

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7 OF 2014

Balasaheb S/o Raghunath Bankar,
Age-32 years, Occu-Nil,
R/o.Padhegaon, Tq.Shrirampur,
Dist.Ahmednagar

PETITIONER

VERSUS

The Rayat Sevak Co-operative Bank Ltd.,
Satara, 455/2/20-F, Peth,
Sadar Bazar, Satara,
Through its Senior Manager,

RESPONDENT

Mr.V.P.Latange, Advocate for the petitioner.
Mr.V.D.Sapkal, Advocate for the respondent

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 27/07/2015

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. As I advert to the contentions of the litigating sides, the undisputed aspects emerging from this case are as follows :-

- a. The petitioner was working as a "Peon" with the respondent / Bank from 2001.
- b. He was charged with committing a mis-conduct by charge

sheet dated 25/03/2008.

- c. He submitted a detailed reply and while admitting the charges levelled upon him, tendered an apology and also deposited the amount said to have been misappropriated.
- d. A departmental enquiry was conducted and finally the petitioner was awarded the punishment of dismissal from service w.e.f. 03/10/2008.
- e. He preferred Complaint (ULP) No.14/2010 before the Labour Court for challenging his dismissal.
- f. By Part-I order dated 19/10/2012, the enquiry was held to be fair and proper and the findings of the Enquiry Officer were sustained.
- g. The Part-I order dated 19/10/2012 has not been challenged by the petitioner before any Court.
- h. The Labour Court dealt with the proportionality of the punishment and by its judgment dated 21/12/2012, allowed the complaint partly by quashing and setting aside the order of punishment dated 03/10/2008 and issued a direction to the respondent to reinstate the petitioner in service with continuity.
- i. Back wages were denied.
- j. The respondent/Management preferred Revision (ULP) No.4/2013 and the petitioner preferred Revision (ULP) No.6/2013 before the Industrial Court.
- k. It is undisputed that the Part-I order delivered by the Labour Court dated 19/10/2012 was not subject matter of the revision.
- l. By the impugned judgment dated 20/03/2013, the revision petition preferred by the petitioner was dismissed and the one

preferred by the respondent/management was allowed.

- m. The judgment of the Labour Court dated 21/12/2012 was quashed and set aside and the order of punishment was upheld.

3. The petitioner has strenuously contended that the proportionality of the punishment in relation to the seriousness and gravity of the mis-conducts at issue is the only aspect which needs consideration. The petitioner had pleaded guilty which establishes his honesty. He had specifically stated that the amount of Rs.5,000/- at issue was mistakenly retained by him and which was deposited with the respondent/Bank, the moment he realized that it was an error on his part. He had his own financial difficulties. Nevertheless, the fact that he pleaded guilty and tendered an apology, would establish that he did not have the attitude and characteristic of being a dishonest employee.

4. Mr.Latange has further canvassed that charges of disobeying a superior or remaining absent are minor charges. The only charge, which appears to be serious, is with regard to creating a false record or manipulating the documents for his benefit or committing misappropriation of a small amount.

5. Mr.Latange solemnly submits that the petitioner was a “Peon”. He is neither educated to be appointed as a “Clerk” nor was he ever so appointed. The Management used to direct him to perform certain assignments which only a Clerk could perform. Since he had seen Clerks around him working in the Bank and since he could easily perform the said work, he used to obey the orders of his Superior.

6. He further submits that no doubt, he has committed a mistake with regard to Rs.5,000/- which amount was deposited with the respondent/Bank without hesitation when he realized that it was a mistake. His conduct has not caused any loss to the Bank, in as much as, it is not the case of the respondent that they have lost money due to the acts committed by the petitioner. He, therefore, prays for leniency and submits that he may even be appointed as a “Peon” by issuing a fresh order. He is in his 30's and cannot survive without an employment.

7. Mr.Sapkal, learned Advocate for the respondent/Bank has vehemently opposed the petition. He has taken me through the charges levelled upon the petitioner. He reiterates that since the Part-I order dated 19/10/2012 is not at issue, the Court cannot reopen the case. Proportionality of the punishment is to be seen

from the act committed. The respondent is a Bank which operates its business on “trust” and “faith” of the depositors. The petitioner cannot be retained in employment as the Bank has lost faith and trust in him. He further submits that this Court may not foist the petitioner on the Bank.

