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CALCUTTA HIGH COURT

SINGLE BENCH

(Before : Sambuddha Chakrabarti, J)

SHYAM PADA DAS — Appellant

Vs.

BOARD OF PRACTICAL TRAINING EASTERN REGION — Respondent

W.P. No. 5813(W) of 2005

Decided on : 26-09-2014

- Air Force Act, 1950 - Section 18, Section 19
- Constitution of India, 1950 - Article 12, Article 226
- Penal Code, 1860 (IPC) - Section 494, Section 498A

Cases Referred

- General Manager, Appellate Authority, Bank of India and Another Vs. Mohd. Nizamuddin, AIR 2006 SC 3290 : (2006) 111 FLR 339 : (2006) 3 LLJ 964 : (2006) 9 SCALE 121 : (2006) 7 SCC 410 : (2006) SCC(L&S) 1663 : (2006) AIRSCW 4880 : (2006) 7 Supreme 286
- Additional District Magistrate (City) Agra Vs. Prabhakar Chaturvedi and Another, AIR 1996 SC 2359 : (1996) 1 JT 207 : (1996) 1 LLJ 811 : (1996) 1 SCALE 202 : (1996) 2 SCC 12 : (1996) 1 UJ 280
- M.M. Malhotra Vs. Union of India (UOI) and Others, AIR 2006 SC 80 : (2005) 107 FLR 1006 : (2005) 9 JT 506 : (2005) 8 SCALE 202 : (2005) 8 SCC 351 : (2005) SCC(L&S) 1139 : (2005) 3 SCR 1026 Supp : (2006) 1 SLJ 303 : (2005) AIRSCW 5497 : (2005) 7 Supreme 111
- Commissioner and Secretary to the Govt. and Others Vs. C. Shanmugam, (1998) 79 FLR 739 : (1998) 4 JT 236 : (1998) 2 SCC 394
- Vishaka and others Vs. State of Rajasthan and Others, AIR 1997 SC 3011 : (1997) 3 Crimes 188 : (1997) 7 JT 384 : (1997) 5 SCALE 453 : (1997) 5 SCALE 451 : (1997) 6 SCC 241 : (1997) 3 SCR 404 Supp : (1997) AIRSCW 3043 : (1997) 7 Supreme 323
- Baldev Singh Gandhi Vs. State of Punjab and Others, AIR 2002 SC 1124 : (2002) 1 JT 602 Supp : (2002) 2 PLR 240 : (2002) 2 SCALE 169 : (2002) 3 SCC 667 : (2002) 1 SCR 1021 : (2002) AIRSCW 878 : (2002) 1 Supreme 654
- Town Area Committee, Jalalabad Vs. Jagdish Prasad and Others, AIR 1978 SC 1407 : (1978) 37 FLR 108 : (1979) 1 SCC 60 : (1978) 10 UJ 359
- Swadeshi Cotton Mills Vs. Union of India (UOI), AIR 1981 SC 818 : (1982) 1 CompLJ 309 : (1981) 1 SCALE 90 : (1981) 1 SCC 664 : (1981) 2 SCR 533
- Union of India and another Vs. W.N. Chadha, AIR 1993 SC 1082 : AIR 1992 SC 1082 : (1993) CriLJ 859 : (1992) 3 SCALE 396 : (1993) 4

