IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 19TH DAY OF MARCH 2015/28TH PHALGUNA, 1936

W.P.(C).No.2850 of 2009 (L)

AGAINST THE AWARD IN I.D.NO.339 OF 2006 DATED 09.07.2008 OF THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, ERNAKULAM.

PETITIONER(S):-

THE FEDERAL BANK LTD.,
HEAD OFFICE, ALUVA-1,
REPRESENTED BY ITS MANAGING DIRECTOR & CEO.

BY ADVS.SRI.B.S.KRISHNAN (SENIOR ADVOCATE)
SRI.J.B.CAMA (SENIOR ADVOCATE)
SRI.K.ANAND (SENIOR ADVOCATE)
SMT.LATHA KRISHNAN.

RESPONDENT(S):-

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1. CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, KARSHAKA ROAD, ERNAKULAM, COCHIN-16.

2. FEDERAL BANK STAFF UNION,
REPRESENTED BY ITS GENERAL SECRETARY,
BANK JUNCTION, ALWAYE-683101.

R1 BY ASSISTANT SOLICITOR GENERAL OF INDIA SRI.N.NAGARESH.
R2 BY ADVS. SRI.B.ASHOK SHENOY
SRI.ABU MATHEW
SRI.SOBHAN GEORGE
R1 BY ADV. SHRI.C.RASHEED, CGC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12-03-2015, ALONG WITH OP(LC).2/2011, THE COURT ON 19-032015 DELIVERED THE FOLLOWING:-

W.P.(C).NO.2850 OF 2009-L

APPENDIX

PETITIONER'S EXHIBITS:-

EXT.P1 TRUE COPY OF AWARD IN I.D.NO.339 OF 2006.

RESPONDENT'S EXHIBITS:-
-- NIL.

Vku/- [true copy]

K. Vinod Chandran, J.

W.P(C) No.2850 of 2009-L & O.P.(L.C.)No.2 of 2011-O

Dated this the 19th day of March, 2015

JUDGMENT

The management, a Scheduled Bank, is before this Court challenging the award of the Central Government Industrial Tribunal-cum-Labour Court, Ernakulam [hereinafter referred to as “Industrial Tribunal”] setting aside two punishments imposed on a workman; one of censure and the other of dismissal.

2. The issue turns on the interpretation of the terms of the bipartite settlement, applicable to the workman of the management. The terms of the bipartite settlement provides that, an enquiry need not be held if the Bank has issued a show cause notice to the employee, if the employee is charged with a minor misconduct and the punishment proposed to be issued is a warning or censure. The requirements were that the employee should be served with the show cause notice advising him of the misconduct and the evidence on which the charge is based; pursuant to which an opportunity to submit a written statement of defence, for which the employee had to have a right to access the documents and material on which the charge is based. A specific opportunity for

hearing was also contemplated on a request being made to that end, wherein the employee was competent to seek for representation by a representative as permitted, if an enquiry is held.

3. The specific clause on which the adjudication of the above dispute turns is, the following:

<u>"Clause 19.12(e) :</u>

"An enquiry need not be held if:

(a) the bank has issued a show cause notice to the employee advising him of the misconduct and the punishment for which he may be liable for such misconduct;

(b) the employee makes a voluntary admission of his guilt in reply to the aforesaid show cause notice; and

(c) the misconduct is such that even if proved the bank does not intend to award the punishment of discharge or dismissal.

However, if the employee concerned requests a hearing regarding the nature of punishment such a hearing shall be given.

(a) An enquiry need not also be held if the employee is charged with minor misconduct and the punishment proposed to be given is warning or censure. However,

(i) the employee shall be served a show cause notice advising him of the misconduct and the evidence on which the charge is based; and

(ii) the employee shall be given an opportunity to submit his written statement of defence, and for this purpose has a right to have access to the documents and material on which the charge is based;

(iii) if the employee requests a hearing such a hearing shall be given and in such a hearing he may be permitted to be represented by a representative authorised to defend him in an enquiry had such an enquiry been held.

(b) Where an employee is charged with a minor misconduct and an enquiry is not held on two previsions occasions, an enquiry shall be held in respect of the third occasion".

The other clause which assumes significance is Clause 19.5(f), which is extracted hereunder:

"19.5 By the expression "gross misconduct" shall be meant any of the following acts and omissions on the part of an employee :

xxx xxx xxx

(f) habitual doing of any act which amounts to "minor misconduct" as defined below, "habitual" meaning a course of action taken or persisted in notwithstanding that at least on three previous occasions censure or warnings have been administered or an adverse remark has been entered against him.

xxx xxx xxx".

