

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 29.08.2019	Delivered on: 16.10.2019
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CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

W.P.No.31348 of 2012

R.Subramaniam

.. Petitioner

Vs.

- 1.Deputy Commissioner of Labour
(Appellate Authority under the Shops and
Establishment Act),
Coimbatore.
- 2.The Assistant General Manager,
HRD (Disciplinary Authority),
Central Office, Karur Vysya Bank,
PB No.21, Erode Road, Karur - 636 002.
- 3.The Chief General Manager,
Appellate Authority,
Central Office,
Karur Vysya Bank Post No.21,
Erode Road, Karur - 636 002.
- 4.The Deputy General Manager,
Divisional Office, Karur Vysya Bank,
577, Oppanakara Street,
II Floor, Coimbatore - 641 001.

.. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of writ of Certiorarified Mandamus, calling for the records from the 1st respondent relating to the order dated 09.08.2012 in TNSE No.8 of 2010 dismissing the Petitioners Appeal and consequently direct the Respondents 2 to 4 to reinstate the Petitioner back in service, pay salary for the entire period of non-employment with consequential and all other attendant benefits with interest together with cost.

For Petitioner : Mr.N.G.R.Prasad
for M/s.Row and Reddy
For R1 : Mr.R.S.Selvam
Government Advocate
For RR2 to 4 : Mr.Anand Gopalan
for M/s.T.S.Gopalan & Co.

O R D E R

The petitioner has come out with the present Writ Petition challenging the order of the first respondent dated 09.08.2012 in TNSE No.8 of 2010, dismissing the petitioner's appeal and to direct the respondents 2 to 4 to reinstate the petitioner back in service and to pay salary for the entire period of non-employment with consequential and all other attendant benefits together with interest and cost.

2.The petitioner joined as Trainee Clerk in the year 1979 in 2nd to 4th respondents' Bank and was confirmed in the said post in the year 1980. He was promoted as Scale I Officer in the year 1985 and he was promoted as Scale II Officer in the year 1997 and he was posted as Branch Manager at the Nellore Branch. He was subsequently promoted as Scale III Officer on 26.04.2004 and was posted to Purasawalkam Branch. The Assistant General Manager, HRD (Disciplinary Authority) of the Bank issued two charge memos dated 30.03.2005 and 03.10.2005 to the petitioner. After enquiry, by the order dated 05.04.2007, the petitioner was dismissed from service. Departmental Appeal filed by the petitioner was rejected on 26.10.2009. The petitioner filed Appeal before the first respondent. The first respondent totally exonerated the petitioner of first charge memo and the first charge in second charge memo.

2(a).The first respondent found guilty of alleged procedural violation relating to Open Cash Credit [hereinafter referred to as "OCC"] loan to Praveen Boiled Rice Mills. The first respondent though exonerated the petitioner of most of the charges, by the impugned order upheld the dismissal order. Against the said order, the petitioner has come out with the present Writ Petition.

3.The learned counsel appearing for the petitioner contended that the first respondent failed to exercise his power under Section 41(2) of Tamil Nadu Shops and Establishment Act and without appreciating the evidence placed before him to come to conclusion, proceeded to consider whether the evidence was available before the Enquiry Officer. The first respondent failed to appreciate the report of the Inspecting Officer of the Bank dated 20.01.2004. The stocks of OCC were kept in trust by

the customer. When the stock depleted, the petitioner immediately informed the higher officials and took possession of the Godown where the stocks of OCC facility was kept. After 20.01.2004 inspection, the customer sold the goods but did not remit the amount to the Bank. The customer has committed breach of trust and petitioner cannot be held negligence of discharging his duty. It is not the case of the Bank as if the petitioner colluded with the customer. The petitioner was discharging his duties diligently and was promoted as Scale III Officer. The first respondent found the petitioner guilty of not following the procedure, but there is no Rule that loan should not be paid in cash. The petitioner was regularly inspecting the Godown of the customer and when the available stock was not sufficient to cover the loan amount, the petitioner immediately took possession of the Godown of the customer where OCC stocks were kept. The first respondent having exonerated the petitioner of all the charges in first charge memo and his first charge of second charge memo, ought to have exonerated the petitioner with regard to second charge relating to very same party and ought to have set aside the order of the dismissal.