8. Considering the fact situation and the submissions of the learned Advocates, the issue is as to whether the punishment awarded to the petitioner could be said to be shockingly disproportionate. The Wednesbury principles as have been deduced in the matter of Associated Provincial Picture Houses Ltd. v/s Wednesbury Corporation [(1947) 2 ALL ER 680 : (1948) 1 KB 223], decides the scope of judicial review in interfering with an administrative function of an establishment or an employer.

9. The two relevant paragraphs set out in the Wednesbury Corporation judgment (supra) read as under :-

“The contention of the authority, in my opinion, is based on a misconception of the effect of the Act in granting this discretionary power to local authorities. The courts must always remember, first, that the Act deals, not with a judicial act, but with an executive act; secondly, that the

conditions which, under the exercise of that executive act, may be imposed are in terms put within the discretion of the local authority without limitation; and thirdly, that the statute provides no appeal from the decision of the local authority. What, then, is the power of the courts ? The courts can only interfere with an act of an executive authority if it be shown that the authority have contravened the law. It is for those who assert that the local authority have contravened the law to establish that proposition. On the face of it, a condition of this kind is perfectly lawful. It is not to be assumed prima facie that responsible bodies like local authorities will exceed their powers, and the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for the local authority. It is only concerned with seeing whether or not the proposition made good. When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the

discretion is an absolute one and cannot be questioned in any court of law.

What, then, are those principles? They are perfectly well understood. The exercise of such of a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty-those, of course, stand by themselves-unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word "unreasonable." It is true the discretion

must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, you may have something so absurd that no sensible person could even dream that it lay within the powers of the authority. WARRINGTON, L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.....”

10. The Apex Court has relied upon the view taken by the Kings

Bench in the *Wednesbury Corporation Judgment* (supra) in the case of Om Kumar V/s Union of India [(2001) 2 SCC 386], in paragraph Nos.27, 28 and 71, which read as under :-

“27. The principle originated in Prussia in the nineteenth Century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court had applied the principle of 'proportionality' to legislative action since 1950, as stated in detail below.

28. By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the

choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality.”

“71. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as ‘arbitrary’ under Article 14, the Court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing Court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The Court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the Courts, and such extreme or rare cases can the Court substitute its own view as to the quantum of punishment.” (Emphasis supplied).

11. The Apex Court, in the Case of B.C.Chaturvedi Vs/ Union of India [(1995) 6 SCC 749], has also relied upon the view taken by the Kings Bench in the Wednesbury Corporation Judgment in paragraph No.18, as under :-

“18. A review of the above legal position would establish that

the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.”

12, The Apex Court, in the case of Union of India V/s G.Ganayutham [(1997) 7 SCC 463], has also discussed the view taken in the case of *Wesdesbury Corporation case* (supra). Relevant paragraph Nos. 31 and 33, read as under :-

“31. The current position of proportionality in administrative law in England and India can be summarised as follows:-

*(1) To judge the validity of any administrative order or statutory discretion, normally the *Wednesbury* test is to be applied to find out if the decision was illegal or suffered*

from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bonafide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury test.

(2) The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English Administrative Law in future is not ruled out. These are the CCSU principles.

(3)(a) As per Bugdaycay, Brind and Smith, as long as the Convention is not incorporated

into English Law, the English Courts merely exercise a secondary judgment to find out if the decision maker could have, on the material before him, arrived at the primary judgment in the manner he had done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English Courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the Courts/Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the

primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principle of 'proportionality' and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primary role only if the freedoms under Article 19, 21 etc. are involve and not for Article 14.

33. In Ranjit Thakur, this Court interfered with the punishment only after coming to the conclusion that the punishment was in outrageous defiance of logic and was shocking. It was also described as perverse and irrational. In other words, this Court felt that, on facts, Wednesbury and CCSU tests were satisfied. Similar view was taken in Indian Oil Corporation vs. Ashok Kumar Arora [1997 (3) SCC 72], that the Court will not intervene unless the punishment is wholly disproportionate."