SCC 260 Supp : (1992) 3 SCR 594 Supp
- The State of Uttar Pradesh Vs. Mohammad Nooh, (1958) 1 SCR 595
- Union of India (UOI) Vs. T.R. Varma, AIR 1957 SC 882 : (1958) 2 LLJ 259 : (1958) 60 PLR 126 : (1958) 1 SCR 499
- State of Mysore Vs. S.S. Makapur, AIR 1963 SC 375 : (1964) 1 LLJ 24 : (1963) 2 SCR 943
- Apparel Export Promotion Council Vs. A.K. Chopra, AIR 1999 SC 625 : (1999) 1 CTC 316 : (1999) 81 FLR 462 : (1999) 1 JT 61 : (1999) 1 LLJ 962 : (1999) 1 SCALE 57 : (1999) 1 SCC 759 : (1999) 1 SCR 117 : (2000) 1 SLJ 65 : (1999) 1 UJ 508 : (1999) AIRSCW 274 : (1999) AIRSCW 4818 : (1999) 9 Supreme 103 : (1999) 1 Supreme 110
- S.L. Kapoor Vs. Jagmohan and Others, AIR 1981 SC 136 : (1980) 4 SCC 379 : (1981) 1 SCR 746
- Canara Bank and Others Vs. Shri Debasis Das and Others, AIR 2003 SC 2041 : (2003) 3 JT 183 : (2003) 2 LLJ 531 : (2003) 3 SCALE 220 : (2003) 4 SCC 557 : (2003) SCC(L&S) 507 : (2003) 2 SCR 968 : (2003) 2 SLJ 345 : (2003) 2 UJ 1129 : (2003) AIRSCW 1561 : (2003) 2 Supreme 793
- Shriyans Pradad Jain Vs. Income Tax Officer and others, AIR 1993 SC 2612 : (1993) 114 CTR 411 : (1993) 204 ITR 616 : (1993) 5 JT 292 : (1993) 3 SCALE 743 : (1993) 4 SCC 727 Supp : (1993) 2 SCR 279 Supp : (1993) 70 TAXMAN 290
- Kuldeep Singh Vs. The Commissioner of Police and Others, AIR 1999 SC 677 : (1999) 81 FLR 630 : (1999) 8 JT 603 : (1999) 1 LLJ 604 : (1998) 6 SCALE 588 : (1999) 2 SCC 10 : (1999) SCC(L&S) 429 : (1998) 3 SCR 594 Supp : (1999) AIRSCW 129 : (1998) 9 Supreme 452
- Nagar Palika, Nataur Vs. U.P. Public Services Tribunal, Lucknow and Others, (1998) 79 FLR 746 : (1998) 4 JT 241 : (1998) 2 SCC 400 : (1998) SCC(L&S) 567
- State Bank of India Vs. Ram Lal Bhaskar and Another, (2011) 131 FLR 1109 : (2011) 12 JT 286 : (2011) LLR 1233 : (2011) 11 SCALE 589 : (2011) 12 SCR 1036 : (2012) 1 SLJ 108

Counsel for Appearing Parties

Ganesh Panda, Senior Advocate, Advocate for the Appellant; Bikash Ranjan Bhattacharyya, Senior Advocate and Abhijit Gangopadhyay, Advocate for the Respondent

JUDGMENT

Sambuddha Chakrabarti, J.—The facts leading to the present case and the various aspects related thereto raise several issues, at times with dimensions beyond the scope of the present writ petition. As such they deserve a thorough examination and must be viewed from a holistic stand, not necessarily circumscribed by the factual aspects of the case.

2. If viewed naively this writ petition may be considered as one like many its sort directed against a disciplinary proceeding resulting in compulsory retirement of the petitioner from service. But the questions that have cropped up in course of hearing and upon examination of the records of the proceeding travel far beyond a former employee's assertion about the conduct of the enquiry and the respondents' effort to justify it. In fact, they touch on broader

issues of fundamentals of service jurisprudence, eminence of inalienable right of defence and certainly the extent to which an employer may be permitted to scuttle that right, if at all.

3. But for that a brief resume of the facts is necessary.

4. The petitioner was the Assistant Director, Training of the respondent No. 1, i.e., the Board of Practical Training (Eastern Region) (the 'Board' for short), a society under the Ministry of Human Resource Development and as such an authority under Article 12 of the Constitution of India.

5. There was a matrimonial dispute in the life of the petitioner which resulted in lodging of mutual criminal cases.

6. The wife of the petitioner brought a charge of bigamy and cruelty against her husband to the police authorities. The Board got this information from the police and placed him under suspension.

7. The petitioner in this writ petition alleges that in the month of March, 2001 he fell very seriously ill and when he went to join the office with the medical certificate on April 20, 2001 he was served with an order of suspension. This was followed by a memorandum, dated May 17/22, 2001 whereby the petitioner was informed that the authorities proposed to hold an enquiry against him under Rule 14 of the Central Civil Services (Classification, Control and Appeals) Rules, 1965 (CCS (CCA) Rules, for short).

8. The substance of the imputations of misconduct was set out in the articles of charges and statements of the imputations of misconduct in respect of each article were also enclosed.

9. The first article of charge in substance was that the petitioner on March 7, 2000 had solemnized a Hindu marriage with one Mithu Mondal and applied for registration of the marriage under the Hindu Marriage Act on March 8, 2000 concealing his marital status. Since the petitioner was a Hindu bigamy was not permissible. He also failed to maintain his wife and minor daughter and had thereby acted in a manner unbecoming of a servant of the Board and failed to maintain a decent standard of conduct in his private life which had brought discredit to the to his service under the Board.