4.The learned counsel appearing for the petitioner contended that the petitioner was inspecting the Godown of the customer along with Ch.Suryanarayana, Co-Auditor every month and quantity and value of stock found at the time of inspection were entered into the Stock Register. The Inspecting Officer of the Bank, R.Ayyappan conducted surprise inspection of the Praveen Boiled Rice Mill on 20.01.2004 and 21.01.2004. The said R.Ayyappan and petitioner inspected OCC Godown of the customer and found stock worth Rs.167.78 Lakhs in the said Godown. At that time, the loan outstanding of the customer was only Rs.115.53 Lakhs. The said R.Ayyappan informed the petitioner that he would give a separate report and therefore quantity of the stocks available was not entered in Stock Register. The said R.Ayyappan recommended to improve the Stock Register only on the safer side. Both the Enquiry Officer as well as the first respondent failed to consider the periodical inspection conducted by the petitioner as well as the report of R.Ayyappan, Inspecting Officer after surprise inspection.

5.The customer procures paddy from the farmers at the time of harvest and pay cash to the farmers for the value of the paddy purchased by them. They sell the rice after hulling the paddy through out the year, based on the market price of the rice. The learned counsel for the petitioner contended that the fourth respondent violated principles of natural justice by not issuing second Show Cause Notice after Enquiry Officer has submitted his report. The petitioner was denied opportunity to submit his explanation as to how no punishment can be imposed on the petitioner. In view of the above violation, order of

dismissal is liable to be dismissed.

6.Per contra, the learned counsel appearing for the respondents 2 to 4 contended that while the petitioner was working as Branch Manager in Nellore Branch, he did not properly follow the procedure in respect of Key Cash Credit [hereinafter referred to as "KCC"] and OCC facility granted to Sri Ramana Kumar Rice Industries (P) Ltd., and Praveen Boiled Rice Mills. In respect of KCC and OCC facility granted to Praveen Boiled Rice Mills, the petitioner without properly appreciating the value of the stock held by the said Mill, released the amount under said two facilities. At the request of the Praveen Boiled Mills, OCC limit of Rs.80 Lakhs was enhanced to Rs.110 Lakhs. Immediately, on enhancement of said loan, the petitioner released the amounts by way of cash to the said firm without ascertaining the end use. The petitioner ought to have allowed the operation of the account only by way of cheque. The petitioner failed to note that there was little transaction in OCC account from 01.07.2003 and there is no transaction from 07.12.2003. The petitioner has not properly verified the stock position of the customer and in view of the VIP status of customer, has entered the quantum of stock in the Stock Register. The learned counsel appearing for the respondents 2 to 4 contended that inspection by R.Ayyappan is only a general inspection and it will not take two days for verifying the stock position in the godown. The said R.Ayyappan has not physically verified the stock position and has given the report only based on the stock statement. Even in the report, R.Ayyappan has stated that "improve the stock". According to report of R.Ayyappan, the stock worth Rs.1,58,17,650/- was available on 31.01.2004. On 04.02.2004, the available stock was worth only to Rs.3 Lakhs. The petitioner has not explained as to how within 4 days, the stock has been reduced to Rs.3 Lakhs. The contention of the petitioner that stocks were removed from 31.01.2004 to 04.02.2004 is not correct. If any stock is removed from the godown, the same would be entered in the records. The petitioner would have easily proved the movement of stock by producing the record. The petitioner failed to discharge his burden of proving that goods were removed from godown from 31.01.2004 to 04.02.2004. The failure on the part of the petitioner proves this charge leveled against the petitioner. Once this charge is proved, it is sufficient to dismiss the petitioner.

6(a).As far as charge No.1 in first charge is concerned, Sri Ramana Kumar Rice Industries (P) Ltd., procured paddy at the rate of Rs.582/- per quintal. Whereas, he valued at Rs.700/- per quintal. The said Sri Ramana Kumar Rice Industries (P) Ltd., has enhanced the value of paddy at Rs.700/- per quintal by adding incidental charges, transferring charges, loading and unloading charges, etc,. The petitioner has failed to properly verify the

register and failed to see that value of the paddy was enhanced to get more loan.

