

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.01.2017

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THE HONOURABLE MR.JUSTICE T.RAJA

W.P.No.15080 of 2016

The Management of ICICI Bank
ICICI Towers
Ambattur Estate
Ambattur, Chennai

... Petitioner

-Vs-

1. The Presiding Officer
Central Govt Industrial Tribunal
cum Labour Court
Sastri Bhavan, Chennai

2. R.C.T.Vadivelan

... Respondents

Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorari, to call for the records connected with I.D.No.44 of 2015 and to quash the impugned order dated 31.03.2016 made in Preliminary Point in I.D.No.44 of 2015 passed by the first respondent, i.e. The Presiding Officer, Central Govt Industrial Tribunal cum Labour Court, Chennai.

For Petitioner : Mr.Sanjay Mohan for
M/s.S.Ramasubramaniam & Associates

For Respondents : Mr.V.Prakash
Senior Counsel for
Mr.K.Krishnamoorthy for R2
R1-Court

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ORDER

The Management of ICICI Bank Limited, Ambattur, Chennai has questioned the validity of the impugned preliminary award passed by the Central Government Industrial Tribunal cum Labour Court, Chennai, the first respondent herein in I.D.No.44 of 2015 dated 31.3.2016 on the preliminary point holding that the action of the disciplinary authority in conducting the domestic enquiry against the second respondent employee was not in accordance with the principles of natural justice and as such it held that the enquiry was not fair and proper.

2. Mr.Sanjay Mohan, learned counsel for the petitioner Bank submitted that the second respondent, while serving as a service staff in the Bank of Madura from 10.2.99, after the merger of the erstwhile Bank of Madura with the ICICI Bank, became the employee of the petitioner by virtue of the merger and as such, was transferred from Karaikudi branch to Dharmapuri branch on 11.10.2010 on administrative reasons. After joining at the Dharmapuri branch, the second respondent remained absent unauthorisedly for several days viz., 112 days between 27.11.2010 and 10.9.2011. Therefore he was issued with a charge sheet cum order of enquiry and an enquiry officer was also appointed to enquire into the alleged misconduct on 13.9.2011. The second respondent was also issued with a letter dated 26.9.2011 intimating him of the first hearing of the enquiry on 30.9.2011. Immediately thereafter, the enquiry officer received a letter undated from the second respondent on 29.9.2011 with a request for issuance of the charge sheet in Tamil and further sought for adjournment of the enquiry. In response thereto, the enquiry officer on 29.9.2011 sent a reply to the second respondent requesting him to appear for the enquiry on 3.10.2011 and in the said letter, the enquiry officer has informed him that the contents of the charge sheet would be translated in Tamil and further the charges would be explained to him on that date. Moreover, the second respondent was also asked to take in that process any co-employee's assistance to defend him before the enquiry officer. Again on 1.10.2011, the second respondent was issued with the letter dated 30.9.2011 enclosing the Tamil translation of the charge sheet cum order of enquiry dated 13.9.2011 reiterating him to participate in the enquiry proceedings and as such, when the hearing of enquiry was scheduled on 3.10.2011 at 11.00 A.M., finding the absence of the second respondent in the said enquiry on the said date, the enquiry was postponed to 1.00 P.M., and once again it was further postponed to 3.00 P.M.

3. Adding further, Mr.Sanjay Mohan submitted that the enquiry officer, again finding the second respondent not present, to give him one more opportunity, adjourned the hearing to 12.10.2011. Thereafter the enquiry officer received a letter at 6.00 P.M., on 3.10.2011 requesting him for an adjournment. However, the enquiry officer proceeded with the enquiry on 3.10.2011 and communicated the proceeding thereon to the second respondent through telegram and again he was asked to participate on the next date of hearing scheduled for 12.10.2011. However, the enquiry officer once again received the letter dated 9.10.2011 from the second respondent with a request to permit him to engage a lawyer to defend his case and for which he sought for 15 days time. Again when the matter was posted on 12.10.2011, the second respondent did not appear for the enquiry. In the meanwhile, the enquiry officer in his letter dated 12.10.2011 declined the request of the second respondent to engage a lawyer, on the ground that it was only a departmental enquiry and the presenting officer Mr.Kavithan