10. The second charge against the petitioner was that he was reportedly arrested on April 2, 2001 and released on bail on the next day. He was again arrested on the very next day but was released on that day itself.

11. The third article of charge related to his absence from office from March 13, 2001 and that he had overstayed even after the period of rest advised by the doctor without any intimation to his office. But during this period he visited both a court and a police station and as such he was alleged to have given false information to the office regarding his absence.

12. The petitioner's reply to the charges not having been found satisfactory a disciplinary proceeding was initiated and the respondent No. 4 was appointed as the Enquiry Officer.

13. The Enquiry Officer found the petitioner guilty of the charges framed against him. The Director of Training of the Board, i.e., the respondent No. 3, was the disciplinary authority. He asked him to show-cause within 72 hours from the date of the receipt of the notice why he should not be removed from service. The petitioner replied mentioning what he considered to be the flaws in the enquiry report and prayed to be given an early hearing in view of the complicated nature of the case and the legal points raised by him. It was very specifically mentioned in that rather lengthy reply that statements were obtained at the enquiry and relied on by the Enquiry Officer without his knowledge. He was thus deprived of the opportunity to have any knowledge about the statements made at the enquiry. It was further pointed out by him that the enquiry report is vitiated by the non-consideration of the documents supplied by the petitioner and he categorically denied claim of the disciplinary authority that he was given reasonable opportunity to defend himself at the enquiry.

14. By an order dated July 6, 2004 the respondent No. 3 held that the charges under the first two articles had been substantiated against the petitioner. Consequently the major penalty of compulsory retirement was imposed on him.

15. The petitioner filed an appeal to the appellate authority, i.e., the Chairman of the Board who is the respondent No. 2 herein and by an order dated November 25, 2004 he upheld the order passed by the disciplinary authority.

16. By this writ petition the petitioner has challenged the order of suspension as well as the disciplinary proceeding itself and has inter alia prayed for a writ in the nature of mandamus commanding the respondents to set aside and cancel his suspension, the enquiry report and the orders of the disciplinary and the appellate authority.

17. The respondent No. 3 has affirmed an affidavit-in-opposition denying the allegations made by the petitioner. But he has confirmed the allegation made by the petitioner that on a police tip-off the petitioner was placed under suspension and that the police had informed the office that the petitioner would be directed to meet him for the purposes of an investigation on a case under Sections 498A/494 of the Indian Penal Code initiated on the written complaint of Smt. Rupa Das, the wife of the petitioner.

18. The real case which emerges from the affidavit-in-opposition is that the petitioner submitted an application for registration of marriage under the Hindu Marriage Act, 1955 to the Marriage Registrar under the signatures of petitioner and others on March 8, 2000. In the said application the petitioner declared that a marriage had already been solemnized between Smt. Mithu Mondal and himself on the day before. Although the concerned Marriage Registrar had certified that no marriage between the petitioner and Smt. Mithu Mondal was registered by him the issue of solemnization of marriage remained valid.

19. The answering respondents have repeated the substance of the charge that even after the expiry of the period of medical rest the

petitioner did not join the office. He was placed under suspension in exercise of the power conferred by Rule 10(1) CCS (CCA) Rules, 1965 for conducting disciplinary proceedings against him. A very specific case which is relevant to the issues involved in the present writ petition has been made out by the deponent that the petitioner informed the deponent by a letter dated May 30, 2001 of his willingness to appear in person before the enquiry authority. The said letter was sought to be projected as an admission on the part of the petitioner that the enquiry authority had offered him reasonable opportunity and acted as per the principles of natural justice. According to the respondents the enquiring authority "examined" six witnesses keeping in view all the aspects of the charge. The petitioner on receipt of the enquiry report had intimated the respondent No. 3 his thanks that the enquiry officer had made natural justice with regard to the articles of charge. Therefore, the allegation that the enquiry proceeding was conducted without following the principles of natural justice was baseless. The deponent stated that when a Grade I Government Officer under his signature declares that he has committed bigamy it is a major misconduct on his part and that had resulted in the compulsory retirement from the service. The respondent No. 3 had also justified the dismissal of the petitioner's appeal as the appellate authority had gone through each and every point. Therefore, he prayed for dismissal of the writ petition.