6(b).As far as second charge is concerned, opening balance produced and the sale and stock and opening balance were not correct. Sri Ramana Kumar Rice Industries (P) Ltd., has given excess valuation to the extent of Rs.60 Lakhs and Bank has lost Rs.60 Lakhs. The petitioner has not regularly visited the godown. If he had done the inspection regularly, the Bank would not have lost Rs.60 Lakhs. The respondents have proved all the charges before the Enquiry Officer. The first respondent without properly appreciating the evidence let in before the Enquiry Officer, erroneously held that the charges in the first charge memo and first charge in the second charge memo were not proved. The said finding is erroneous. The first respondent has upheld the order of dismissal based on the second charge in second charge memo proved and dismissed the appeal filed by the petitioner by giving valid reason.

6(c).The Inspecting Officer who inspected the stock on 20.01.2004 has made an endorsement that stock position to be improved. In spite of the same, the petitioner did not act as per the procedure and caused loss to the Bank. Before the Enquiry Officer and first respondent, the respondents 2 to 4 have produced materials and proved that the petitioner was negligent in following the procedure.

7.The learned counsel appearing for the respondents 2 to 4 contended that there is no provision in the Regulations of the Bank to issue second Show Cause Notice to the petitioner. The petitioner has not proved as to how he was affected by non-issuance of second Show Cause Notice.

8.The respondents 2 to 4 have not filed any appeal challenging the order of the first respondent, holding that the charges in the first charge memo and first charge in second charge memo were not proved. Even without filing any appeal, the respondents 2 to 4 can prove that finding of the first respondent in this aspect is wrong. The petitioner is entitled to make the said submissions as per Order 41 Rule 22 of Code of Civil Procedure. In support of his contention, the learned counsel appearing for the respondents 2 to 4 relied on the following judgments:

8(i)(1999) 7 SCC 435, [Ravinder Kumar Sharma Vs. State of Assam and Others], wherein at paragraph Nos.16 to 19, 22 & 23, the Hon'ble Apex Court held as follows:

"...16.The next question is as to whether, the law as stated above has been modified by the 1976 Amendment of Order

41 Rule 22. It will be noticed that the Amendment has firstly deleted the words "on any of the grounds decided against him in the Court below, but take any cross-objections" in the main part of Order 41 Rule 22 CPC and added the words "but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour" in the main part.

17.The main part of Order 41 Rule 22 (1) CPC, (after the 1976 Amendment) reads as follows:

"O.41 R.22(1): Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow."

18.The 1976 Amendment has also added an Explanation below Order 41 Rule 22, as follows:

"Explanation: A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding,

notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree is, wholly or in part, in favour of that respondent".

19. In connection with Order 41 Rule 22, CPC after the 1976 Amendment, we may first refer to the judgment of the Calcutta High Court in Nishambhu Jana vs. Sova Guha [(1982) 89 CWN 685]. In that case, Mookerjee, J. referred to the 54th report of the Law Commission (at p.295) (para 41.70) to the effect that Order 41 Rule 22 gave two distinct rights to the respondent in the appeal. The first was the right to uphold the decree of the court of first instance on any of the grounds which that court decided against him. In that case the finding can be questioned by the respondent without filing cross-objections. The Law Commission had accepted the correctness of the Full Bench of Madras High Court in Venkata Rao's case. The Commission had also accepted the view of the Calcutta High Court in Nrisingha Prosad Rakshit vs. The Commissioners of Bhadreswar Municipality that a cross-objection was wholly unnecessary in case the adverse finding was to be attacked. The Commission observed that the words "support the decree..." appeared to be strange and "what is meant is that he may support it by asserting that the ground decided against him should have been decided in his favour. It is desirable to make this clear". That is why the main part of Order 41 Rule 22 was amended to reflect the principle in Venkata Rao's case as accepted in Chandre Prabhuji's case.

22. A similar view was expressed by U.N. Bachawat, J. in Tej Kumar vs. Purshottam [AIR 1981 MP 55] that after

the 1976 Amendment, it was not obligatory to file cross-objection against an adverse finding. The Explanation merely empowered the respondent to file cross-objections.