Hence, if an employee is charged with a minor misconduct and if the Bank intends to merely impose a punishment or censure or warning, then no enquiry need be conducted on two occasions. However, on the third occasion even if the punishment intended is only of warning or censure, necessarily there should be an enquiry conducted. On four instances of such minor misconduct being committed, the same is treated as a “major misconduct”, being a habitual act which amounts to a “major misconduct”; which could lead to even dismissal.

4. The facts are now to be noticed with reference to W.P.(C).No.2850 of 2009, which challenges the award setting aside the punishment of censure. The workman was initially proceeded for unauthorised absence of 11 days between 21.03.1990 and 06.07.1990 by a show cause notice dated 31.07.1990, available in the paper book produced in W.P.(C).No.2850 of 2009. The workman was alleged to have availed of leave for reasons of failing health, without any medical certificate. It was also evident that except on one occasion the leave applications were submitted subsequent to his absence. The Branch, in which the workman was working, had directed the workman to produce medical certificate; which the workman had not complied with. In response, the workman merely sought for sanction of extra-ordinary leave. Disciplinary action was threatened. The workman submitted a reply dated 09.08.1990,

virtually admitting the fact of unauthorised absence and sought for permission to avail of sick leave with a medical certificate. Then again on 29.08.1990, the management issued a communication proposing to deal with the matter under Clause 3 of the bipartite settlement and expressing its intention to charge the employee with a minor misconduct, the punishment of which was proposed to be censure or warning. Objections were directed to be filed within seven days.

5. In the meanwhile, alleging further unauthorised absence of 13 days between 11.07.1990 and 31.08.1990, a further show cause notice was issued. The earlier action initiated by show cause notice dated 29.08.1990 was specifically referred to and it was stated in the subsequent show cause notice dated 04.10.1990 that the matter would be dealt, along with the issue referred in the earlier show cause notice of 29.08.1990. The intention to impose punishment only in the nature of warning or censure for the minor misconduct of unauthorised absence was declared in the said notice. No response was made by the workman. On 05.02.1991, an order of censure was passed against the workman, for both the instances of unauthorised absence.

6. Subsequently, on a third instance of unauthorised absence of 15 days between 12.09.1990 and 20.12.1990, a further show cause notice was issued on 16.02.1991. Again it was proposed that the matter will be dealt with under Clause 3 of the bipartite settlement, since the charge related to a minor misconduct and the punishment proposed was only a censure or warning. The absence was admitted by the workman by his communication dated 28.02.1991, claiming leave under various heads. A second punishment of censure was imposed by order dated 22.04.1991.

7. On a further charge of the very same nature, a charge-sheet was issued, enquiry was conducted and a punishment imposed of stoppage of increment for a period of six months, which is not relevant for consideration, as will be noticed immediately. The Union approached the appropriate Government under Section 10 of the Industrial Disputes Act, 1947 [for brevity "the ID Act"] for reference of the dispute on the question of justifiability of imposition of penalty of censure by order dated 22.04.1991, which was the subject matter of I.D.No.339 of 2006. The issue referred, as noticed by the Tribunal in the award produced at Exhibit P1 in W.P.(C). No.2850 of 2009 refers to both issues, i.e., the imposition of censure

and stoppage of increment. However, the Tribunal has in its award itself noticed that the question of issue of stoppage of increment for six months without cumulative effect was the subject matter of challenge in another Industrial Dispute, numbered as I.D.No.275 of 2006. In that Industrial Dispute, the said punishment of stoppage of increment is said to have been upheld. No challenge is raised by the workman against it.

8. On the basis of the award of censure on two occasions and the punishment of stoppage of increment on a third occasion, all for minor misconducts of unauthorised absence, the management proceeded against the workman for major misconduct under Clause 19.5(f) of the bipartite settlement. An enquiry was conducted and a punishment of dismissal was imposed. The same was again taken up by the Union before the appropriate Government and was referred for adjudication, which was numbered as I.D.No.72 of 2006 before the same Tribunal. The issue referred was the justifiability of the dismissal order passed. That award is assailed in O.P.(LC).No.2 of 2011.

9. The Tribunal in the award impugned in W.P.(C). No.2850 of 2009 found that the punishment of censure imposed by

order dated 22.04.1991 could have been imposed only by conducting an enquiry, since there were two earlier instances, where the workman was charged for minor misconduct, grounding such finding on the afore-extracted clause of the bipartite settlement. When that punishment of censure was set aside, as a natural consequence the major penalty imposed of dismissal of service also had to go, since then there was no “habitual act” of minor misconduct, which necessarily had to occur after three instances of minor misconduct charged having resulted in imposition of punishment.