Felix, B.E., P.G.D.M. in H.R., was also not a legally trained person. With the above reasoning, on refusing the request of the second respondent to engage a lawyer, the enquiry was adjourned to 28.10.2011 and the same was also communicated to the second respondent by letter dated 12.10.2011 by RPAD. Again relentlessly the second respondent, without even taking part in the enquiry, by letter dated 22.10.2011, once again requested the enquiry officer to permit him to engage an Advocate on his behalf to participate in the enquiry. As the second respondent was persistently absent from appearing for the enquiry and seeking repeated adjournments, the said letter was forwarded to the disciplinary authority to get a reply on the same. The disciplinary authority in their letter dated 27.10.2011 categorically informed that the second respondent's request to engage a lawyer cannot be acceded to, since the presenting officer is not a legally trained or qualified person. Accordingly the second respondent was directed to appear and present his case before the enquiry officer.

4. In view of the stalemate, the enquiry was again adjourned to 8.11.2011 and the same was informed to the second respondent, who, in his letter dated 4.11.2011, once again requested the enquiry officer for assistance of a lawyer and this was submitted along with the reply to the charge sheet. On receipt of the same, the enquiry officer again adjourned the matter to 15.11.2011 due to administrative reasons and the adjournment was also informed to the second respondent by telegram on 8.11.2011. Unreasonably the second respondent, taking advantage of the frequent adjournments granted by the enquiry officer, sent a telegram on 14.11.2011 requesting the enquiry officer to go through his letter and do the needful for closing the enquiry. Therefore, when the second respondent was bent upon not to participate in the enquiry, the enquiry officer again adjourned the matter to 22.11.2011. On the said date also, the second respondent failed to participate in the enquiry. However, he informed the enquiry officer by his letter dated 19.11.2011 that the enquiry can be proceeded with in his absence. In spite of repeated adjournments, again based on continuous refusal of the second respondent to participate in the enquiry proceedings by seeking adjournment on one pretext or the other, the enquiry officer proceeded with the enquiry ex parte and the copies of the enquiry proceedings were duly sent to the second respondent by RPAD on 22.11.2011 and the copy of the report dated 8.12.2011 was also submitted by the enquiry officer holding that all the charges framed against the second respondent were proved. On receipt of the report of the enquiry officer, the disciplinary authority also in their letter dated 9.12.2011 sent the findings of the enquiry officer to the second respondent giving him an opportunity to make his submissions on the findings of the enquiry officer within five days. But there was no reply from the second respondent. Therefore on 13.1.2012, the petitioner Bank sent another letter to the second respondent as a final chance to make his submissions regarding the findings of the

enquiry officer. Again the second respondent did not make use of both the opportunities to submit his reply on the enquiry report. Therefore, the disciplinary authority passed a final order dismissing the second respondent from the services of the bank and the order thereon was also sent to the second respondent by RPAD on 2.3.2012.

5. Aggrieved by the order of dismissal, the second respondent raised a dispute before the conciliation officer. On receipt of the letter, the petitioner Management appeared before the conciliation officer and filed a detailed counter affidavit. But the conciliation ended in failure giving rise to the present dispute before the first respondent by the second respondent and the same was also numbered in I.D.No.44 of 2015, alleging that the enquiry conducted by the petitioner was not fair and proper. The Central Government Industrial Tribunal cum Labour Court, taking the preliminary issue with regard to the four ends of the enquiry, has given a finding that the enquiry held against the second respondent was not fair and proper, against which the present writ petition is filed.

