

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RSA No.134/2015**

% **12th July, 2016**

BANI SINGH

..... Appellant

Through: Mr. Jitender Chaudhary, Advocate.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr. Sanjeev Narula, CGSC with Mr. Ajay Kalra, Advocate, Mr. Abhishek Ghai, Advocate and Mr. Raj Kumar, S.I.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/plaintiff impugning the Judgment of the First Appellate Court dated 29.9.2014 by which the first appeal of the respondents herein was accepted and the Judgment of the Trial Court dated 6.8.2013 was set aside. Trial court by the Judgment dated 6.8.2013 decreed the suit filed by the appellant and set aside the orders passed by the disciplinary authority and the appellate authority ordering the punishment of removal of the

appellant from services with the Central Industrial Security Force on account of having unauthorizedly fired as many as 49 rounds from his service rifle.

2. The admitted facts which appear on record are that the appellant/plaintiff failed to appear after initially appearing in the enquiry proceedings. The appellant/plaintiff claims that he did not appear in the enquiry proceedings on account of the fact that he was mentally ill. The appellate court as well as the trial court in the impugned judgments have come to a finding that there is no record which was filed by the appellant/plaintiff of his suffering such mental medical condition during the enquiry proceedings so that the appellant/plaintiff could not appear in the enquiry proceedings. Trial court in paras 18 and 19 of its judgment has dealt with this aspect exhaustively. This finding of fact cannot be challenged in this second appeal, and in any case such finding is absolutely correct and justified because no evidence was led by the appellant/plaintiff of his being mentally incapacitated to appear in the enquiry proceedings.

3. Two issues arise for consideration and as have been strenuously urged on behalf of the appellant by his counsel. Firstly, it is argued that the admitted fact which has come on record is that the appellant was not supplied with the documents attached to the memorandum of charges and hence the enquiry proceedings are violative of the principles of natural justice. To buttress this aspect, counsel for the appellant has sought to argue the existence of the conflicting stands of the respondents that whereas in the trial court it was

contended that documents were supplied but before the first appellate court it was conceded that the documents with the memorandum of charges were not supplied. The second ground which is urged is that the appellant was not given the enquiry report and hence the appellant is prejudiced whereby the entire departmental proceedings against the appellant/plaintiff have to be set aside including the order of removal from services.

4. So far as the aspect of the appellant/plaintiff not being supplied with the documents is concerned, it is found that the appellant/plaintiff failed to appear in the enquiry proceedings. No valid justification has been found to exist by the courts below for the appellant/plaintiff not to appear in the enquiry proceedings. I am thus of the opinion that there cannot be violation of the principles of natural justice on account of non-supply of documents to the appellant/plaintiff. For example, if a defendant in a suit is only served of the plaint and not the documents filed with the plaint, but if the defendant chooses to remain *ex parte*, and does not file his defence or ask for documents in the enquiry proceedings or lead evidence, surely the judgment passed in the suit cannot be sought to be set aside on the ground that documents were not supplied to the defendant. On similar reasoning once a charged officer does not appear in the enquiry proceedings, does not file his defence and does not ask for documents, such charged officer cannot complain of violation of the principles of natural justice because if such charged officer had appeared in the enquiry proceedings and asked for the documents, such documents would have surely been

given to him. In my opinion, therefore, the appellant/plaintiff cannot claim violation of the principles of natural justice or any prejudice on this count. Appellate court in para 9 of its judgment has rightly held in this regard that since the appellant has failed to show prejudice to him, his ground of enquiry proceedings being vitiated is incorrect, and which para reads as under:-

“9. It was for the plaintiff to establish that he was prejudiced due to non supply of the documents. There is no evidence to suggest that the plaintiff ever made a request to the Inquiry Officer to supply the documents or grant permission for inspection. In fact he had no intention to participate in the inquiry proceedings. He took the plea of mental ailment to justify his absence from the inquiry proceedings and it was rejected by the Ld Trial Court. If the plaintiff did not participate in the departmental proceedings without any justifiable reason, how can he claim that he was prejudiced in his defence? It is correct that the Appellate authority did not discuss the issue of non supply of documents in its order but the same does not make any difference as plaintiff could not show that he was prejudiced due to non supply of the documents. The orders passed by the Appellate Authority in some other proceedings on which Id counsel for the plaintiff relied upon during the course of arguments, does not help the plaintiff as those orders have been passed in separate cases and the law as laid down by the Hon’ble Supreme Court and by the Hon’ble High Court as quoted above is that prejudice is to be established by the plaintiff.”