23. In our view, the opinion expressed by Mookerjee, J. of the Calcutta High Court on behalf of the Division Bench in Nishambhu Jena's case and the view expressed by U.N. Bachawat, J. in Tej Kumar's case in the Madhya Pradesh High Court reflect the correct legal position after the 1976 Amendment. We hold that the respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the respondent, for the purpose sustaining the decree to the extent the lower court had dismissed the suit against the defendants-respondents. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory. In other words, the law as stated in Venkata Rao's case by the Madras Full Bench and Chandre Prabhuji's case by this Court is merely clarified by the 1976 Amendment and there is no change in the law after the Amendment."

8(ii) (2004) 3 SCC 214, [Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another], wherein at paragraph No.35, the Hon'ble Apex Court held as follows:

"...35. A few decisions were brought to the notice of this Court by the learned Additional Solicitor General wherein this Court has made a reference to Order 41 Rule 22 of the CPC and permitted the respondent to support the decree or decision under appeal by laying challenge to a finding recorded or issue decided against him though the order, judgment or decree was in the end in his favour. Illustratively, see Ramanbhai Ashabhai Patel (1965) 1 SCR 712; Management of Northern Railway Co-operative Society Ltd. (1967) 2 SCR 476; Bharat Kala Bhandar Ltd. - (1965) 3 SCR 499. The learned ASG is right. But we

would like to clarify that this is done not because Order 41 Rule 22 CPC is applicable to appeals preferred under Article 136 of the Constitution; it is because of a basic principle of justice applicable to Courts of superior jurisdiction. A person who has entirely succeeded before a Court or Tribunal below cannot file an appeal solely for the sake of clearing himself from the effect of an adverse finding or an adverse decision on one of the issues as he would not be a person falling within the meaning of the words 'person aggrieved'. In an appeal or revision, as a matter of general principles, the party, who has an order in his favour, is entitled to show that even if the order was liable to be set aside on the grounds decided in his favour, yet the order could be sustained by reversing the finding on some other ground which was decided against him in the court below. This position of law is supportable on general principles without having recourse to Order 41 Rule 22 of the Code of Civil Procedure. Reference may be had to a recent decision of this Court in Nalakath Sainuddin Vs. Koorikadan Sulaiman - (2002) 6 SCC 1 and also Banarsi & Ors. Vs. Ram Phal - JT 2003 (5) SC 224. This Court being a Court of plenary jurisdiction, once the matter has come to it in appeal, shall have power to pass any decree and make any order which ought to have been passed or made as the facts of the case and law applicable thereto call for. Such a power is exercised by this Court by virtue of its own jurisdiction and not by having recourse to Order 41 Rule 33 of the CPC though in some of the cases observations are available to the effect that this Court can act on the principles deducible from Order 41 Rule 33 of the CPC. It may be added that this Court has jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. Such jurisdiction is conferred on this

Court by Article 142 of the Constitution and this Court is not required to have recourse to any provision of CPC or any principle deducible therefrom. However still, in spite of the wide jurisdiction being available, this Court would not ordinarily make an order, direction or decree placing the party appealing to it in a position more disadvantageous than in what it would have been had it not appealed."

9.The learned counsel appearing for the petitioner in reply contended that the Hon'ble Apex Court and Division Bench of this Court have held that Code of Civil Procedure will have no application in respect of Writ proceedings initiated under Article 226 of the Constitution of India and relied on the judgment reported in 2007 2 L.W. 919 [Villupuram Market Committee and others Vs. K.Sekar and others] wherein a Division Bench of this Court has held that Order 41 Rule 22 of Code of Civil Procedure is not applicable to Writ proceedings and referred to paragraph Nos.15, 24 and 25, which held as follows:

"...15. The Honourable Supreme Court, while examining the above issue has also stated that, when the High Court exercises the extraordinary jurisdiction under Article 226 of the Constitution of India, it aims at securing a very speedy and efficacious remedy to a person, whose legal or constitutional right has been infringed and if all the elaborate and technical rules laid down in the Code are to be followed in the writ proceedings, the very object and purpose is likely to be defeated. In paragraph No.5 of the said judgment, the Honourable Supreme Court therefore held thus:

"... If because of the explanation, proceeding under Article 226 of the Constitution has been excluded, there is no question of making applicable the procedure of Code as far as it can be made applicable' to such proceeding. The procedures prescribed in respect of suit in the Code if are made applicable to the writ proceedings then in many cases it may frustrate the exercise of extraordinary powers of the High Court under Articles 226 and 227 of the

Constitution..."