13. In the above backdrop, the fact remains that the petitioner had resorted to causing interpolations in the record of the Bank. Similar is his involvement with regard to an amount of money which charges

have been proved in the Enquiry. The Apex Court in the case of Janatha Bazar (South Kanara Central Co-operative Whole Sale Stores Limited) Etc. Vs. The Secretary, Sahakari Noukarana Sangha Etc. [2000 AIR SCW 3439 = AIR 2000 SC 3129] has decided the scope of interference of the Court in the quantum of punishment u/s 11-A of the Industrial Disputes Act. The relevant paragraphs 3, 6 and 8 read as under :-

“3. The question involved in these appeals is -- Whether High Court was justified in confirming the order passed by the Labour Court reinstating the respondents-workmen with 25% back wages inspite of specific finding of fact that the charges of breach of trust and misappropriation of goods for the value given in the said charges had been clearly established. Apparently, it would be an unjustified direction to reinstate an employee against whom charge of misappropriation is established. A proved act of misappropriation cannot be taken lightly even though number of such misappropriation cases remain undisclosed and such employees or others amass wealth by such means. In any case, misappropriation cannot be rewarded or legalised by reinstatement in service with full or part of back wages.

6. As stated above, the learned Single Judge and the Division Bench in writ appeals confirmed the findings given by the Labour Court that charges against the workmen for breach of trust and misappropriation of funds entrusted to them for the

value mentioned in the charge-sheet had been established. After giving the said findings, in our view, the Labour Court materially erred in setting aside the order passed by the Management removing the workmen from the service and reinstating them with 25% back wages. Once act of misappropriation is proved, may be for a small or large amount, there is no question of showing uncalled for sympathy and reinstating the employees in service. Law on this point is well settled. [Re.: Municipal Committee, Bahadurgarh v. Krishnan Behari and Ors. [1996] 2 SCR 827]. In *U.P. State Road Transport Corporation v. Basudeo Chaudhary and Anr.* : (1997)11 SCC 370 this Court set aside the judgment passed by the High Court in a case where a conductor serving with the U.P. State Road Transport Corporation was removed from service on the ground that alleged misconduct of the conductor was attempt to cause loss of Rs. 65/- to the Corporation by issuing tickets to 23 passengers for a sum of Rs. 2.35 but recovering @ Rs. 5.35 per head and also by making entry in the way bill as having received the amount of Rs. 2.35, which figure was subsequently altered to Rs. 2.85. The Court held that it was not possible to say that Corporation removing the conductor from service has imposed a punishment which is disproportionate to his misconduct. Similarly in *Punjab Dairy Development Corporation Ltd. and Anr. v. Kala Singh and Ors.* : (1997) ILLJ 1041 SC, this Court considered the case of a workman who was working as a Dairy Helper-cum-Cleaner for collecting the milk from various centers and was charged for the misconduct that he inflated the quantum of milk supplies in milk centers and also inflated the quality of fat contents where there

were less fat contents. The Court held that "in view of proof of misconduct a necessary consequence will be that Management has lost confidence that the workman would truthfully and faithfully carry on his duties and consequently the Labour Court rightly declined to exercise the power under Section 11A of the I.D. Act to grant relief with minor penalty".

8. In case of proved misappropriation, in our view, there is no question of considering past record. It is the discretion of the employer to consider the same in appropriate cases, but the Labour Court cannot substitute the penalty imposed by the employer in such cases." (Emphasis supplied).

14. The Apex Court in the case of Managing Director, ECIL, Hyderabad Vs. B.Karunakar, AIR 1994 SC 1074 = (1993) 4 SCC 727, has dealt with the aspect of the right of a workman in disciplinary proceedings. The 15th amendment to the Constitution gave the workman / employee a right to show cause on the charge sheet and then the second right to show cause on the quantum of punishment. By the 42nd amendment, the second right was altered. The right to show cause on the quantum of punishment was taken away and the right to show cause on the findings of the Enquiry Officer were given to an employee. It was thus left to the employer to decide the quantum of punishment.

15. The Division Bench of this Court in the matter of P.R.Shele Vs. Union of India and others [2008 (2) Mh.L.J. 33] has held in paragraph Nos.9, 10 and 15 as under :-

“9. We may also refer to yet another judgment of the Supreme Court in *Union of India and Ors. v. Upendra Singh* (1994) ILLJ 808 SC. The relevant observations of the Supreme Court may be quoted:

In the case of charges framed in a disciplinary inquiry the tribunal or Court can interfere only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. At this stage, the tribunal has no jurisdiction to go into the correctness or truth of the charges. The tribunal cannot take over the functions of the disciplinary authority. The truth or otherwise of the charges is a matter for the disciplinary authority to go into. Indeed, even after the conclusion of the disciplinary proceedings, if the matter comes to Court or tribunal, they have no jurisdiction to look into the truth of the charges or into the correctness of the findings recorded by the disciplinary authority or the appellate authority as the case may be.