10. On I.D.No.339 of 2006 being answered in favour of the workman, setting aside the order of censure dated 22.04.1991, what survived was the censure imposed by order dated 05.02.1991 and the stoppage of increment, which was upheld by the Tribunal in I.D.No.275 of 2006. Hence, the reference in I.D.No.72 of 2006 was also answered in favour of the workman. It was also found that the stoppage of increment would not come within the “habitual act” as contemplated in Clause 19.5(f) of the bipartite settlement for reason of reference only to warning and censure in the said clause. The said award is assailed in O.P.(LC) No.2 of 2007.

11. I have heard learned Senior Counsel Sri.J.B.Cama for the petitioner-Bank and learned counsel Sri.Ashok M.Shenoy for the respondent-Union.

12. The learned Senior Counsel would place reliance on the decisions in ***P.V.K.Distillery Ltd. v. Mahendra Ram*** **[(2009) 5 SCC 705]** and ***U.P.State Brassware Corpn. Ltd. and Another v. Udai Narain Pandey*** **[CDJ 2006 SC 043]** as also a Single Bench decision of this Court in ***C.L.Subramniam v. Collector of Customs*** **[1969 Lab.I.C.1269],** which admittedly has been overruled in ***C.L.Subramaniam v. Collector of Customs*** **[1972 (3) SCR 485];** but survives, according to learned Senior Counsel, insofar as the proposition he wishes to advance.

13. ***P.V.K.Distillery Ltd.*** (*supra*) and ***U.P.State Brassware Corpn. Ltd.*** (*supra*) are with respect to entitlement for full backwages on an order of reinstatement, which would be relevant for consideration only if the awards of the Tribunal are upheld. ***C.L.Subramaniam*** **[1969 Lab.I.C.1269]** is relied on to contend that the clubbing of two charge-sheets is a permissible exercise. Therein, a charge-sheet was issued and while the enquiry was in progress, another charge-sheet was issued and the charges

therein also were taken up for adjudication in the same enquiry. It is to be immediately noticed that therein the charges were inextricably linked. Here, though the charge was similar, being of unauthorised absence, it was with respect to two instances of different number of days in different periods. In any event, the clubbing of the two charges and imposition of one punishment, without enquiry, is not the question raised. As was noticed at the outset, the entire issue turns on the interpretation of the above extracted clause. The learned Senior Counsel would contend that the said clause has to be read with Clause 19.5(f); which speaks of three previous occasions on which censure or warning has been administered or an adverse remark entered against the delinquent.

14. True, the major misconduct being a habitual doing of any act which amounts to a minor misconduct; referred to a course of action taken or persisted in, notwithstanding that at least on three previous occasion censure or warning has been imposed. The contention raised on behalf of the management is that, consolidating the two charges issued on 29.08.1990 and 04.10.1990, an order of censure was issued on 05.02.1991. Subsequently, again on the misconduct of unauthorised absence, a charge-sheet was issued on

16.02.1991 and a censure imposed on 22.04.1991. The third instance of unauthorised absence was charged, enquiry held and the workman imposed with a punishment of stoppage of increment for six months without cumulative effect. Notwithstanding the said three punishments imposed, the workman again committed the misconduct of unauthorised absence, upon which the charge of “major misconduct” was framed, enquiry held and the workman dismissed from service. The argument is that, the third punishment of stoppage of increment without cumulative effect, was imposed after an enquiry as is contemplated in Clause 19.12(e). There was no requirement for an enquiry for imposition of the second censure, since it was only the second punishment imposed.

15. A reading of the specific clause extracted hereinabove as Clause 19.12(e), would indicate that an enquiry is given a go-by, if the employee is charged with minor misconduct, *inter alia* on the management proposing to impose only a punishment of censure or warning. However, though a minor misconduct, when on two previous occasions an enquiry has not been held, then on the 3rd occasion an enquiry has to be necessarily held. In the present case, with respect to the two 'censure' imposed,

there were three instances where charge-sheets were issued on 29.08.1990, 04.10.1990 and 16.02.1991. The first two instances were consolidated and a solitary punishment of censure was imposed. It is also evident from the second charge-sheet dated 04.10.1990 that the same was sought to be dealt with along with the earlier charge-sheet of 29.08.1990. It was the prerogative or the privilege of the management to club together such instances and impose only one punishment or two different punishments for the two instances.