6. Mr.Sanjay Mohan, learned counsel for the petitioner bank submitted that although the writ petition filed questioning the correctness of the preliminary award passed by the Central Government Industrial Tribunal cum Labour Court is ordinarily not maintainable, if the enquiry is defective, as per the settled legal position, if the case of the petitioner Bank is brought under the exemptions arising under the peculiar circumstances, this Court under Article 226 can always interfere. In support of his submissions, relying upon the judgment of a learned single Judge of this Court in the Management of HH 256 Nedumpirai Primary Agricultural Cooperative Bank Limited represented by its Special Officer v. The Presiding Officer, Labour Court and K.Gunabushanam, MANU/TN/0328/2008, he argued that when this Court has laid down the principle that in exceptional circumstances, wherever the Labour Court failed to follow the principles, interim order passed by the Labour Court can be challenged to shorten the litigation, in the present case also, when the misconduct was proved in the enquiry and thereupon the disciplinary authority has imposed the punishment, without giving sufficient opportunity to the petitioner management, the Central Government Industrial Tribunal cum Labour Court has wrongly come to the conclusion that the enquiry was neither fair nor proper. In an industrial dispute having not reached its finality, at any stage of the proceedings before it is concluded, the employer should be given a chance to lead additional evidence including production of documents and by permitting the same, the multiplicity of proceedings can be avoided. But in the case on hand, the Central Government Industrial Tribunal cum Labour Court, having failed to follow the principles, rejected the claim made by the petitioner to adduce additional evidence. Therefore the petitioner Management is entitled to challenge the order of rejection in the present

writ petition, even though it is an interim order. While dealing with a similar issue, a Division Bench judgment of this Court in State Bank of India v. Presiding Officer, Industrial Tribunal, MANU/TN/8220/2007 holding that in exceptional cases, when there is no specific provision either in the bye-laws, circular, guidelines enabling the workman to have the legal assistance, having participated on several sittings, if the workman abandoned the enquiry after certain stage, it cannot be held that no opportunity was given if the enquiry officer proceeded ex parte. In the present case also, when the second respondent was issued with the notice of enquiry, he did not even participate in the enquiry repeatedly on various dates seeking assistance of a lawyer, when there is no specific provision in the rules enabling the workman to have the legal assistance. Moreover, he has also sent a letter dated 19.11.2011 to the enquiry officer to proceed in his absence, as the enquiry officer refused to give him permission to engage a lawyer. Therefore the enquiry officer, only on receipt of the letter from the second respondent informing him that he won't participate in the enquiry, proceeded ex parte and finally gave a finding holding the second respondent guilty of the charges, based on which the disciplinary authority concluded to terminate the second respondent from the services of the Bank. While so, the Central Government Industrial Tribunal cum Labour Court cannot come to the conclusion that it was not a fair and proper enquiry. Hence it is a fit case where the law laid down by this Court in the Management of HH 256 Nedumpirai Agricultural Cooperative Bank Limited case will apply to interfere with the impugned preliminary award, he pleaded.

7. Again placing on record one more judgment of the Division Bench of this Court in State Bank of India rep. by the Assistant General Manager (Pers. and HRD) v. The Presiding Officer, Industrial Tribunal and K. Ibrahim, 2007 2 LLJ 968 Madras, he submitted that the Division Bench of this Court found that the employee in that case, who sought the assistance of a lawyer and the same was also granted to get the assistance from anyone, after participating in several proceedings, did not cross examine P.W.1, taking note of the fact that the employee failed to utilize several chances given to him before proceeding ex parte to hold him guilty and finally the disciplinary authority came to the conclusion that the act of gross misconduct was proved and thereupon he was imposed with the punishment that was challenged before the Labour Court and that the Labour Court, failing to notice the facts on record that the workman, having been permitted to have the assistance of any member or an office bearer of a registered trade union including his lawyer, had failed to utilize the chances to appear before the enquiry, has wrongly held that the enquiry was not fair and proper, the Division Bench has come to the conclusion that the facts in the said case would constitute an exceptional case, which would warrant interference even in a preliminary award. Therefore it is not open to the second respondent to say that in all cases no