24. However, when we refer to the decision of the Honourable Supreme Court reported in AIR 1996 SC 1092 (PURAN SINGH Vs. STATE OF PUNJAB), the elaborate discussion contained therein, which have been extracted by us in the earlier part of our order, we find that the position is entirely different than what has been stated in the Division Bench judgment. The Honourable Supreme Court has not stated the legal position confining to the proceedings under Article 226 of the Constitution of India alone. In fact, in paragraph 10 of the said judgment, the Honourable Supreme Court has specifically stated that the ratio laid therein was not only with reference to the Writ Petition, but was applicable to the Writ Appeal as well. In fact, the Writ Appeal is nothing, but the continuation of the proceedings of the Writ Petition filed under Article 226 of the Constitution of India. In fact, the Division Bench of this Court in the decision reported in 1991 (2) MLJ 635 was conscious of the fact that the decision in the writ appeal had to necessarily take in a discussion of the relevant aspects of Article 226 of the Constitution though such a writ appeal is preferred under Clause 15 of the Letters Patent. In this context, it will be worth while to refer to the decision of the Honourable Supreme Court reported in 1986 (SUPP) SCC 401 (UMAJI KESHAO MESHARAM Vs. RADHIKABAI), wherein the Honourable Supreme Court has highlighted, how the Appellate Side Rules framed by invoking the Sections 122 and 125 of the Civil Procedure Code will have to be confined strictly to the proceedings covered by the Civil Procedure Code. In paragraph 110 of the said judgment, the Honourable Supreme Court has stated as under:

".... In fact, proceeding under Article 226 cannot be governed by rules made by the high Courts under the Code of Civil Procedure, 1908. Under Sections 122 and 125 of the Code, the High Courts are

conferred the power to make rules regulating their own procedure and the procedure of the civil courts subject to their superintendence and they can by such rules annul, after or add to all or any of the rules in the First Schedule to the Code. These rules are, therefore, intended to regulate the exercise of procedure in respect of matters to which the Code applies. The Code deals with suits and appeals, reference, review and revision arising out of orders and decrees passed in suits..."

25. As we are bound by the above categorical pronouncement of the Honourable Supreme Court, we are unable to follow the Division Bench decision relied upon by the learned senior counsel for the writ petitioner reported in 1991 (2) MLJ 635 (THE TAMIL NADU ELECTRICITY BOARD Vs. R.SRINIVASAN). We therefore, prefer to follow the decision of the Honourable Supreme Court and hold that the Code of Civil Procedure will have no application in respect of the Writ Appeal proceedings filed under Clause 15 of the Letters Patent, though, it is an Appellate proceedings, it is nonetheless the continuation of the proceedings initiated under Article 226 of the Constitution, to which the provisions of the Code of Civil Procedure are not applicable as per the Explanation to Section 141 of CPC."

9(i).The learned counsel appearing for the petitioner also relied on paragraph No.31 of the judgment reported in (2004) 3 SCC 214, [Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another], wherein the Hon'ble Apex Court held as follows:

"...31.Now we digress a little to deal with the issue as to the maintainability of the cross objections. For three reasons we find the cross objection not entitled to consideration on merits : firstly, in an appeal by special leave under Article 136 of the Constitution, cross objections do not lie; secondly, the BPT having given a

proposal to the Court though on being prompted by the Court to do so, the Bombay Port Trust should not be permitted to beat a retreat and withdraw from the compromise proposals or lay challenge to it in the facts and circumstances of the case. The compromise proposals have been held to be fair, just and reasonable, and challenge to it is devoid of any merit; and thirdly, the issue as to compromise proposals stands implicitly circumscribed by the order of remand dated 31.10.1995 and cannot be allowed to be reagitated at this stage. The first of these three needs elaboration."