20. In a short affidavit-in-reply the petitioner denied the allegation made in the affidavit-in-opposition. He alleged that the respondents tried to mislead the court by recording false and fabricated documents. He has specifically mentioned that he had not been given any opportunity to cross-examine the witnesses and the oral evidence of none of the witnesses on behalf of the management was recorded in his presence. In the reply the petitioner has taken a further point that the then Director, Training, of the Board who was the disciplinary authority was one of the witnesses along with other witnesses. He further denied to have ever made any confession that the enquiring authority had given him reasonable opportunity or acted as per the principles of natural justice.

21. By a supplementary affidavit the petitioner has produced two copies of judgments and orders. By the first order the marriage between the petitioner and his wife was dissolved by a decree of divorce on mutual consent on October 13, 2007. The second was a certified copy of a judgment and order dated July 14, 2010, in a criminal case which was initiated against the petitioner under Sections 498A/494 of the Indian Penal Code on the complaint of his former wife Smt. Rupa Das. The accused persons including the petitioner were found not guilty and were acquitted.

22. The respondents had filed an opposition to the said supplementary affidavit and reiterated their earlier stand that the petitioner had committed the offence of bigamy which was evident from is own declaration. A new fact was alleged in the said affidavit that the petitioner had participated at the enquiry and apart from himself had examined three witnesses namely Rupa Das, Sambhu Nath Mitra, the Office Superintendent of BOPT and Niranjan Chowdhury.

23. That the enquiry proceeding contains several lacunae was practically admitted at the hearing by Mr. Bikash Ranjan Bhattacharyya, the learned Senior Counsel for the respondents. He, however, very strenuously sought to justify the action of the respondents on the basis of the declaration contained in the application made by the petitioner and one Smt. Mithu Mondal to the Marriage Registrar. In line with the stand taken by the respondents Mr. Bhattacharyya argued that even if the lacunae in the disciplinary proceeding exist the unimpeachable fact remains that the petitioner had married for the second time during the subsistence of the first marriage and thereby committed the offence of bigamy. For an employee, that too holding such a high position as that of the petitioner, bigamy is a very serious lapse and must be regarded as a major misconduct warranting a major penalty. And that is precisely what the respondents had done. Notwithstanding any shortcoming in the conduct of the enquiry the second marriage must be deemed to have been admitted by the petitioner through his application and, therefore, the authorities cannot be faulted for the ultimate punishment imposed.

24. Mr. Bhattacharyya went so far to argue that non-compliance of the principles of natural justice - even if taken for the sake of argument - would have had no material bearing on the outcome of the enquiry inasmuch as the finding of guilt of the petitioner is based on the self-declaration of a marriage with one Smt. Mithu Mondal. He invoked the doctrine of 'empty formality' in the matter of compliance with the principles of natural justice. Natural justice need not be stretched that far when its compliance would result in an empty formality and would not have produced any result different from the one reached by the respondents.

25. Before I come to consider the submissions of Mr. Bhattacharyya the allegations of the petitioners are worth considering. It has been the persistent case of the petitioner that the enquiry officer as well as the disciplinary authority had failed to give him reasonable opportunity to defend his case and in the process violated the principles of natural justice which in turn have vitiated the entire proceeding.

26. Over and above the documents annexed to the writ petition and different affidavits I have had the privilege of going through the records of the case which, pursuant to my direction, were produced in court. Even a cursory browse through the records leaves no manner of doubt that the enquiry was conducted in a manner which was not expected of a model employer. The reasons are not very far to seen.

27. First, the petitioner was not given any chance to cross-examine any of the witnesses and the evidence of the prosecution witnesses were taken behind his back. The whole case started with a complaint by the then wife of the petitioner Smt. Rupa Das to the authorities for cruelty and torture inflicted by the petitioner on her. She alleged that the petitioner had solemnized a second marriage with one Mithu Mondal which was informed to the authorities. She was again the source of information about the detention of the petitioner in

custody. In fact, the records contain several letters written by Smt. Rupa Das to different officers of the respondent No. 1 on different dates. The petitioner also wrote a letter to the respondent No. 3 alleging that his wife used to run a Madhu Chakra and she was caught red handed by the members of the local club in the company of two persons in a drunken state. These two men were handed over to the police.