writ will lie against a preliminary award passed by the Industrial Tribunal/Labour Court. Adding further, he submitted that although the Apex Court in *Cooper Engineering Limited v. P.P.Mundhe*, (1975) 2 SCC 661 has held that it is legitimate for the High Court to refuse to intervene on a preliminary issue, for the reason that when there was no domestic enquiry or defective enquiry being admitted by the employer, there would be no difficulty. At the same time, there will be no justification for any party to stall the final adjudication of the dispute by the labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award and it will be also legitimate for the High Court to refuse to intervene at that stage. Such an observation was made with anxiety that there should be no undue delay in industrial adjudication. But the case on hand is completely different, because the impugned preliminary award is fully of perverse reasoning. When the second respondent employee sought for repeated postponement of enquiry on the ground that he should be permitted to engage a lawyer, which is not permissible under any provision, bye-law or rule, the Central Government Industrial Tribunal cum Labour Court has come to the wrong conclusion that even though the enquiry officer was not willing to permit the employee to engage a lawyer, permission could have been granted to engage any ex-union office bearer as requested by him in view of his contention that the existing employees are afraid to defend him. When it is not known how any ex-union office bearer can be brought into the enquiry when there is no rule or provision permitting such engagement, such a finding is absolutely wrong to hold that the enquiry was not fairly held.

8. The second reasoning by the Central Government Industrial Tribunal cum Labour Court would show that when the petitioner Bank had served a copy of the finding given by the enquiry officer, the second respondent has admittedly received the same and marked the copy of the same from his side as Ex.W29 along with the letter asking him to make his statement on the report. After recording the said letter received by the employee as Ex.W29 along with the copy of the report of the enquiry officer, it has wrongly come to the conclusion that the copy of the enquiry report was not furnished to him. Moreover, it has further held that in the absence of service of enquiry report with the proposed punishment on the employee, he was prejudiced. It has been a well settled legal position by the Apex Court as well as this Court that in the light of the 42nd amendment, the second show cause notice with proposed punishment on the delinquent is completely dispensed with. Taking support from the judgment of the Apex Court in *Chairman, Ganga Yamuna Gramin Bank and others v. Devi Sahai*, (2009) 11 SCC 266, he submitted that issuance of second show cause notice proposing punishment is not necessary, unless there is a special provision to this effect in the relevant rules. In the present case also, when no such provision is framed by the petitioner bank, the Central

Government Industrial Tribunal cum Labour Court ought not to have held that in the absence of service of the enquiry report with the proposed punishment on the employee he was prejudiced. Therefore he pleaded that the law laid down by the First Bench of this Court in N.Gurumurthy v. Second Additional Labour Court, Madras, 1995 1 LLN 1022 carving out two exceptions, namely, (i) that the interference could be called for, if the preliminary order was passed without notice to one of the parties and (ii) that the entertainment of writ petition could be made, if the preliminary award does not contain any reason for its conclusion, should be applied, since, in the present case, the factual position constitute an exceptional case, which demands interference with the impugned preliminary award. Again clarifying the position, he submitted that when the First Bench in N.Gurumurthy's case has carved out two exceptions for interference with the impugned preliminary award, law is well settled that if peculiar facts and circumstances are established that the reasoning to pass the preliminary award is perverse, the said award, even though is preliminary, can be interfered with. As mentioned above, when the Central Government Industrial Tribunal cum Labour Court has wrongly given a finding that no fair and proper enquiry was held on three grounds that the second respondent was not permitted to engage any ex-union office bearer as required by him, in view of his contention that the existing employees are afraid to defend him, although the enquiry officer was not willing to permit the second respondent to engage a lawyer, permission could have been granted to engage any ex-office bearer, when there is no specific provision, such a finding is liable to be interfered with. Secondly, in the absence of issuance of second show cause notice proposing punishment on the delinquent, no prejudice would be caused. This is also ignored. Thirdly, when the second respondent was served with the copy of the enquiry report, which was marked by him before the Labour Court as Ex.W29, holding against the petitioner Bank that he was not furnished with the copy of the report is not only indicating its total non application of mind but also a perverse finding. Therefore, on these grounds, the impugned preliminary award should be interfered with, he pleaded.