The learned counsel appearing for the respondents 2 to 4 relied on paragraph No.35 of this judgment, that has been cited supra.

10. Heard the learned counsel for the petitioner, learned Government Advocate appearing for the first respondent as well as the learned counsel appearing for respondents 2 to 4 and perused the entire materials on record.

11. The issues to be decided in the present Writ Petition are:

(i) Whether the petitioner has failed to follow the procedure in respect of OCC facility granted to Praveen Boiled Rice Mills and the impugned order of the first respondent upholding the order of dismissal of the petitioner is valid?

(ii) Whether the respondents 2 to 4 are entitled to invoke Order 41 Rule 22 of Code of Civil Procedure?

12. Issue No.1:

The petitioner was promoted as Scale-II Officer in the year 1997 and posted as Branch Manager at Nellore Branch. When the petitioner took charge as Branch Manager of the said Branch, Praveen Boiled Rice Mills was an existing customer enjoying KCC and OCC facilities. In the year 2013, the said firm was having OCC facility of Rs.80 Lakhs. They wanted enhancement of said limit to Rs.111 Lakhs. The necessary proposal was sent to the Credit Management Department, Central Office of the Bank. After considering the proposal, limit was enhanced to Rs.110 Lakhs on 14.07.2003. According to the petitioner, the said firm sought enhancement to pay the amounts due to farmers from whom the said firm already purchased paddy. The petitioner after verifying the stock position, permitted the said firm to withdraw the amounts to settle the dues to the farmers. The

charge leveled against the petitioner is that, contrary to the procedure he allowed cash withdrawal without verifying the end-user. The respondents 2 to 4 have failed to substantiate this charge. As rightly pointed by the learned counsel appearing for the petitioner, the respondents 2 to 4 have not produced any materials to show that loan facilities granted to the customers can be operated only by way of cheques. The respondents have not disproved the contentions of the petitioner that said firm has already procured paddy from farmers and only to pay the farmers, they have sought for enhancement of facility to Rs.111 Lakhs. It is not the case of the respondents 2 to 4 that said firm did not utilize the funds for the purpose for which it was sanctioned and said customer utilized the funds for some other purpose.

12(i).As far as the charge against the petitioner that he did not follow the procedure in respect of KCC and OCC facilities granted to Sri Ramana Kumar Rice Industries (P) Ltd., as well as Praveen Boiled Rice Mill is concerned, the first respondent has exonerated the petitioner from two charges in respect of Sri Ramana Kumar Rice Industries (P) Ltd., and first charge in second charge memo with regard to KCC facility given to Praveen Boiled Rice Mill. In the said background, it has to be seen whether the petitioner was negligent in respect of OCC facility granted to Praveen Boiled Rice Mill. The charge leveled against the petitioner in respect of OCC facility is that he has not ensured proper verification of OCC stock and failed to notice that operation of account was poor from 01.07.2003 and there was no operation in the account from 07.12.2003. Due to this, Bank has suffered loss. On the other hand, the petitioner has stated that he was inspecting the Godown every month and physically verified the stock available and the value and recorded the same in the Cash Register. The petitioner has stated that he inspected the Godown on 22.07.2003 along with Ch.Suryanarayana, concurrent Auditor of the Bank and upon being satisfied with the stock position, endorsed that adequate stock found in Stock Inspection Register. Subsequently, according to the petitioner, he inspected the Godown on 23.08.2003, 25.09.2003, 18.10.2003, 29.11.2003 and 19.12.2003. On all these inspections, sufficient stock to cover the OCC account was found in the Godown and necessary entries were made in the Stock Inspection Record. The respondents 2 to 4 have not let in any contra evidence to this contention.

