BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.10.2022

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P(MD)No.14100 of 2021
and
W.M.P.(MD)No.11064 of 2021

S.Raja ... Petitioner

Vs.

1.The Assistant General Manager (OAD),
Disciplinary Authority, State Bank of India,
Circle Top House, No.16, College Lane,
Chennai – 600 006.

2.The Enquiry Officer, State Bank of India,
FIMM RACC, Distillary Road,
Nagercoil – 629 001. ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the penalty order dated 23.07.2021 in VIG/KMV/75 passed by the 1st respondent and quash the same and direct the resinstatment of the petitioner with all attendant benefits.

For Petitioner : Mrs.K.Sumathi for Mr.S.Suresh

For Respondents : Mr.M.Ajmal Khan, Senior Counsel,
For Mr.M.Ponnaiah, Standing Counsel.

ORDER

Heard the learned counsel appearing for the petitioner and the learned senior counsel appearing for the respondents.

2.The writ petitioner was working as Special Assistant (Cash-in-charge)/ Cashier at Thingal Nagar Branch of State Bank of India from 30.06.2010 to 20.10.2015. One of his duties was to replenish cash on daily basis along with a joint custodian/an officer of the bank. During the relevant period, one Ms.Vanitha, Accounts Officer/Deputy Manager was the joint custodian along with the petitioner. Though as per ATM Cash Manual, the exercise of replenishment must be a joint work, due to some understanding at the branch level, Ms.Vanitha often did not accompany the petitioner.

3.The relevant date in this case is 31.07.2015. On the said date, the petitioner and Ms.Vanitha were to jointly go to the ATM centre and replenish cash. But Ms.Vanitha did not accompany the petitioner. She handed over the hood key and also the password. There is no dispute that the petitioner and the said Ms.Vanitha were joint custodians from 29.07.2015 to 13.08.2015. On 14.08.2015, the petitioner was on leave and had gone to Chennai to receive an award. One Ms.Hamilta and Ms.Lavanya were the joint custodians. They complained to the Chief Manager namely, Thiru.Mahendravarman that there was physical shortfall of Rs.2,50,000/- at ATM compared to admin balance. The petitioner returned from Chennai and resumed his earlier role from 17.08.2015 onwards. On 27.08.2015, on advice from the Chief Manager, the petitioner remitted a sum of Rs.2,50,000/- to make good the physical shortfall. This was duly reported by the Chief Manager to the Regional Manager, Tirunelveli.

4.On 03.02.2016, the petitioner was suspended from service. A criminal complaint was lodged. It was however closed. Subsequently, Crime No.38 of 2019 was registered but the same was quashed by this Court in Crl.O.P.(MD)No.3749 of 2020 on 06.03.2020. In the meanwhile, charge memo dated 22.11.2017 was issued. The petitioner offered his reply. An enquiry officer was appointed. The enquiry officer submitted his report dated 29.06.2021 holding that the charges levelled against the writ petitioner stood proved. The petitioner was served with a copy of the enquiry report. The petitioner offered his reply dated 12.07.2021. Thereafter, the disciplinary authority proposed to impose the penalty of dismissal. The petitioner was asked to appear in person through video conference on 22.07.2021 at 11.30 am. The petitioner sought personal hearing along with his legal representative. This was denied and the disciplinary authority insisted that the petitioner should appear on 22.07.2021 through video conference. The petitioner did not avail the said opportunity. Thereafter, the impugned order dated 23.07.2021 was passed by the disciplinary authority imposing the penalty of dismissal from service. Challenging the same, W.P.(MD)No.14100 of 2021 has been filed.

5.The learned counsel for the petitioner reiterated all the contentions set out in the affidavit filed in support of the writ petition and contended that the impugned order has to be set aside and the writ petitioner reinstated with all consequential benefits.

6.The respondents have filed a detailed counter affidavit and the learned senior counsel took me through its contents. He submitted that the writ petition deserves to be dismissed for more reasons than one. According to him, when an effective remedy of appeal is available, the question of entertaining this writ petition does not arise. He drew my attention to the writ petitioner's conduct in having filed several writ petitions at every stage. According to him, the petitioner was given the fullest opportunity. There has been no violation of principles of natural justice. The writ petition is bereft of merits. He pressed for dismissal.