9. Per contra, Mr.V.Prakash, learned senior counsel for the second respondent submitted that when it is a settled legal position by the Apex Court in Cooper Engineering Limited v. P.P.Mundhe, (1975) 2 SCC 661 holding that it would not be proper for the High Court under Article 226 of the Constitution of India to interfere with the preliminary award passed by the Labour Court either on the question as to whether the domestic enquiry has been held fairly and properly or relating to the jurisdiction of the Labour Court, for the reason that such a course should be avoided for elongation of the proceeding and to curtail the period of litigation and at the same time would enable the labour Court to pass an award as well as possible within the time prescribed by the Act, the attempt made by the employer to interfere with the preliminary award saying that the

enquiry was fairly held would unnecessarily advance injustice to the affected employee. Therefore, no interference is called for, he pleaded. Taking support from the judgment of the First Bench of this Court in Shree Kumar Textiles (P) Limited v. Labour Court, 1997-3-LLN 376, he submitted that when a preliminary award was passed by the Labour Court, the interference was refused by the learned single Judge holding that it is not the stage on which interference is called for, as it is open to the management to challenge the correctness of the award, in the event the award goes against the management. As against that, an appeal was filed and the First Bench of this Court, agreeing with the learned single Judge, refused to interfere with the preliminary award holding that the order passed by the Labour Court satisfied the requirement that it was a speaking award and it has been passed after hearing both sides on the basis of the evidence by the parties. Again placing strong reliance on the order of the learned single Judge in W.P.No.35044 of 2013 dated 3.3.2016 (Management of G.T.N. Engineering (India) Limited represented by its Manager, HR v. The Labour Court, Coimbatore and others), holding that the dismissal of writ petition would not cause any prejudice to the writ petitioner and the issues could be agitated by the writ petitioner, if the final award is passed against them, he pleaded for dismissal of this writ petition, on the ground that it is well settled by the Apex Court in Workmen v. Motipur Sugar Factory, AIR 1965 SC 1803 that even in case of no enquiry or the enquiry is defective and the Labour Court coming to the conclusion that the enquiry is defective, the employer could be given an opportunity to lead evidence, if a request is made at the appropriate stage in the adjudication proceedings, no peculiar facts and circumstances have arisen in the present writ petition warranting interference with the impugned preliminary award. On this score he urged this Court to dismiss the writ petition.

10. Heard the learned counsel for the parties.

11. The Apex Court in Cooper Engineering Limited v. P.P.Mundhe, (1975) 2 SCC 661, has deprecated the interference by this Court on the preliminary award holding that the point on which the interference is sought for can be challenged after the final award is passed. Since the interference was never encouraged by the Apex Court in the interest of expediting quick disposal of cases by the Industrial Tribunal cum Labour Court, it is pertinent to note the object for the Apex Court in Cooper Engineering case to lay down the law not to interfere with the preliminary award only in order to obviate the undue delay in the adjudication of the regular dispute, hence it was observed that the Industrial Tribunal should decide the preliminary issues and also the main issues on merit, so that there may not be any further litigation at the interlocutory stage. It was further observed that there was no further justification for the parties to stall the final adjudication of the dispute referred to the Industrial Tribunal/Labour Court by questioning such

decision on the preliminary issue before the High Court. Again in S.K.Verma v. Mahesh Chandra and another, (1983) 4 SCC 214 the Apex Court strongly disapproved the practice of raising frivolous preliminary objections at the instance of the employer to delay and defeat the purpose of adjudication on merits. Once again in D.P.Maheshwari v. Delhi Administration and others, (1983) 4 SCC 293, the Apex Court while speaking through O.Chinappa Reddy, J has observed that the policy to decide the preliminary issue required a reversal in view of the unhealthy and injudicious practices resorted to for unduly delaying the adjudication of industrial disputes for resolution of which an informal forum and simple procedure were devised with the avowed object of keeping them from the dilatory practices of civil Courts. In the said case, it was further observed that all issues whether preliminary or otherwise should be decided together so as to rule out the possibility of any litigation at the interlocutory stage. It is therefore necessary to extract paragraph-22 of the judgment in Cooper Engineering Limited case as follows:-

"22. We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer, there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the labour court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue. We should also make it clear that there will be no justification for any party to stall the final adjudication of the dispute by the labour court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for the High Court to refuse to intervene at this stage. We are making these observations in our anxiety that there is no undue delay in industrial adjudication."