28. It is interesting that the Office Superintendent of the respondent No. 1 society by a note, dated April 19, 2001 had discussed the allegations against the petitioner transpiring from the complaints of Smt. Rupa Das and the proposed actions to be taken in the matter along with various legal aspects of the act alleged against him. He had pointed out that in a case like this a enquiry as laid down in CCS(CCA) Rules was mandatory.

29. The records of the case reveal that Sri S.P. Ghosh the Administrative-cum-Accounts Officer (AAO) in his note, dated May 14, 2001, recorded that it was "carefully observed" from the papers submitted both by Smt. Rupa Das as well as the officers of the Dum Dum Police Station that the petitioner had committed a serious mistake violating the conduct rules of the Government of India. Thus it was "evident" that the petitioner married Smt. Mithu Das (Mondal) on March 7, 2000 in spite of having his first wife. He proposed a departmental enquiry against the petitioner which the disciplinary authority approved.

30. These have been mentioned in details only as evincing that even before a departmental enquiry was ordered, the AAO concluded that it was "evident" that the petitioner had committed offence. It cannot be lost sight of that in annexure IV to the charge-sheet the two witnesses by whom the charges were proposed to be sustained were the AAO and the Office Superintendent. It was further mentioned there that the respondents might examine any other witness with prior intimation to the charged officer. But no such intimation was ever given to the petitioner.

31. By an order, dated August 3, 2001, the disciplinary authority appointed the AAO as the presenting officer to present the case in support of the charges at the enquiry. Mr. Bhattacharyya submitted that questions at the enquiry were put by the enquiry officer. When there was a presenting officer the enquiry officer should not have done so. Such wrong exercise of power has been uniformly disapproved by judicial decisions.

32. The first hearing took place on August 21, 2001 when the petitioner was examined. The procedure adopted by the respondents must be reckoned not only unusual but a rather surprising one. Here was a case where the charged employee was examined as the first witness before the prosecution witnesses were examined.

33. After the examination of the petitioner he was not intimated any date of further proceeding of the enquiry and consequently when other witnesses were examined he had neither any knowledge of the same nor could he be present there. From the records produced in court it does not appear that the respondents ever attached any

importance to the necessity of keeping him informed about the next dates of the proceeding.

34. On August 28, 2001 Sri P.C. Basu, The Director of Training who was also the disciplinary authority, was examined as PW-4. This must be reckoned to be a very unusual procedure followed by the respondents. This is the least that could be expected of a management willing to conduct the enquiry impartially. In the case of The State of Uttar Pradesh Vs. Mohammad Nooh, the disciplinary authority appeared as a witness against a civil servant. The Supreme Court considered it to be a violation of natural justice and observed that it shocked notions of judicial propriety and fair play.

35. To overcome the obvious conclusion resulting from the examination of the disciplinary authority Mr. Bhattacharyya submitted that PW-4 did not dispose anything on the charge of second marriage of the petitioner. His evidence was restricted to whether the petitioner had intimated the office on his unauthorized absence and, therefore, the examination of PW-4 cannot be said to have in any way vitiated the enquiry.

36. This is not a very convincing submission. Law never requires that all the witnesses will have to dispose on all the charges against a delinquent. Unauthorized absence beyond the period of medical advice certainly formed a part of the articles of charge. In the course of such deposition he even described a statement of the petitioner as "baseless" and had taken definitely a stand against the petitioner.

37. This is a very major lapse on the part of the respondent. A witness appearing in support of the charge should never have acted as a disciplinary authority. He thus becomes partisan and loses his impartiality to act as a disciplinary authority.

38. Two subsequent acts by the disciplinary authority equally raise one's eyebrows. He asked the AAO to consult the books and to intimate him about the major penalty that could be taken against the petitioner. Simultaneously by a letter dated August 16, 2002 he requested an external person i.e., the Chief Personnel Officer, IR, Eastern Railway, to examine the enquiry report and to suggest the next course of action. The latter opined that two of the charges were proved and left the matter relating to the imposition of penalty to the respondents themselves.

39. Mr. Bhattacharyya submitted that the opportunity to make verbal submission that was given to the petitioner on the enquiry report only proved the impartiality on the part of the disciplinary authority. There is no provision for providing a charged employee with any further verbal submission on the enquiry report in the CCS (CCA) Rules. Even then a disciplinary authority, if he so deems necessary might give a charged employee a further opportunity.