7.I carefully considered the rival contentions and went through the materials on record.

8.The first question is whether the writ petitioner has to be non-suited for not having availed the alternative remedy of appeal before the appellate authority. It is well settled that the rule of non-exhaustion of alternative remedy is more a rule of discretion and not something which goes to the jurisdiction available under Article 226 of the Constitution of India. If the petitioner bypasses the appellate remedy, then the scope for factual appreciation gets limited. It is a risk which the petitioner takes. It is always open to the Writ Court to entertain a writ petition even if the petitioner has an alternative remedy of appeal. The Writ Court will interfere if the petitioner can show breach of the principles of natural justice. Therefore, the writ petition cannot be dismissed as not maintainable on this ground.

9.The learned counsel appearing for the petitioner raised very many contentions. It was contended that Clause 3 of the Memorandum of Settlement dated 10.04.2002 was not borne in mind. The learned counsel for the petitioner took me through relevant clauses and argued that since the petitioner has been acquitted, he can only be discharged and not dismissed. It is true that Crime

No.38 of 2019 registered against the writ petitioner was quashed by this Court in Crl.O.P.(MD)No.3749 of 2020 on 06.03.2020. But a reading of the order dated 06.03.2020 does not lead to the conclusion that the petitioner was acquitted. The employer had originally filed a complaint and it was temporarily closed on 16.04.2016. The closure report was questioned in Crl.O.P.(MD)No. 10630 of 2016. Vide order dated 05.07.2016, the said criminal original petition was disposed of with certain directions. I therefore held that the second complaint was not maintainable and granted liberty to the employer to work their rights in terms of the order dated 05.07.2016 in Crl.O.P.(MD)No.10630 of 2016. It appears that nothing further took place. From this, one cannot conclude that the writ petitioner was acquitted. Acquittal has a definite connotation in criminal law. The accused must have been tried, evidence adduced and the Criminal Court must have given a judgment that the prosecution has not proved the charge. In the case on hand, the petitioner has not obtained any such judgment of acquittal. The second complaint given by the employer was quashed on a technical ground and the employer was given liberty to pursue the first complaint. The first complaint never took off. Therefore, the petitioner cannot claim the benefit of the aforesaid clause in the Memorandum of Settlement.

10.The charge memo contains the following articles of charge:-

"***Charge No.1:***

On 31.07.2015, the employee replenished cash in the onsite ATM without the presence of joint custodian. While replenishing the cash in ATM, he misappropriated Bank's money to the tune of Rs.2,50,000/-. He has thus violated the system procedures as laid down in the ATM manual (June 2008) Page 113. [As detailed in Statement of Allegations under item No.1 of Annexure-II (enclosed)].

Charge No.2:-

The employee obtained the secret password from ATM cash replenishment from the Accountant and amended the admin balance leaving a cash shortage of Rs.2,50,000/- between physical balance and admin balance. Thus, he violated the laid down instructions regarding maintenance of secrecy of password as laid down in the ATM manual (June 2008) Page 67. [As detailed in Statement of Allegations under item No.2 of Annexure-II (enclosed)].

Charge No.3:

Thus, Shri S.Raja, Special Assistant (under suspension), has misappropriated an amount of Rs.2,50,000/- while replenishing cash in the onsite ATM at Thingal Nagar Branch on 31.07.2015 and amended the admin balance of ATM. In the process, the employee has indulged in misappropriation of Bank's money for his personal benefit with fraudulent intention. The above acts of *the employee, if proved would tantamount to Gross Misconduct in terms of paragraph 5(j) of Memorandum of Settlement dated 10.04.2002."*