12. While restating the said principle, the First Bench of our High Court in N.Gurumurthy v. Second Additional Labour Court, Madras, 1995-1-LLN-1022, after restating the reasons for non interference at the preliminary stage, has also discussed that the interference could be called for, if the preliminary

order was passed without notice to one of the parties and (ii) that the entertainment of the writ petition could be made, if the preliminary order does not contain any reason for its conclusion. Applying the said ratio, it has been the contention of the petitioner Bank that the rule of interference with the preliminary award has been subsequently expanded with the rule of peculiar facts and circumstances of the case for interference. But, however, the case on hand does not pertain to any one of the two situations over the rule of peculiar facts and circumstances of the case, but could be with the perverse finding recorded by the Labour Court.

13. I do agree with the said argument. In the present case of the management, it has been argued that when there is no specific provision or rule informing the employee of seeking the assistance of a lawyer in the domestic enquiry, the finding recorded by the Labour Court that even though the enquiry officer was not willing to permit the employee to engage a lawyer, permission could have been granted to engage any ex-union office bearer in view of his contention that the existing employees are afraid to defend him, is without any jurisdiction. The reason is that when the Central Government Industrial Tribunal cum Labour Court was justified in holding that the enquiry officer was not willing to permit the employee to engage a lawyer, again holding that permission could have been granted to engage any of the ex-union office bearer as requested by him for the reason that no existing employees are willing to defend him, also shows that there is no provision for engaging any ex-union office bearer. On this score, it is not open to the Central Government Industrial Tribunal cum Labour Court to say that the enquiry was not held fairly and properly.

14. Secondly, with regard to the issuance of second show cause notice for imposing the proposed penalty, it has been once and for all settled that in view of the 42nd amendment dispensing with the second show cause notice for proposed punishment, the consequent finding given by the Labour Court that in the absence of service of enquiry report with the proposed punishment on the employee, he was prejudiced, is legally unsustainable. When the Central Government Industrial Tribunal cum Labour Court in paragraph-10 of the impugned preliminary award has held that the second respondent was served with the notice along with the copy of the report asking him to make his submission on the report, again holding that in the absence of service of enquiry report with the proposed punishment on the employee he is prejudiced, is uncalled for. Therefore, when the copy of the report of the enquiry officer was already served and was also marked before the Tribunal as Ex.W29 by the second respondent and it was further admitted that he was called upon to make his submission on the said report, there cannot be any prejudice caused to him. Equally, as there is no provision to engage a lawyer, the enquiry officer was unwilling to permit the employee to engage a lawyer. But the Central Government Industrial Tribunal cum

Labour Court has come to the conclusion that even though the enquiry officer was unwilling to permit the delinquent to engage a lawyer, permission could have been granted to engage any ex-union office bearer as requested by him in view of his contention that the existing employees are afraid to defend him, also is equally impermissible, because there is no rule cited by the second respondent in his support to say that he is entitled to have the assistance of any ex-union office bearer. Moreover, it has been the claim of the petitioner Bank that the enquiry officer was not a legally qualified person. Only in a case if the workman is pitted against a legally trained person in the departmental enquiry, the delinquent workman who is not that much familiar with the legal procedure involved in the preliminary enquiry is entitled to seek the assistance of a competent person. However, no such case has been made out by the second respondent to engage either a lawyer or any ex-union office bearer. Hence the finding recorded by the Central Government Industrial Tribunal cum Labour Court in this regard is not acceptable.

15. But that alone would not persuade this Court to interfere with the impugned preliminary award. The ultimate question is whether the domestic enquiry held against the second respondent was fair or not needs to be satisfied by this Court. It has been admitted by the petitioner Bank in this writ petition that while the second respondent was serving as a service staff, he was transferred from Karaikudi branch to Dharmapuri branch on 11.10.2010 due to administrative reasons. After joining at the Dharmapuri branch, it is pleaded that the second respondent remained absent for several days i.e., to the extent of 112 days for the period between 27.11.2010 and 10.9.2011, for which he was issued with a charge sheet cum order of enquiry dated 13.9.2011. Moreover, an enquiry officer was also appointed to enquire into the alleged misconduct. At this stage, the second respondent was asked to submit his reply to the charge sheet directly to the enquiry officer. The first flaw committed by the petitioner clearly shows that when the second respondent was issued with the charge sheet, he was also issued with an order of enquiry for his unauthorized absence dated 13.9.2011 and immediately the enquiry officer was appointed to go into the alleged misconduct, without even looking at the sufficient cause to be made by the delinquent employee in his explanation, and the disciplinary authority while issuing the charge sheet ought not to have appointed the enquiry officer. That shows that they were not willing to hear any explanation whatsoever from the delinquent who is said to have absented unauthorisedly. The copy of the charge sheet clearly shows that while issuing the charge sheet the delinquent employee was not given an opportunity to give his explanation regarding the charges made against him. As rightly found by the Central Government Industrial Tribunal cum Labour Court, even in the charge sheet, it has been clearly stated that the reply of the second respondent to the charge sheet, if any, has to be given

