

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE B.P.RAY

FRIDAY, THE 4TH DAY OF JANUARY 2013/14TH POUSHA 1934

WP(C) .No. 39854 of 2003 (T)

PETITIONER(S) :

SMT.K.K.REMADEVI
ASWATHI BHAVAN
PEYAD, THIRUVANANTHAPURAM.

BY ADVS.SRI.SANTHAN V.NAIR
SRI.V.GOPIKRISHNA
SRI.V.V.MITHUN

RESPONDENT(S) :

1. UNION BANK OF INDIA REPRESENTED BY THE
ASSISTANT GENERAL MANAGER,
UNION BANK OF INDIA, M.G.ROAD, ERNAKULAM.
2. THE INDUSTRIAL TRIBUNAL, KOLLAM.

R1 BY ADV. SRI.A.S.P.KURUP, SC, UBI

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
04-01-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

jm

P.D. RAJAN, J.

W.P.(C) No. 39854 of 2003

Dated this the 24th day of March, 2015

JUDGMENT

This writ petition is preferred under Article 226 of the Constitution of India seeking the following reliefs:

- "(i) issue a writ of certiorari or any other writ or order against 2nd respondent Industrial Tribunal calling for the records leading to Ext.P6 award and quash the same.
- (ii) To declare that the worker is not guilty of any misconduct and direct the 1st respondent to reinstate her in service with continuity of service, full back wages and other attendant benefits.
- (iii) In the alternative remand the matter to the Tribunal for fresh disposal in an objective and judicial basis as per S.11A of the Industrial Disputes Act.
- (iv) To grant such other reliefs that are deemed just and fit on the facts of circumstances of the case."

The petitioner's case is that when she was working as Cash Peon, Currency Chest, Union Bank of India, Thiruvananthapuram main branch, Abdul Khader was the Currency Chest Officer. On 20.9.1996, the Currency Chest

Officer was balancing the cash, he detected that there was shortage of a sum of ₹1 lakh in bin No. K8, one bundle (1000s of 100 denomination currency notes). It was alleged by the 1st respondent that the petitioner being the cash peon, she enters in the cash room and currency chest frequently along with the charge officers and as per their direction, she removes the cash from the bin and keeps it in the cash box whenever required. He noticed that she used to keep her tiffin box in the cash room and no other peon was asked to perform such duties related to the cash room. Her conduct shows that she had stolen ₹1 lakh from the Chest room as alleged. In an earlier occasion, disciplinary action was taken against her while she was working in the main branch Thiruvananthapuram. In the present allegation, she was served with a charge sheet on

1.3.1997 and a domestic enquiry was conducted by the 1st respondent, in view of the enquiry report, she was dismissed from service. The Industrial Tribunal in I.D. No.10/99 upheld the decision of the disciplinary authority, aggrieved by that, the petitioner preferred this writ petition.

3. The learned counsel appearing for the petitioner contended that no materials were placed before the enquiry officer to prove the allegation levelled against her. Since MW1 and MW3 were the custodian of the cash chest, the financial difficulty of the petitioner cannot be taken as a presumption that she had stolen amount from the chest. When there is no direct or indirect evidence either oral or documentary to prove the alleged offence, it has to presume that prima facie case is not made out

against the petitioner. When prima facie case is not made out against the petitioner, an earlier misconduct of the petitioner is irrelevant. Hence, the enquiry report and finding of the Tribunal are equally perverse and liable to be set aside.

4. The learned counsel for the respondents contended that the incriminating circumstances brought out in evidence by the enquiry officer makes a clear case. The witnesses, MW1 and MW3 were exonerated only on account of their good service and the punishment was imposed on her due to her previous conduct. There is no reason to interfere in the finding in Ext.P6 award of the tribunal. The learned counsel also submitted that this Court cannot sit in appellate jurisdiction of the decision of the Industrial Tribunal. He relied the decision in State

Bank of India and others v. Ramesh Dinkar Punde [(2006) 7 SCC 212], Roop Singh Negi v. Punjab National Bank and others [2009(2) SCC 570] and Union of India & Ors. v. Bishamber Das Dogra [2009 (13) SCC 102].