The jurisdiction of the Central Administrative Tribunal is akin to the jurisdiction of the High Court under

Article 226 of the Constitution. Therefore, the principles, norms and the constraints which apply to the said jurisdiction apply equally to the Tribunal. If the original application of the respondent were to be filed in the High Court it would have been termed, properly speaking, as a writ of prohibition. A writ of prohibition is issued only when patent lack of jurisdiction is made out. It is true that a High Court acting under Article 226 is not bound by the technical rules applying to the issuance of prerogative writs like certiorari, prohibition and mandamus in United Kingdom, yet the basic principles and norms applying to the said writs must be kept in view.

“10. We may also refer to the judgment of this Court in Ramchandra Govindrao Gaidhani v. Union of India and Anr. delivered on 18-9-2006 in Writ Petition No. 6211 of 1999, to which one of us (Smt. Ranjana Desai, J.) is a party. Similar view has been taken by this Court in that case. Examined in the light of the above judgments, we cannot fault the Tribunal for having refused to examine the correctness, the truth or otherwise of the charges. We cannot lose sight of the fact that the petitioner did not challenge the Disciplinary Authority's order or the Appellate Authority's order. The first submission of learned Counsel for the petitioner must, therefore, fail.

“15. We may also refer to another judgment of the Supreme Court in Managing Director, North-East Karnataka Road

Transport Corporation v. K. Murti . The relevant paragraph of the judgment may be quoted:

The learned Counsel for the appellant, at the time of hearing, placed strong reliance on the two decisions of this Court, one in Regional Manager, Rajasthan SRTC v. Ghanshyam Sharma which was also a case of bus conductor carrying passengers without issuing tickets. This Court, in the above case, held that carrying the passengers without tickets amounts to dishonesty or grave negligence and for such misconduct punishment of removal from service is justified. This Court also further observed that the Labour Court was not justified in directing the reinstatement with continuity of service but without backwages. This Court has also relied upon a judgment in Karnataka SRTC v. B.S. Hullikatti. In the said judgment, this Court has held that in such cases where the bus conductors carry passengers without ticket or issue tickets at a rate less than the proper rate, the said acts would inter alia amount to either being a case of dishonesty or of gross negligence and such conductors were not fit to be retained in service because such inaction or action on the part of the conductors results in financial loss to the Road Transport Corporation. This Court has also observed that in cases like the present, orders of dismissal should not be set aside. The learned Counsel for the appellant also cited Divisional Controller, N.E.K.R.T.C. v. H. Amaresh. In this case, this Court was considering

the case of misappropriation of a small amount of State Road Transport Corporation's fund by a conductor and held it a grave act of misconduct, which resulted in financial loss to the Corporation. This Court also held that punishment of dismissal from service awarded by the disciplinary authority did not call for any interference by the Labour Court or the High Court and hence the order of reinstatement passed by the High Court was set aside. This Court also in a catena of decisions held that the Tribunal should not sit in appeal over the decision of any employer unless there exists a statutory provision in this behalf. This Court also observed that the High Court gets jurisdiction to interfere with the punishment in the exercise of its jurisdiction under Article 226 of the Constitution only when it finds that the punishment imposed is shockingly disproportionate to the charges proved."

16. It is thus crystallized that the amount mis-appropriated is not germane. It is the act of misappropriation which indicates the attitude and character of a personality. The Division Bench, therefore, concluded that in a case of misappropriation, any interference by the Court in modifying the quantum of punishment would amount to showing misplaced sympathy.

17. In the case of Chairman and Managing Director, United

Commercial Bank V/s P.C.Kakkar [(2003) 4 SCC 364], the Apex Court concluded that unless it appears to the Court that the punishment of dismissal was in outrageous defiance of logic and moral standards, there should be no interference in the quantum of punishment. Interference is permissible only if the quantum of punishment in relation to the gravity of the mis-conduct shocks judicial conscience.

18. Keeping in view the law as it stands today, I do not find that the impugned judgment of the Industrial Court dated 20/03/2013 could be termed as being perverse or erroneous. This petition is devoid of merit and is therefore dismissed.

19. Rule is discharged.

(RAVINDRA V. GHUGE, J.)