directly to the enquiry officer. Therefore at the time of issuing the charge sheet itself, the disciplinary authority has prejudged the issue to take a negative decision against the second respondent delinquent.

16. Secondly, before giving an opportunity to the delinquent to explain his stand on the charges, it goes without saying that the disciplinary authority has decided to hold the enquiry, which clearly indicates the clear violation of the principles of natural justice.

17. Thirdly, when the charge sheet cum order of enquiry was issued on 13.9.2011, he was once again issued with another letter dated 26.9.2011 asking him to appear for enquiry on 30.9.2011. That also again shows that they were in a hurry to complete the enquiry, without even willing to peruse his explanation by the disciplinary authority. The rule says that once the employee is issued with a charge memo/charge sheet containing allegations, he should be given reasonable opportunity to explain his case before the disciplinary authority. Only if the disciplinary authority is dissatisfied with the explanation offered by the said delinquent employee on the allegations, it is open to the disciplinary authority to constitute an enquiry by appointing an enquiry officer. The said procedure has been completely overlooked. That shows that there is no fair or proper enquiry.

18. Fourthly, when the second respondent was serving only as a service staff, it is not known how the disciplinary authority can issue the charge memo in English and again the enquiry officer, on receipt of the letter from the delinquent that he does not know English and therefore he should be given a translation of the charge in Tamil, in reply, had written a letter dated 29.9.2011 informing the delinquent employee that the contents of the charge would be explained to him in the language he preferred at the beginning of the enquiry which is adjourned to 3.10.2011. That also clearly shows that by issuing the charge sheet in English, the petitioner has completely deprived the delinquent employee to know about what are the charges framed against him. Unless the service staff who is working in the last grade in the petitioner Bank is able to understand the charges, he would not be in a position to submit his explanation and also would not be equally in a position to take part in the enquiry, if it is subsequently held. Therefore, from the beginning of the enquiry proceeding and from the date of issuing the charge sheet cum order of enquiry dated 13.9.2011, it has been clearly admitted by the petitioner management that the second respondent was issued with the charge sheet cum order of enquiry directing him to submit his explanation to the enquiry officer; that without giving an opportunity to submit his explanation to the charge sheet by not furnishing the charge sheet in Tamil and appointing the enquiry officer along with the issuance of the charge memo would

cumulatively and candidly show that no fair enquiry has been held. Therefore on this score, this Court is not inclined to interfere with the preliminary award passed by the Industrial Tribunal cum Labour Court. However the finding given by the Labour Court, namely, that the enquiry officer should have permitted the second respondent to engage any ex-union office bearer as none of the existing staff was willing to defend him, is without any basis, hence the same is set aside. Similarly, when he was issued with the enquiry report, this Court for the reason that he was not given any opportunity to explain his case before the enquiry officer, the enquiry report is not legally maintainable, the same is liable to be set aside, as issuance of second show cause notice proposing penalty is also dispensed with, by virtue of the 42nd amendment, hence that portion is also set aside, since the question of issuing notice to the second respondent, after the submission of report by the enquiry officer, by the disciplinary authority calling upon the delinquent to show cause on the proposed punishment has been concluded long time back by the Apex Court in the case of Punjab National Bank v. Kunj Behari Misra, (1998) 7 SCC 84 holding that after the 42nd amendment, it is not necessary to issue any notice calling for explanation from the delinquent on the quantum of punishment.