12(ii).The contention of the respondents 2 to 4 is that the petitioner, due to VIP Status of Praveen Boiled Rice Mills has made entries in the Inspection Report based on the Information given by said firm without inspecting the Godown and physically verifying the stock. The respondents 2 and 3 have not let in any evidence to prove their contention. It is pertinent to note that on 20.01.2004 and 21.01.2004, there was surprise inspection of the Branch by R.Ayyappan, Inspecting Officer of the Bank. The

said R.Ayyappan inspected the Godown of the Praveen Boiled Rice Mills where the stocks hypothecated in respect of OCC facility were kept. The said R.Ayyappan in his report has stated that stock worth Rs.167.78 Lakhs were found in the Godown at the time of his inspection. The respondents 2 to 4 have not disputed the veracity of statement of R.Ayyappan. It is not their case that both the petitioner and R.Ayyappan colluded with the firm and R.Ayyappan has given false report. The respondents 2 to 4 have not disputed the contention of the petitioner that during January 2004, the outstanding loan of the customer was Rs.115.53 Lakhs only and R.Ayyappan has reported to improve the stock position only to be on the safer side.

12(iii).The Enquiry Officer failed to take note of the fact that the stock worth Rs.167.78 Lakhs was available as per the report of R.Ayyappan. The Enquiry Officer has taken note of the later part of the observation of the R.Ayyappan that "improve the stock". Without properly appreciating the entire report of R.Ayyappan, Inspecting Officer, the Enquiry Officer has concluded that stock available at the time of inspection of R.Ayyappan was not adequate. The Enquiry Officer also failed to consider that the explanation of the petitioner that after inspection on 20.01.2004 and 21.01.2004, the customer has sold the stock, leaving only Rs.3 Lakhs worth stock and did not remit the amount to the Bank.

12(iv).Further, the contention of the petitioner is that breach of trust by firm cannot be a reason to allege that the petitioner was negligent. The 1st respondent without properly appreciating the above facts, accepted the findings of the Enquiry Officer to hold that the petitioner failed to take necessary steps to ensure and protect the interest of the Bank. Both the Enquiry Officer as well as the 1st respondent failed to consider that stock given as security for OCC facilities is only by way of hypothecation and custody of stock is with customer. The customer is entitled to sell the stock hypothecated to the Bank. The condition attached to such sale is, customer must remit the sale proceeds to OCC account. Subsequently, the customer can avail the available limit in OCC to purchase stock for his business. When such is the procedure in respect of OCC and when the respondents 2 to 4 do not dispute veracity of the report dated 21.01.2004 of R.Ayyappan, Inspecting Officer, with regard to stock position, the explanation given by the petitioner that the firm has sold the stock after 21st January 2004 and did not remit the amounts to the Bank and that negligence cannot be attributed on the petitioner for breach of trust is acceptable.

12(v).Immediately after coming to know that stock worth Rs.3 Lakhs only is available in the Godown, the petitioner took

possession of the Godown as per the instructions of the Bank. The customer handed over the Godown with the stock along with covering letter dated 13.03.2004. In the said letter, customer had stated that approximately 2000 bags were available in the Godown. The stocks are not physically counted and without disclosing the contents kept in the gunny bag, the stocks were handed over to the Bank. The 1st respondent considering the said statement has erroneously concluded that stock were not counted. The said conclusion is erroneous for the simple reason that the said statement was made by the customer in his letter dated 13.03.2004. Such a statement made on 13.03.2004 will not lead to a conclusion that the petitioner did not inspect the Godown from July 2003 to December 2003 and the stocks available were not physically verified. In any event, the Inspecting Officer, R.Ayyappan after physically verifying the stock has given a report that stock worth Rs.167.78 Lakhs were available on 20th January 2004. For the above reason, the finding of the Enquiry Officer is perverse as he failed to properly appreciate the materials placed before him during the enquiry. The 1st respondent relying on the portions of finding recorded by the Enquiry Officer, without properly considering the Inspection Report dated 20th January 2004 and misinterpreting the statement of the customer, contained in the letter dated 13.03.2004 has erroneously held that the 2nd charge in the 2nd charge memo leveled against the petitioner is proved.