The learned counsel for the petitioner would argue that the petitioner's service conditions are governed by the Bipartite Settlement dated 10.04.2022 and that the first two articles of charge will not constitute an act of misconduct. I reject this contention. The expression "misconduct" has been defined in Clause 5 of the Bipartite Settlement. Clause 5(j) describes, doing any act prejudicial to the interest of the bank or gross negligence or negligence involving or likely to involve the bank in serious loss, as an act of gross misconduct. Clause 5(l) includes abetment or instigation of any of the acts or omissions mentioned in Clause 5. When ATM Manual clearly prescribes that the replenishment must be done by two persons jointly, replenishment done by the petitioner without the joint custodian being present would definitely amount to gross misconduct. There is reason as to why the banking procedures insist on the involvement of two persons jointly in carrying out a given work or transaction. It may be that Ms.Vanitha, the officer concerned had asked the petitioner to open the hood and carry out the work of replenishment by parting with her password. But the petitioner ought to have categorically told her that he will not comply with the said instruction. It is well settled that it is not a defence for a subordinate official to plead obedience to the superior's instructions, if the same is otherwise illegal. Ms.Vanitha's act in parting with password and handing over the hood key and asking the petitioner to replenish the ATM on his own was an act that was prejudicial to the interest of the bank and likely to involve the bank in serious loss. The petitioner had abetted the same by carrying out the illegal directive. Therefore, I reject the contention that the charges 1 and 2 could not have been framed against the writ petitioner.

11.Before proceeding further, it is necessary to bear in mind the following principles laid down by the Hon'ble Apex Court. In ***Allahabad Bank v. Krishna Narayan Tewari (2017) 2 SCC 308***, it was held as follows :

> "7.It is true that a writ court is very slow in interfering with the findings of facts recorded by a Departmental Authority on the basis of evidence available on record. But it is equally true that in a case where the Disciplinary Authority records a finding that is unsupported by any evidence whatsoever or a finding which no reasonable person could have arrived at, the writ court would be justified if not duty bound to examine the matter and grant relief in appropriate cases. The writ court will certainly interfere with disciplinary enquiry or the resultant orders passed by the competent authority on that basis if the enquiry itself was vitiated on account of violation of principles of natural justice.......Non-application of mind by the Enquiry

Officer or the Disciplinary Authority, non-recording of reasons in support of the conclusion arrived at by them are also grounds on which the writ courts are justified in interfering with the orders of punishment."

In ***Rajasthan State Road Transport Corporation and Ors. vs. Bal Mukund Bairwa (2009) 4 SCC 299***, the Hon'ble Apex Court held as follows :

> "10.An employee charged with grave acts of misconduct must be held to be entitled to a fair hearing in the departmental proceeding. The common law principles of natural justice must also be complied with. Rules laid down in the statutory rules indisputably should be followed."

In ***Roop Singh Negi vs. Punjab National Bank and Ors (2009) 2 SCC 570***, it was held that a decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are.

12.However, the petitioner is entitled to succeed for the reasons appearing below :

(a) Even according to the respondents, the writ petitioner and Ms.Vanitha were to jointly carry out the work of replenishment of the ATM on 31.07.2015. The stand of the respondents is that on the said date, the petitioner had misappropriated bank's money to the extent of Rs.2,50,000/-. Ms.Vanitha was independently dealt with. The charges framed against Ms.Vanitha are as follows:-

*"**Charge No.1:***
The official failed to accompany the joint custodian while replenishing cash in the onsite ATM and violated the laid down instructions stipulated in page no.113 of ATM manual – June 2008.

Charge No.2:
The official failed to maintain secrecy of the ATM cash replenishment Terminal Master Keys (TMK)/password and diluted its confidentiality, thereby breached the system integrity. This laxity on the part of the official resulted in shortage of Cash balance and difference in Physical and Admin cash balance of Rs.2,50,000/- on 31.07.2015 and facilitated Shri S.Raja, Special Assistant (Cash-in-charge) to misappropriate an amount of Rs.2,50,000/- for his pecuniary benefit and thus violated the laid down instructions stipulated in page no.67 of ATM manual – June 2008.

Charge No.3:
The official failed to bring to the notice of higher authorities regarding the irregularity on the part of Shri S.Raja, Special Assistant (Cash-in-charge), that the cash disbursements were not

made to the customers relating to gold loans on the date of sanctioning of loan after posting and authorizing the debit vouchers in CBS. However, he effected cash disbursements for the gold loans to the gold loan borrowers only the next day.

Charge No.4:

Thus, Smt K.Vanitha, Officer MMGS II, failed to discharge her duties and responsibilities with utmost diligence and devotion, thereby violated Rule 50(4) of State Bank of India Officers' Service Rules 1992 and facilitated perpetration of fraud by Shri S.Raja, Special Assistant (Cash-in-charge)."