19. In fact, a recent judgment of the Apex Court in Punjab National Bank and others v. K.K.Verma, AIR 2011 SC 120 can be usefully referred to, in which it has been unambiguously held that there is no second opportunity available to the delinquent employee after the finding of guilt on the quantum of punishment, since the said right being the second right is taken away by the 42nd amendment. In fact, in the said judgment, while dealing with the 42nd amendment, the Apex Court has held as follows:-

"19. The 42nd Amendment effected in 1976 once again amended sub-article 311(2) as follows:-

"311.(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Provided that where it is proposed, after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed."

20. In Mohd.Ramzan Khan's case (AIR 1991 SC 471) (supra) the Court was concerned with the question as to whether the 42nd Amendment brought about any change in the matter of supply of a copy of the report which is a part of the first stage, and the effect of non-supply thereof on the punishment proposed. The Court considered the various judgments on this aspect and held in paragraph 18 of the judgment as follows:-

"We make it clear that wherever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge hereafter."

It is only with a view not to affect the inquiries which were conducted in the meanwhile that the Court held that those inquiries will not be affected, and though it was only declaring the law, the propositions laid down therein will apply prospectively. This was basically to protect the actions which were taken during the interregnum i.e., after the 42nd Amendment became effective until it was explained as above in this judgment."

Again, in the same judgment, the Apex Court, while referring to two of the Constitution Bench judgments in Managing Director, ECIL, Hyderabad and others v. B.Karunakar and others, AIR 1994 SC 1074 and in Union of India & another v. Tulsiram Patel, AIR 1985 SC 1416, made it absolutely clear that after the 42nd amendment, the employees are not entitled in law to be heard in the matter of penalty. The relevant portion of the judgment reads as under:-

"28....In Karunakar's case, AIR 1994 SC 1074 (supra), another Constitution Bench has referred to Tulsiram Patel in paragraph 4 and then explained the legal position in this behalf in paragraph 7 as follows:-

"While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the 42nd Amendment."

Thus, the right to represent against the findings in the inquiry report to prove one's innocence is distinct from the right to represent against the proposed penalty. It is only the second right to represent against the proposed penalty which is taken away by the 42nd Amendment. The right to represent against the findings in the report is not disturbed in any way. In fact, any denial thereof will make the final order vulnerable."

20. A perusal of the above shows that after the submission of the report of the enquiry officer, it is not necessary to issue the second show cause notice indicating proposed penalty for the delinquent to submit his explanation with regard to the proposed penalty. Therefore, the absence of issuance of the second show cause notice will not make the enquiry improper. Secondly, when there is no provision permitting the delinquent to engage any ex-union office bearer to defend his case, on this score also, the enquiry cannot be held to be improper. For these reasons, these findings alone are partly set aside. Thirdly, records show that a copy of the enquiry report was furnished to the second respondent and the same was evidently filed by the second respondent as Ex.W29, hence the finding given by the Central Government Industrial Tribunal cum Labour Court that the same was not furnished is not acceptable. However, as the enquiry officer submitted his report holding him guilty, which has been found to be unfair by the Central Government Industrial

Tribunal cum Labour Court, it is for the Court below to proceed further from that stage and it is open to the petitioner Bank to lead evidence.

21. In view of my above findings that the enquiry held by the employer was not fair and proper, from this stage, it is for the Central Government Industrial Tribunal cum Labour Court to proceed further. Since the Court below can go into the correctness of the allegation whether he was unauthorisedly absent or not and on this aspect both parties are to produce evidence to substantiate their case, this Court under Article 226 is not inclined to dwell on this issue. Therefore, this Court directs the Central Government Industrial Tribunal cum Labour Court to proceed from that stage and do the needful in the manner known to law.

22. The writ petition is partly allowed as indicated above. Consequently, W.M.P.Nos.13153 and 23396 of 2016 are closed. No costs.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

The Presiding Officer
Central Government Industrial Tribunal
cum Labour Court
Sastri Bhavan
Chennai.

+1cc to M/s.S.Ramasubramaniam & Associates, Advocate,

S.R.No.4134

+1cc to Mr.K.Krishnamoorthy, Advocate, S.R.No.3599

W.P.No.15080 of 2016

TM(CO)
CA(16/02/2017)