5. While invoking the jurisdiction under Article 226 of the Constitution of India, it is the settled legal position that this Court cannot act as appellate authority of the Industrial Tribunal. The judicial review of the appellate authority or the High Court is circumscribed with the jurisdiction and confined only to correct the errors of law or procedural errors resulting in miscarriage of justice or violation of principles of natural justice. The judicial review is not similar to that of adjudication on merit by re-appreciation of evidence as an appellate authority. In this case a consistent view has been taken by the Industrial

Tribunal while exercising its quasi judicial power. The disciplinary authority also had taken a consistent view that a grave misconduct was proved against the petitioner, therefore, disciplinary authority concluded that she is to be terminated from service. Apex Court in State Bank of India and others v. Ramesh Dinkar Punde [(2006) 7 SCC 212]. held that it is impermissible for the High Court to reappreciate the evidence which had been considered by the inquiry officer, a disciplinary authority and the Appellate Authority. The finding of the High Court, on facts, runs to the teeth of the evidence on record.

6. From the facts of case, it appears that the petitioner was charged with misconduct of having stolen ₹1 lakh from the chest of the 1st respondent bank and accordingly an enquiry was conducted by the disciplinary

authority. The enquiry officer has a duty to reach at a finding that the materials placed before him is sufficient to prove the charge levelled against the delinquent. The main duty of the enquiry officer is to collect evidence during his investigation or collect any other evidence collected by any other enquiry officer, if the delinquent officer alleged to have been committed any offence while she is working in that office. The evidence with regard to standard of proof required has to be considered by the disciplinary authority. For that, this Court can verify or peruse the evidence recorded by the enquiry officer in the course of enquiry and recorded statement therein. Normally, the proceedings of the enquiry officer is not like that of a criminal trial. The standard of proof prescribed in such enquiry is that of preponderance of probability and

not proof beyond any reasonable doubt. The inference is that while a person having deal with bank money for the official purpose, that would draw a presumption that he is handling the money according to the rules and regulations imposed on him by the bank. The enquiry officer's report shows that she entered in the cash chest along with the branch Manager and currency Chest Officer who were the custodians of the keys.

7. The second allegation was that she had kept her tiffin box in the currency chest room. During enquiry MW1 to MW3 were examined by the enquiry officer. MW1 was the Branch Manager, who was keeping one of the pair keys of the cash chest. According to him, on 20.9.1996 the Currency Chest Officer, MW3 brought to his notice that there was a shortage of ₹1 lakh in the currency chest.

During examination, he pointed out that the petitioner was permitted to enter inside the bin room and she might have stolen that amount, but he did not see the incident. During cross examination, he admitted that she cannot enter the chest room alone, since MW1 was keeping one of the keys and MW3 was keeping another pair keys of the Chest. The enquiry officer also examined MW3 Abdul Khader, who deposed that on 19.9.1996, they sent a diversion of ₹500 crores to SBT, Kadakkavoor and on the next day, after finishing his routine work upto 12 'O' clock he called Mrs. Remadevi for bin balancing. She hesitated initially and then came. On coming to bin K8, in the bin book the balance was 72,800 pieces. On physical verification it was found out as 71,800. There was a shortage of 1000 pieces of ₹100/- denomination. Immediately, he reported

to MW1 and next two days, (21st and 22nd) were public holidays and on the third day, i.e., on 23.9.1997 Zonal Auditors visited the branch, at that time, MW1 informed about the shortage to them. After verifying cash by the Auditors, it was confirmed the shortage and reported the matter to the Chief Manager for further action.