16. However, the specific clause dealing with a mandatory enquiry, in respect of the third occasion, refers to **two previous occasions where an employee is charged with a minor misconduct.** There were two instances in which the employee was charged with unauthorised absence by charge-sheets dated 29.08.1990 and 04.10.1990. The fact that the same were clubbed together and a single punishment of censure was imposed is immaterial, going by the mandate of the bipartite settlement. It is to be emphasised that the mandate for enquiry is not on two punishments being imposed; but on two charges of misconducts being levelled on two previous occasions. The fact that the earlier

two charges relating to two previous occasions were consolidated and the Bank decided to impose only one punishment of censure, would not save the requirement of the enquiry on the third occasion. In such circumstance, the censure imposed by order dated 22.04.1991 on the basis of charge-sheet dated 16.02.1991 without an enquiry, falls foul of the mandate in the bipartite settlement. The finding in the award of the Tribunal impugned in W.P.(C).No.2850 of 2009 has to be upheld.

17. However, the learned Senior Counsel raises a contention that the management is entitled to substantiate the charges on evidence adduced before the Tribunal, which issue was not considered by the Tribunal. As has been held in ***Shambhu Nath Goyal v. Bank of Baroda*** **[(1983) 4 SCC 491]** and ***Karnataka State Road Transport Corpn. v. Lakshmidevamma*** **[(2001) 5 SCC 433],** the management has to take such prayer at the first instance, in the written statement, before the Tribunal. Evidently such contention has been taken at the first instance in the written statement. Necessarily the Tribunal would have to afford an opportunity to adduce evidence. In such circumstance, the award assailed in W.P.(C).No.2850 of 2009 would be treated as a preliminary order, setting aside the

punishment on the lack of enquiry and the management would be afforded an opportunity for adducing evidence to substantiate the charge.

18. When the censure imposed as per the order dated 22.04.1991 is set aside, definitely there would not be three earlier instances of a "minor misconduct" alleged and proved and punishment imposed. What survives is only the punishment of censure imposed on 05.02.1991, with respect to two occasions on which a solitary censure was imposed and the stoppage of increment, upheld in I.D.No.275 of 2006. While the mandate of enquiry is on the third occasion when the employee is charged with a minor misconduct; the 'habitual act' would be the 4th instance when the employee persists with an act when he had already been imposed a punishment of censure or warning on three previous occasions. The "occasion" in Clause 19.12(e)(b) relates to the "charge" and that in 19.5 relates to the "imposition of punishment".

19. However, since the earlier Industrial Dispute, with respect to the charge-sheet of 16.02.1991 has been remanded, the award setting aside the major misconduct of dismissal challenged in O.P.(LC).No.2 of 2011 would also have to be set aside and the

matter remanded for reconsideration to the Tribunal. The Tribunal shall first consider I.D.No.339 of 2006 and then I.D.No.72 of 2006.

20. With respect to the finding that stoppage of increment would not lead to a charge of major misconduct or "habitual act", this Court is unable to uphold the findings of the Labour Court in I.D.No.72 of 2006. The habitual act, which results in a gross misconduct, is the 4th instance; when on three previous occasions censure or warning have been administered or an adverse remark entered against the employee. The punishments for a minor misconduct have been detailed under Clause 19.8, which are as follows:

> "**19.8** An employee found guilty of minor misconduct may:
>
> (a) be warned or censured; or
>
> (b) have an adverse remark entered against him; or
>
> (c) have his increment stopped for a period not longer than six months.

The stoppage of increment is a more harsher punishment than a censure or warning or adverse remark. It cannot be said that when in three instances a lesser punishment was imposed, it could lead to a major punishment in the 4th instance and there could be no such allegation of a habitual act when in one of the earlier instance a harsher punishment for a minor misconduct was imposed. Such an interpretation would go against the terms of the settlement and would be incongruous. Hence, the said finding of the Tribunal would be set aside. The two punishments of censure coupled with a third punishment of stoppage of increment would result in a major misconduct, when in the 4^{th} instance a similar instance occurs; the same coming within the definition of a habitual act resulting in a charge of “major misconduct”.

21. On the aforesaid findings, Exhibit P1 award in I.D.No.339 of 2006, impugned in W.P.(C).No.2850 of 2009, would be upheld as a preliminary order and the award in I.D.No.72 of 2006 would be set aside for reason of the remand ordered in the earlier case and also for the reason of this Court having set at naught the finding of the Tribunal that the punishment of stoppage of increment takes the misconduct out of the definition of “habitual act”.

The Writ Petition and the Original Petition are allowed with the above observations.

Sd/-
K. Vinod Chandran,
Judge

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