it is not possible to visualize that the petitioner was indulging in habitual indebtedness. It was only a stray instance of using the credit cards in excess of their ceiling.

22. The version of the petitioner is that under some compelling circumstances he used the credit card in excess of its limit and that he was in a position to repay the amount utilized. He also stated in his explanation that he had a house property and he could be able to repay the amount to the respondent bank by selling away the said property. The respondent bank, however, had recovered the amount from his salary before he compulsorily retired from service. Therefore, certainly the first charge levelled against the petitioner does not attract Regulation 19 of the said Rules. Regulation 3 deals with the general conduct of the officer employee and lays down that every officer employee has to discharge

his duties with utmost integrity, honesty, devotion and diligence and do nothing which is unbecoming of an officer employee. Here it is to be seen that even the Regulation 3 relates to the general conduct of the employee in the performance of his official duties or in exercise of powers conferred on him. Here, we are dealing with a situation wherein an officer of the employee utilizing the credit cards in excess of their ceiling, it cannot be said that the act is committed in the course of discharge of the official duties of the petitioner, who is the officer of the employee.

23. The respondent bank issued credit cards to the petitioner just as it issued to many other customers. Any breach of the conditions of the credit cards is committed, the action should be against the said breach and in accordance with the remedy provided for the violations. It is not the case where the petitioner using the credit card of some other persons or committing any fraudulent or deceitful act by using the said credit cards. The facts of the case in hand are identical to the facts of the case in A.L. KALRA case (8th supra). Nothing was brought on record either in the case of domestic enquiry or before this Court that using credit card in excess of its limit is a misconduct as per the regulations of the Bank governing the petitioner. Therefore, I am of the considered view that by exercising power of judicial review under Article 226 of the Constitution of India this Court can review the order passed by the enquiry officer which was confirmed by the disciplinary authority. As the conduct of the petitioner cannot be treated as misconduct enumerated under Regulation 3 or 19 of the Andhra Bank Officer Employees' (Conduct) Regulation, 1981, the petitioner is entitled to be reinstated into service.

24. The other question now comes up for consideration is whether the petitioner is entitled for back wages and all consequential benefits. When an employee is ordered to be reinstated into service upon setting aside the order of termination/removal of service by the employer, the employee will not get an indefeasible right of back wages. The court has to take into consideration the facts and circumstances of the case, the conduct of the parties, totality of the circumstances either to give or refuse the back wages. In this context, it would be relevant to refer the following judgment of the Supreme Court in Chairman-Cum-M.D Chairman-Cum-M.D., Coal India Ltd. and Others Vs. Ananta Saha and Others, the Supreme Court held as follows:

That even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is re-instated, it would not automatically make him entitled for back wages as entitlement to get back wages is independent of re-instatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the

court or the tribunal should not be rigid or mechanical but flexible and realistic.

25. Keeping in view the above principles laid down by the Hon''ble Supreme Court, I am of the view that in the instant case, since the petitioner was out of employment for a period of 12 years pursuant to the order of compulsory retirement passed against him by the respondent bank and also considering the fact that the enquiry was not initiated on any false grounds, he is not entitled for back wages. Consequently, the petitioner is directed to be reinstated into service with all consequential benefits pertaining to his service without back wages. In the result, the writ petition succeeds and the same is allowed to the extent indicated above. There shall be no order as to costs.