8. In cross examination of MW3, he admitted that on 18.9.1996, the petitioner was absent. In her absence, Mrs. Vasantha attended the Cash Chest. They have not reported the matter to the concerned higher authorities in time. From scrutiny of the evidence of MW1 and MW3, it is clear that they have not taken any care to report the matter to the police or to the higher authorities of the 1st respondent. MW1 admitted that he remitted ₹60,000/- and MW3 remitted ₹40,000/- in the 1st respondent bank

and further proceedings were dropped. MW3, in his cross examination admitted that the shortage was cleared on 5.10.1996 by borrowing from his relatives. This conduct of MW1 and MW3 creates some doubt in the credibility since they were the custodian of the pair keys. When MW1 and MW3 entering into the Chest Room, then only petitioner accompany them. Moreover, under what circumstances this amount was stolen, was not disclosed by MW1 or MW3. Therefore, I am of the opinion that prima facie no materials were placed before the enquiry officer to prove that the petitioner had stolen ₹ 1 lakh from the 1st respondent bank. When MW1 and MW3 were the custodian of the cash chest, she cannot remove the cash from the cash chest without their knowledge. But, the financial difficulty of the petitioner was taken as a ground

for presuming that she had stolen the amount from the cash chest since she was allowed to keep her tiffin box in the chest room. When there was no direct or indirect evidence, either oral or documentary and no recovery of money to prove the allegation of theft, it has to presume that prima facie case is not made out against the petitioner. When prima facie case is not made out against the petitioner, it is not fair to make such allegation against the petitioner.

9. The relevancy of past conduct of the delinquent employee has to be considered in this backdrop. The strong allegation of the 1st respondent was that the petitioner joined in the service by suppressing her educational qualification, which was later detected by the bank. In that incident, the 1st respondent imposed a lesser

punishment of censure and she was barred from further promotion for a period of two years. Later, when she was working in the main branch at Thiruvananthapuram in the year 1991 she was placed under suspension on allegation that she had stolen Rs.10,000/-. Consequently she was charge sheeted and after enquiry, disciplinary authority withheld three increments. In this incident, the disciplinary authority collected the prior antecedents of the petitioner for reaching a conclusion that her previous conduct was deadly against the interest of the bank. He opined that she committed misconduct on several occasion and her appointment was by suppressing certain material facts has to be considered with the present allegation. The learned counsel appearing for the respondent relied on a decision reported in the Divisional Controller, KSRTC v. M.G.

Vittal Rao [2011 (3) Scale 33] and contended that once the employer has lost the confidence in the employee and the bona fide loss of confidence is affirmed, the order of punishment must be considered to be immune from challenge, for the reason that discharging the office of trust and confidence requires absolute integrity, and in a case of loss of confidence, reinstatement cannot be directed. This decision cited by the respondent has no application to the facts highlighted in this case. When there is no charge against the petitioner with regard to the loss of confidence, the enquiry officer cannot go outside the charge. If that be the position, the decision in the **Divisional Controller's case** (supra) is not applicable in the case in hand.

10. The past conduct of the employee and its

impact was discussed by the Apex Court in **Mohd. Yunus Khan v. State of U.P. & Ors.** [S.L.P (c) No.19318/2007] in which it is held as follows:

"This Court in **Union of India & Ors. v. Bishamber Das Dogra** (2009) 13 SCC 102, considered the earlier judgments of this Court in **State of Assam v. Bimal Kumar Pandit**, AIR 1963 SC 1612; **India Marine Service (P) Ltd. v. Their Workmen**, AIR 1963 SC 528; **State of Mysore v. K. Manche Gowda**, AIR 1964 SC 506; **Colour-Chem Ltd. v. A.L. Alaspurkar & Ors.**, AIR 1998 SC 948; **Director General, RPF v. Ch. Sai Babu** (2003) 4 SCC 331, **Bharat Forge Co.Ltd v. Uttam Manohar Nakate** (2005) 2 SCC 489; and **Govt. of A.P. & Ors. v. Mohd. Taher Ali** (2007) 8 SCC 656 and came to the conclusion that it is desirable that the delinquent employee be informed by the disciplinary authority that his past conduct could be taken into consideration while imposing the punishment. However, in case of misconduct of a grave nature, even in the absence of statutory rules, the Authority may take into consideration the indisputable past conduct/service record of the delinquent or "adding the weight to the decision of imposing the punishment if the fact of the case so required."

