
(2005) 03 AHC CK 0248
In the Allahabad High Court
Case No : C.M.W.P. No. 34636 of 2003

Viresh Kumar Tiwari

APPELLANT

Vs

Zila Sahkari Bank Ltd. and Others

RESPONDENT

Date of Decision : 07-03-2005

Acts Referred:

Citation : (2005) 3 ESC 1723

Hon'ble Judges : Dilip Gupta, J

Bench : Single Bench

Advocate : H.N. Tripathi, for the Appellant; P.N. Ojha and S.C., for the Respondent

Final Decision : Allowed

Judgement

Dilip Gupta, J.—This writ petition has been filed for quashing the orders dated 30.4.2003 and 8.5.2003 and for a direction to the respondents to reinstate the petitioner on the post of Clerk-cum-Cashier in the Zila Co-operative Bank Ltd., Ballia (hereinafter referred to as the "Bank"). By the order dated 30.4.2003 the U.P. Co-operative Institutional Service Board, Lucknow (hereinafter referred to as the "Board") granted approval to the proposal of the Bank dated 13.3.2003 for dismissing the petitioner from the services of the Bank and by the order dated 8.5.2003 the petitioner was dismissed from the services of the Bank.

2. While the petitioner was working as the Clerk-cum-Cashier in the Bank, disciplinary proceedings were initiated against him and he was placed under suspension by means of the order dated 16.9.1994. On the basis of the charge-sheet dated 2.3.1995 an enquiry was conducted against the petitioner and the Enquiry Officer submitted his report dated 22.11.2001 holding that the charges against the petitioner stood proved. The Administrative Committee of the Bank met on 13.3.2003 and decided to dismiss the petitioner from the services of the Bank. The approval from the Board was sought by means of the communication dated 17.4.2003 and the same was granted by the Board on 30.4.2003 and thereafter the dismissal order dated 8.5.2003 was issued.

3. I have heard Dr. H.N. Tripathi, learned Counsel for the petitioner, Sri P.N. Ojha, learned Counsel appearing for the respondent Nos. 1 to 3 and the learned Standing Counsel appearing for respondent No. 5. Though notice was issued to respondent No. 4 but no Counsel has put in appearance on behalf of respondent No. 4.

4. Dr. H.N. Tripathi, learned Counsel for the petitioner submitted that the charge-sheet was not served upon the petitioner at all; that neither the show cause notice dated 17.5.2002 enclosing the copy of the enquiry report said to have been sent by Registered post was served upon the petitioner and nor was the show cause notice dated 5.2.2003 said to have been sent by Registered post was served upon the petitioner and, therefore, the orders impugned are in complete violation of the principles of natural justice and against the provisions of Regulation 85 contained in the U.P. Co-operative Societies Employees Services Regulations, 1975 (hereinafter referred to as the "Regulations").

5. Sri P.N. Ojha, learned Counsel for the respondent Bank, however, submitted that it cannot be contended by the petitioner that the charge-sheet was not served upon him because a bare perusal of the impugned order dated 8.5.2003 clearly shows that repeated opportunities were granted to the petitioner to file a reply and even the opportunity of personal hearing was granted by the Enquiry Officer but the petitioner failed to avail of this opportunity and, therefore, he cannot be permitted to contend that the Enquiry Officer had conducted the proceedings in breach of the principles of natural justice. He further submitted that the show cause notices dated 17.5.2002 and 5.2.2003 were sent to the petitioner by Registered post. According to him, the disciplinary proceedings had been conducted in accordance with the provisions of Regulation 85 of the Regulations and no infirmity can be said to be attached to the impugned orders.

6. I have carefully considered the submissions advanced by the learned Counsel for the parties and have perused the materials available on record.

7. The first contention of Dr. H.N. Tripathi, learned Counsel for the petitioner is that the charge-sheet dated 2.3.1995 was never served upon the petitioner and, therefore, the entire proceedings culminating in the dismissal order dated 8.5.2003 are bad in law. According to him, though it has been mentioned in the impugned order dated 8.5.2003 that the charge-sheet was sent to the petitioner but only vague averments have been made and there is no mention as to how and on what date it was actually served upon the petitioner and neither has any document been annexed in the counter-affidavit to indicate as to how the charge-sheet was served upon the petitioner. Sri P.N. Ojha, on the other hand, relied upon the averments made in the counter-affidavit and submitted that the charge-sheet was sent to the petitioner by Registered post at his permanent address and also through Special Messenger but the petitioner refused to accept the charge-sheet.