5. The observations of the Supreme Court in the judgment in the case of *State Bank of Patiala and Others Vs. S.K. Sharma (1996) 3 SCC 364* in this regard are relevant because the Supreme Court has observed that unless the case is a case of no notice or no opportunity or no hearing category, the issue of violation of principles of natural justice has to be looked into alongwith the doctrine of prejudice and if there is no prejudice it cannot be held that enquiry proceedings are vitiated. The Supreme Court has crystallized the legal propositions in para 33 of the judgment in the case of *State Bank of Patiala and Others (supra)* and this para 33 reads as under:-

“33. 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 orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departamental 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 of (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained hereinbefore 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 vitiate 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 inspite 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 report, 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 slated under (4) hereinbelow 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 waived it or that the provision could not be waived by him, then the Court or 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 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 principle 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 arises 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."

6. Clearly, therefore principles of natural justice are not hidebound and it is not as if on account of just technicalities, that the enquiry proceedings should be

set aside. This aspect has been dealt with by the Supreme Court in para 32 of the judgment in the case of *State Bank of Patiala and Others (supra)* and this para showing that technicalities will result in counter-productive exercise reads as under:-

“32. Now, coming back to the illustration given by us in the preceding paragraph, would setting aside the punishment and the entire enquiry on the ground of aforesaid violation of sub-clause (iii) be in the interests of justice or would it be its negation? In our respectful opinion, it would be the latter. Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counter-productive exercise.”

7. Learned counsel for the appellant sought to cite various judgments before this Court on the aspect that non-supply of documents would result in prejudice and hence entitling the charged officer to set aside the report but when I put a specific query to the counsel for the appellant/plaintiff as to whether there is any judgment in which the charged officer has chosen not to appear and yet it has been held by any court that even in such a case, non-supply of documents would amount to violation of principles of natural justice. Obviously, there being no such judgment no such judgment could be pointed out to this Court. Therefore, I do not propose to refer to the judgments which the counsel for the appellant wanted to cite because they would have no relevance to the facts of the case because ratio of a case is facts dependent as held by the Supreme Court in the Constitution Bench judgment in the case of *Padma Sundara Rao (Dead) and Others Vs. State of Tamil Nadu and Others (2002) 3 SCC 533* wherein the Supreme Court has held

that difference of even a single fact can make the difference to the ratio of a case. Also, in my opinion, assuming for the sake of arguments that the employer has changed its stand from the trial court wherein it disputed that it did not supply the documents but in the appellate court took up a stand that documents were not supplied as the appellant/plaintiff failed to appear in the enquiry proceedings, the same will not create such a substantial question of law for this Court to interfere under Section 100 CPC.

8. The second issue was of some moment in the opinion of this Court because an enquiry report is required by a charged officer so as to question the same or to question any punishment which would be sought to be imposed on the basis of the said enquiry report.

9. In this regard these observations of the Supreme Court in para 32 in the case of *State Bank of Patiala and Others (supra)* are apposite as the appellant did not ask the appellate or the disciplinary authority for the copy of the enquiry report. He also did not do so even thereafter including during the trial of the suit. DW5 the enquiry officer on behalf of respondents has filed and proved this enquiry report as DW5/3 but till date appellant has not chosen to argue why this enquiry report is wrong.

10. In this regard, it is also to be noted that in the Order of the Appellate Authority dated 10/16.3.1999 it has been observed that the appellant/plaintiff

cannot complain of non-receipt of the enquiry officer's report because this report was sent to the appellant/plaintiff by post but he refused to receive the same. In the opinion of this Court, once there is such a finding and the case of the appellant/plaintiff before the appellate authority was that he did not refuse to receive the report by post and in fact he was not present in town for receiving of the postal article because he was undergoing treatment at a hospital in Aligarh, the appellant/plaintiff in the suit had to lead evidence by summoning the record to show that in fact the report was not sent to him and hence not refused by the appellant/plaintiff. Onus of proof in a suit is always upon the plaintiff and the plaintiff has failed to show his case of not refusing to receive the enquiry officer's report and in fact being hospitalized in Aligarh, because the appellant/plaintiff had to lead the necessary evidence. The record shows that appellant/plaintiff did not summon the record either of the postal department or from the office of his ex-employer and also there is no medical record of the relevant time to show that there could not be refusal because the appellant/plaintiff was in Aligarh for medical treatment. Obviously the issue of medical treatment at Aligarh has to be co-related to the date, month and year of the refusal of the postal article and in the absence of any record as to when the appellant/plaintiff did not refuse to receive the postal article there cannot be co-relation of the medical record for the purpose of the case of the appellant/plaintiff that he was in Aligarh for medical treatment.

11. In view of the above, no substantial question of law arises for this Regular Second Appeal to be entertained under Section 100 CPC. Dismissed.

JULY 12, 2016
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VALMIKI J. MEHTA, J