The learned counsel relied on another decision in **Union of India & Ors v. Bishamber Das Dogra** [2009(13) SCC 102] in

support of imposing penalty on the basis of past conduct. When prima facie case is not made out against the petitioner, the past conduct is not relevant, since the dismissal in this case was not for the past conduct, therefore, the above decision is also not applicable to the facts of this case.

11. Misconduct on the part of the petitioner was explained in Ext.P1 as (1) Gross misconduct; i.e., doing acts prejudicial to the interest of the bank involving serious loss to the Bank. 2) Minor misconduct; i.e., breach of rules of business of the bank. No evidence has been collected by the enquiry officer with regard to the acts, which are prejudicial to the interest of the bank and the breach of rules of business of the bank. But, the enquiry officer reported only about the loss of ₹1lakh from the cash

chest for proving the misconduct. Moreover, the other allegation that she had kept her tiffin box inside the currency chest was not properly answered by the enquiry officer. Nothing has been stated in Ext.P3 enquiry report to the effect that the petitioner had misappropriated any amount or violated the rules. Therefore, the finding of the enquiry officer in Ext.P3 is perverse. The delinquent admitted that she is suffering from financial constraints. Her take home salary was around ₹900/- per month. She admitted that her husband is working and getting income for their livelihood. Considering the nature and gravity of the allegation against the petitioner, I am of the opinion that, without proper evidence, a wrong conclusion was taken by the enquiry officer.

12. Apex Court in Roop Singh's case (supra) held

that a departmental proceeding is a quasi judicial proceeding. The enquiry officer performs a quasi- judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration of the materials brought on record by the parties. The main duty of the enquiry officer is to collect evidence during his investigation or collect evidence collected by any other investigating officers against the petitioner, if she is alleged to have been committed any offence while working in that office. No oral or documentary evidence have been produced before the enquiry officer at the time of enquiry to prove the alleged charge. The management witness tendered certain oral evidence, in which also they have no direct knowledge

with regard to the loss of ₹1 lakh from the Chest bin. When there is no direct or circumstantial evidence to prove the alleged theft from the Chest bin, mere inference about by her past conduct itself is not sufficient to conclude that she had committed theft of ₹1 lakh from the Chest bin. The documents produced by the witnesses also did not prove the allegation against the petitioner. The observation made by the higher authorities is not sufficient to conclude that the theft was committed by the petitioner.

14. The report shows that the enquiry officer had not applied his mind, according to the reference and his conclusion that the petitioner committed theft, which is unsustainable in law and it is liable to be set aside.

Hence, I set aside Ext.P6 award passed by the

Industrial Tribunal, consequently the findings of the enquiry officer in Ext.P3 is also set aside. The 1st respondent is directed to reinstate the petitioner forthwith, with full backwages.

This writ petition is allowed.

P.D. RAJAN, JUDGE.

acd

Union of India & Ors. v. Bishamber Das Dogra [2009 (13)

SCC 102].

"17. This Court in *State of Assam v. Bimal Kumar*, AIR 1963 SC 1612 considered the issue as to whether while imposing the punishment it is permissible to take into consideration the past conduct of an employee if it is not so mentioned in the second show cause notice. The Court observed that while issuing second show cause notice, the

disciplinary authority naturally has to come to a tentative or provisional conclusion about the guilt of the charged employee as well as about the punishment which would meet the requirement of justice in his case, and it is only after reaching conclusions in both these matters provisionally that the disciplinary authority issues the second notice. The delinquent employee is entitled to show cause not only against the action proposed to be taken against him but also against the validity or correctness of the findings recorded by the Enquiry Officer and provisionally accepted by the disciplinary authority. Thus, it enables the delinquent to cover the whole ground and to plead that no case had been made out against him for taking any disciplinary action and then to urge that if he fails in substantiating his innocence, the action proposed to be taken against him is either unduly severe or not called for.

18. In *State of Mysore v. Manche Gowda*, AIR 1964 SC 506, this Court held that the disciplinary authority should inform the delinquent employee that it is likely to take into consideration the past conduct of the employee while imposing the punishment unless the proved charge against the delinquent is so grave that it may independently warrant the proposed punishment. Though his previous record may not be subject matter of the charge at the first instance."