(b) Vide order dated 18.01.2018, Ms.Vanitha was imposed with the penalty of reduction by three stages in time scale of pay for a period of two years with further directions that she will not earn increments during the said period and that it will have the effect of postponing the future increments of her pay. A mere reading of the charges framed against Ms.Vanitha would indicate that the writ petitioner figures prominently therein. The finding of the disciplinary authority is that the charges 1, 2 and 4 have been proved.

(c) The General Manager (NW-II) was the appointing and disciplinary authority for Ms.Vanitha. By holding that the charges 1, 2 and 4 are proved, he had found the writ petitioner also guilty. The disciplinary authority in the case of the writ petitioner is Assistant General Manager (OAD). He is lesser in rank compared to General Manager. The penalty order imposed in the case of Ms.Vanitha is there on record. Of course, the learned senior counsel for the respondents would strongly argue that the proceedings pertaining to Ms.Vanitha are independent and that it was not referred to or relied upon by the disciplinary authority in the present case. But the fact remains that an officer above the rank of the first respondent had already rendered findings against the writ petitioner. It had already been concluded that the writ petitioner had misappropriated a sum of Rs.2,50,000/-. Therefore, the first respondent could not have taken a different view. This in my view has seriously violated the principles of natural justice. The writ petitioner did not have a fair opportunity before the disciplinary authority. Any delinquent has the right to have his case decided independently by the disciplinary authority. This right has been breached in this case.

(d)Even though Ms.Vanitha was in the officer grade while the writ petitioner was governed by the Bipartite Settlement, considering the special facts and circumstances, the final order in the case of Ms.Vanitha as well as the writ petitioner could have been passed by one and the same authority on the same date, one after another. In the alternative, the proceedings against the writ petitioner could have been concluded first and thereafter, the final order in the case of Ms.Vanitha chould have been passed. Passing of the final order in the case of Ms.Vanitha by a superior authority and passing of the final order in the case of the writ petitioner subsequently by an authority lower in rank has clearly prejudiced the rights of the writ petitioner. By no stretch of imagination, the Assistant General Manager could have rendered a finding contrary to what was rendered by the General Manager. This simple reason is sufficient to set aside the impugned order.

(e) The writ petitioner has pointed out that he was entrusted with the responsibility only from 29.07.2015. One Sathiya was in his place along with Ms.Vanitha from 23.07.2015 till 28.07.2015. But for reasons that are not quite clear in the enquiry report, even on those days, the petitioner has been shown as the jointly responsible along with Ms.Vanthia. More than anything else, the ATM Manual Cash Verification Certificate dated 31.07.2015 shows that the physical balance and admin balance has been tallied. The figure was Rs. 36,34,500/-. It was signed by both the joint custodians namely, Ms.K.Vanthia and Mr.S.Raja (writ petitioner) and counter signed by the Branch Manager namely, Thiru.P.Mahendra Varman. The allegation is that on 31.07.2015, the petitioner had committed the act of misappropriation. This allegation and the

ATM Cash Verification Certificate do not go together. The petitioner therefore insisted that Ms.K.Vanitha and Thiru.P.Mahendra Varman (Chief Manager) must be examined as witnesses. The enquiry officer while issuing summons made it clear that it is for the petitioner to produce them. This approach cannot be appreciated. The petitioner has been visited with a very serious charge. He has been imposed with the punishment of dismissal from service. While the delinquent may adopt appropriate strategies and tactics, the employer must play a fair game. He is obliged to produce the best witnesses. He is bound to make available those witnesses whom the delinquent wants to examine. Ms.K.Vanitha as well as Thiru.P.Mahendra Varman are employees of State Bank of India. The employer could have easily caused their production as witnesses. In fact, the employer ought to have examined them as witnesses in the first instance. Not having done so, when the delinquent prayed that they must be examined, their production ought to have been ensured. After all the charge is that the petitioner misappropriated a sum of Rs.2,50,000/- by making use of the absence of Ms.K.Vanitha. But the ATM Cash Verification Certificate signed by Vanitha as well as Mahendra Varman states that there was no shortfall as on 31.07.2015. Ms.Vanitha and Mr.P.Mahendra Varman ought to have explained the circumstances in which they issued the verification certificate. The ATM Cash Verification Certificate was produced by the petitioner and it was listed as Document No.21. The enquiry officer could not have been turned a nelson's eye. The failure to examine the best witnesses had vitiated the fairness of the enquiry.