12(vi).The contention of the learned counsel for the respondents 2 to 4 that report of R.Ayyappan, Inspecting Officer of Bank who conducted surprise check is not correct is only an after thought. At no point of time till the time of arguments, respondents 2 to 4 have not come out with such a plea. Respondents 2 to 4 have not placed any material to show that they took action against R.Ayyappan for giving a report without physically verifying the stock. The surprise check as ordered and conducted by Bank is only to prevent the negligence or misconduct committed by Branch Manager in respect of stock held by customer, who had availed OCC facility. If the report of the Inspecting Officer was not correct, respondents 2 to 4 ought to have taken action against the said officer for furnishing false report.

13.Issue No.2:

The respondents 2 to 4 issued two charge memos to the petitioner. In the domestic enquiry, the Enquiry Officer held that charges leveled against the petitioner in both the charge memos were proved. Based on the finding of the Enquiry Officer, the first respondent by the order dated 05.04.2007, dismissed the petitioner from service. The petitioner filed appeal to the third respondent and the same was rejected by the order dated 26.10.2009. Against the said order, the petitioner

filed appeal before the first respondent under Shops and Establishment Act. The first respondent exonerated the petitioner on all the charges in first charge memo and first charge in second charge memo. Based on the second charge in the second charge memo, the first respondent dismissed the appeal filed by the petitioner and confirmed the order of dismissal passed by the second respondent and confirmed by the third respondent. Against the order of first respondent, the petitioner has come out with the present Writ Petition.

13(i).When the Writ Petition is taken up for hearing, the learned counsel appearing for the respondents 2 to 4 contended that the respondents 2 to 4 are entitled to invoke Order 41 Rule 22 of Code of Civil Procedure to substantiate the impugned order of dismissal passed by the first respondent on the finding which were held against the respondents 2 to 4 in the impugned order. This Court comes to the conclusion that impugned order of first respondent is liable to be set aside. The learned counsel for the respondents 2 to 4 relied on the judgments reported in (2004) 3 SCC 214, [Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another] and (1999) 7 SCC 435, [Ravinder Kumar Sharma Vs. State of Assam and Others]. On the other hand, the learned counsel for the petitioner relied on the very same judgment reported in (2004) 3 SCC 214, [Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another] and the Division Bench of this Court reported in 2007 2 L.W. 919, [Villupuram Market Committee and others Vs. K.Sekar and others] and contended that Order 41 Rule 22 of Code of Civil Procedure is not applicable in the Writ proceedings. In the judgment reported in (2004) 3 SCC 214, [Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another], the Hon'ble Apex Court did not hold that provisions of Code of Civil Procedure is applicable to the Writ proceedings under Article 226 of Constitution of India.

13(ii).On the other hand, the Hon'ble Apex Court passed the said judgment as per Article 136 of Constitution of India. The other judgment reported in (1999) 7 SCC 435, [Ravinder Kumar Sharma Vs. State of Assam and Others] did not arise in the Writ proceedings and therefore the same is not applicable to the present case. Paragraph No.31 of the judgment reported in 2004) 3 SCC 214, [Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another], and the judgment of the Division Bench of this Court reported in 2007 2 L.W. 919, [Villupuram Market Committee and others Vs. K.Sekar and others] are squarely applicable to the facts of the present case. The Division Bench of this Court has categorically held that production of Order 41 Rule 22 of Code of Civil Procedure is not applicable in the Writ proceedings under Article 226 of Constitution of India. The Division Bench of this Court has held that the said provision is

not applicable in the Writ proceedings and Writ Appeal is continuation of Writ proceedings. In view of the judgment of Division Bench of this Court reported in 2007 2 L.W. 919, [Villupuram Market Committee and others Vs. K.Sekar and others], the contention of the learned counsel for the respondents 2 to 4 is without merits and the same is rejected.

14.The Enquiry Officer as well as the 1st respondent have not properly appreciated the materials on record and hence the finding of the Enquiry Officer and impugned order of the 1st respondent are liable to be set aside and is hereby set aside as respondents 2 to 4 have failed to prove the charges leveled against the petitioner.

15.In the result, the Writ Petition is allowed. No costs.

Sd/-
Assistant Registrar(CS-VII)

//True copy//

Sub Assistant Registrar

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(Appellate Authority under the Shops and
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- 2.The Assistant General Manager,
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W.P.No.31348 of 2012

RV(CO)
GMV(06/11/2019)