8. It is true that the impugned order dated 8.5.2003 does make a mention that

the charge-sheet was issued to the petitioner and repeated opportunities were granted to the petitioner to file a reply to the charge-sheet and to appear for personal hearing also but in paragraphs 8 and 12 (a) and 12 (c) of the writ petition a specific averment has been made by the petitioner that the charge-sheet was not served upon him. The reply to the averments made in paragraph 8 of the writ petition which is contained in paragraph 9 of the counter-affidavit filed on behalf of the Bank, inter alia, mentions that the charge-sheet was sent through Registered post to the petitioner at his permanent address and also through Special Messenger but the petitioner refused to accept the charge-sheet. No document, however, has been annexed which may indicate that it was ever sent by Registered post and nor has the endorsement of the Special Messenger been annexed. Even the dates on which the said Registered letter was sent, has not been indicated and nor the date on which the petitioner refused to accept the charge-sheet sought to be served by Special Messenger, has been indicated. The reply to the averments contained in paragraph 12 (a) and 12 (f) of the writ petition contained in paragraphs 14 and 15 of the counter-affidavit are equally vague. In view of the specific averments made by the petitioner in the writ petition that the charge-sheet was not served upon him, it was for the respondents to have substantiated the claim of service of the charge-sheet by specific averments and authentic documents but this was not done. It is, therefore, difficult to hold that the charge-sheet was actually served upon the petitioner.

9. Regulation 85 of the Regulations provides that the disciplinary proceedings against an employee shall be conducted by the Inquiry Officer with due observance of the principles of natural justice for which it shall be necessary that the employee shall be served with a charge-sheet containing specific charges and allegation of evidence in respect of each charge and he shall be required to submit explanation in respect of the charges within reasonable time which shall not be less than 15 days. It further provides that the employee shall also be given an opportunity to produce at his own costs or to cross-examine witnesses in his defence and shall also be given an opportunity of being heard in person, if he so desires. It is only when no explanation in respect of the charge-sheet is received or the explanation submitted is unsatisfactory that the competent authority may award him appropriate punishment.

10. The Supreme Court in the case of Sahadu Bala Botre (dead) by LRs. and another Vs. Namdeo Bapuji Kerala (Dead) by LRs. and others, examined the principles of natural justice in the context of disciplinary proceedings and held as follows :

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

(7) There may be situations where the interests 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."

11. In the instant case the charge-sheet was not served upon the petitioner at all. This is a case of violation of the substantive provision falling under the category of "no notice" or "no opportunity". Thus, in view of the provisions of Regulation 85 and the principles enumerated by the Supreme Court in the case of State Bank of Patiala and others (supra) the impugned orders are liable to be set aside.

12. Sri P.N. Ojha, learned Counsel for the respondent Bank then submitted that a show cause notice dated 17.5.2002 enclosing the copy of the enquiry report was sent to the petitioner by Registered post and since he failed to submit a reply to the said notice, the petitioner cannot be heard to make any complaint about the violation of the principles of natural justice.

13. Dr. H.N. Tripathi, learned Counsel for the petitioner, on the other hand, submitted that the said Registered letter was never served upon the petitioner and in respect of his contention, he placed reliance upon the averments made in paragraph 12 (g) of the writ petition wherein the petitioner has made a specific averment that the said letter was never presented before the petitioner and so the question of refusal to accept the Registered letter is baseless and incorrect and the respondents were required to establish that the petitioner had refused to receive the show cause notice. The reply to this averment is contained in paragraph 15 of the writ petition but the averments are absolutely vague and no documents have been annexed to support the contention of the respondents. Paragraph 15 of the counter-affidavit is quoted below :

"That the contents of paragraph Nos. 12 (b) to 12 (k) of the writ petition are false, incorrect and are denied. The judgment cited in the para under reply are not applicable to the case of the petitioner on account of the fact that the facts of both the cases are different. The sole contention of the petitioner in the para under reply that he was not afforded opportunity of hearing prior to passing of impugned order dated 8.5.2003. It is further submitted that the order dated 8.5.2003 was passed after affording several opportunity to the petitioner and after following the procedure under Regulations 84 and 87 of the Regulations. It is totally false to state that the disciplinary proceeding initiated against the petitioner under local pressure."