(f) The claim of the employer is that on 14.08.2015, when the petitioner had gone to Chennai, Ms.Hamilta and Ms.Lavanya are said to have given a complaint to the Chief Manager that there was shortfall of Rs.2,50,000/-. The learned counsel for the petitioner took me through the testimony of these witnesses and conclusively demonstrated that even though Ms.Lavanya was the joint custodian along with Ms.Hamilta, she did not accompany Ms.Hamilta. Ms.Hamilta and one messenger alone had operated the ATM and loaded cash. Ms.Lavanya had joined them only in the last few minutes. There is nothing on record to show that the complaint of Ms.Hamilta and Ms.Lavanya was countersigned by the Chief Manager on the same day. There is considerable merit in the submission of the learned counsel appearing for the petitioner that the presence of a unauthorised person in the on-site ATM on 14.08.2015 and the absence of Ms.Lavanya during substantial part of the replenishment process would throw doubt on the allegations made against the petitioner. This is a relevant material that must have been taken note of. The disciplinary authority did not bear this aspect in mind.

(g) On the side of the employer only two witnesses were examined. But as many as 14 documents were marked. Interestingly, the documents were marked by the Presenting Officer himself. The learned counsel for the petitioner drew my attention to the decision reported in ***2011 SCC Online Mad 2845 (K.Raman Vs. Presiding Officer)***. It has been held therein that the statement of the Presenting Officer cannot be taken as evidence substantiating the case of the employer. The learned senior counsel for the respondents pointed out that the issue as to whether the Presenting Officer can figure as a witness came up for consideration before the Hon'ble Full Bench of High Court at Calcutta in ***WP No.2392 of 2001 (S.V.S.Marwari Hospital Vs. State of West Bengal and Others).*** The Hon'ble Full Bench gave a finding that only if the delinquent employee can show that he suffered prejudice by reason of the Presenting Officer acting as a witness on behalf of the management, the enquiry proceedings will possibly be held to be vitiated. The prejudice must be real prejudice as opposed to formal prejudice, affecting some substantial legal right of the employee and that the burden is on the employee to establish such prejudice. No doubt, the judgment of the Hon'ble Full Bench of the High Court at Calcutta is entitled to the greatest respect and weight. But a judgment of another High Court can have only a persuasive value and not binding effect. The learned counsel for the petitioner relies on a decision rendered by a learned

Judge of this Court. I am inclined to hold the view that only with the consent of the delinquent/employee, a document can be marked straightaway by the Presenting Officer. Otherwise, a document has to be marked only through its author or somebody who is connected with the documents in some way. He can even be custodian of the document. It is true as pointed out by the learned senior counsel for the respondents that the writ petitioner's legal representative cross-examined the witnesses in respect of the documents marked by the Presenting Officer. But the scope of cross-examination can only be to the extent of the knowledge of the witnesses and it can never be a full-fledged cross-examination. Unless, the Presenting Officer is formally declared as witness and his statement had been made available to the petitioner, he could not have cross-examined the Presenting Officer. The prejudice suffered by the petitioner is real and not illusory or formal. Thus, the petitioner had made out a case even if I go by the judgment of the Hon'ble Full Bench of High Court at Calcutta.

(h) The learned counsel for the petitioner had raised many other contentions but I am of the view that the reasons set out above are more than sufficient to set aside the order impugned in this writ petition and it is accordingly set aside. The matter is remitted to the file of the disciplinary authority. The disciplinary authority will re-open the enquiry. In other words, the evidence that has already been adduced will remain intact. A new enquiry officer will be appointed and further enquiry will be conducted and concluded in compliance with the principles of natural justice and in the light of the observations made above. Since the authority in the rank of General Manager had already decided the issue, the enquiry report will be placed before an authority superior in rank to that of General Manager. It is for the said authority to take appropriate action on merits and in accordance with law. Since the dismissal order has been set aside, the petitioner stands reinstated. Of course, it is open respondent management to pass an order to keep the petitioner under suspension. But then, subsistence allowance as per rules will have to be paid till final order is passed in the disciplinary action.

13.With these directions, this writ petition is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

11.10.2022

Index : Yes / No
Internet : Yes/ No
ias

G.R.SWAMINATHAN, J.

ias

W.P(MD)No.14100 of 2021

11.10.2022