14. Thus, I am unable to accept the contention of the respondent Bank that the petitioner refused to accept the show cause notice dated 17.5.2002.

15. Sri P.N. Ojha, learned Counsel for the respondent Bank also submitted that subsequently when the matter was placed before the Administrative Committee of the Bank then another show cause notice dated 5.2.2003 was sent to the petitioner by Registered post requiring the petitioner to file a reply by 20.2.2003. The impugned order dated 8.5.2003 mentions that even this show cause notice was not received by the petitioner and in such circumstances he submitted that no relief should be granted to the petitioner. This fact has also been specifically denied by the petitioner in paragraph 12 (g) of the writ petition but the reply to this paragraph which is contained in paragraph 15 of the counter-affidavit is absolutely vague. It was for the respondents to have substantiated their claim about service of the show cause notice by Registered post but they have failed to do so. In paragraph 11 of the counter-affidavit it has also been stated that the show cause notice dated 5.2.2003 (wrongly mentioned as 15.2.2003) was sent to the petitioner by Registered post and the envelope has been annexed as Annexure "CA 11" to the counter-affidavit bearing the endorsement of the

Postman that the addressee could not be met even after repeated visits. The endorsement is not to the effect that the addressee refused to receive the letter. In the absence of any document to substantiate that the Registered letter dated 5.2.2003 was either accepted or refused by the petitioner, it cannot be held that the said letter was served upon the petitioner.

16. In the end, Sri P.N. Ojha, learned Counsel for the respondent Bank submitted that another letter dated 12.3.2003 was sent to the petitioner by Special Messenger requiring him to appear before the Administrative Committee for personal hearing on 13.3.2003. The Special Messenger could not meet the petitioner and, therefore, a news item was published in the newspaper requiring the petitioner to appear before the meeting of the Administrative Committee to be held on 13.3.2003. Dr. H.N. Tripathi, learned Counsel for the petitioner submitted that in the first instance the petitioner had no knowledge about the publication in newspaper and secondly calling upon the petitioner to file a reply on the same date the news item is published in an empty formality and serves no purpose. The respondents have not annexed the copy of the newspaper publication, which could have indicated the precise nature of the publication. The petitioner had to be made aware the precise allegations against him before he could be asked to appear before the Administrative Committee on the said date. Thus, in my opinion, it cannot be said that any proper opportunity was granted to the petitioner at all by this mode.

17. Sri P.N. Ojha, learned Counsel for the respondent Bank has placed reliance upon a decision of a Division Bench of this Court in the case of Sudhir Singh v. District Co-operative Bank Ltd., Muzaffarnagar 2003 (1) ESC 465 . The said decision is of no benefit to the petitioner because the Court was not inclined to interfere with the impugned order of termination of service since the facts disclosed in the counter-affidavit indicated that the petitioner did not co-operate with the enquiry. The facts in the present case are quite contrary. The other decisions relied upon by the learned Counsel for the petitioner, namely, Lalit Popli Vs. Canara Bank and Others, and Aligarh Muslim University and Others Vs. Mansoor Ali Khan, also do not help him. In the instant case even the charge-sheet was not served upon him and, therefore, the basic requirement of the principles" of natural justice was not complied with. The other two show cause notices dated 17.5.2002 and 5.2.2003 were also not served upon the petitioner. The enquiry was conducted de hors the provisions of Regulation 85 of the Regulations.

18. For all the reasons stated above, the impugned orders dated 30.4.2003 and 8.5.2003 cannot be sustained and are set aside. It shall, however, be open to the respondents to conduct the enquiry in accordance with law but while doing so since a substantial period of time has already lapsed from the date the disciplinary proceedings were initiated against the petitioner, they may consider whether it would be appropriate to reopen the matter now. The grant of consequential benefits, however, would depend upon the decision to be taken by

the authorities regarding initiation of the disciplinary proceedings.

19. The writ petition, therefore, succeeds to the extent indicated above. There shall be no order as to costs.