40. But a careful perusal of the records dispels all misgivings that the purpose behind it was to show impartiality. Otherwise the respondents would have acted very differently from the very start. The reason mentioned by the disciplinary authority in his letter to the petitioner i.e., passage of some time after the submission of the

enquiry report, was obviously not the real cause. It appears from his own letter that he called the charged officer for a further hearing on the legal advice and that too with a specific purpose.

41. A very specific stand has been by the respondents that the petitioner cannot allege violation of the principles of natural justice as while acknowledging the receipt of the enquiry report inter alia suggests as he had thanked the authorities for conducting the enquiry maintaining the principles of natural justice.

42. It is true that the petitioner made a concessional statement. But that does not really clinch the issue or foreclose him from making a grievance subsequently. He has thereafter although alleged that natural justice had been violated. In his reply, dated January 5/7, 2004, to the notice of punishment he specifically raised the issue of recording evidence behind his back. Referring to a Supreme Court judgment he claimed the entire enquiry proceeding to be totally void and as such there was no question of imposing any punishment. In his appeal to the Chairman of the Board also the same point was taken by him. Therefore, even if he might have made a concessional statement that cannot be acted upon by the respondents or acts as an estoppel against the petition.

43. That apart an employer must have to at all stages of the proceeding scrupulously comply with the requirements of the principles of natural justice. The onus is entirely on him. He cannot go behind any concession on the part of a charged employee as a justification of the acts done by them. The requirement to comply with the principles of natural justice is mandatory and unwaivable. Nothing turns on whether an employee in a letter had made any concession to that effect. It is all the more so when it is found that almost at every stage the authorities failed to comply with the same and the petitioner persistently made a serious grievance about the lapses.

44. Mr. Bhattacharyya is also aware of the manifold lacunae. He, therefore, sought to justify the punishment with reference to the declaration made by the petitioner in his application. For him this declaration constituted a binding admission on the part of the petitioner.

45. Appreciating that the conduct of the enquiry was not otherwise legally supportable Mr. Bhattacharyya went so far as to submit that even assuming that there was no enquiry at all against the petitioner, he still could be punished on the basis of his application to the Marriage Registrar. This submission must be reckoned to be an argument in desperation. When the petitioner was imposed with a major penalty the CCS(CCA) Rules require that an employee cannot be so dealt with except by holding an enquiry against him.

46. That apart, the submission is not tenable for two reasons. First, after holding an enquiry against the petitioner there is no scope for against that the authorities might as well impose punishment without an enquiry. Secondly, if no enquiry had been held against the petitioner no major penalty could be imposed upon him.

47. Mr. Bhattacharyya's submissions that the petitioner could be punished on the basis of the admission itself is also not acceptable for a very different reason. It is true and is a settled principle of law that a fact admitted need not be proved. But this is not a case where the fact has been admitted unqualifiedly. The petitioner while admitting his signature on the application for registration of marriage has explained that he did it in a state of mental depression and he had categorically and repeatedly maintained the stand that he had not married again. If, the authorities decided to rely on an application made by him I find no reason why they should not have taken his subsequent statements seriously into consideration. In other words, it is not clear why the authorities decided to stick to the statement made in the application as sacrosanct compared to his categorical denial subsequently.

48. It cannot be lost sight of that the criminal case on the charge of bigamy against the petitioner had subsequently been dismissed by a competent court of law and that too was initiated on the complaint of Smt. Rupa Das. It may further be mentioned that Smt. Rupa Das was the de facto complainant in the criminal case who had lodged the FIR. It appears from the judgment and order passed in the criminal case that this PW-1 in cross-examination had stated that there was some misunderstanding between the PW-1 and the accused persons which led to the filing of the criminal case. They further deposed that they had no allegation against the accused persons.

49. The judicial magistrate while acquitting the petitioner had specifically observed that the prosecution witnesses which included Smt. Rupa Das and Smt. Debasmita Das, the daughter of the petitioner, could not withstand the cross-examination or prove the charges brought by them.

50. In the departmental enquiry great importance was attached - if not disproportionate - to the letters written by Smt. Rupa Das on whose allegations all the actions against the petitioner snowballed. That is only because the prosecution did not allow the petitioner to cross-examine any of the witnesses and no copy of deposition of any of the witnesses, other than that of Niranjan Chowdhury, was given to the petitioner before the conclusion of the enquiry proceeding. When no opportunity is given to a delinquent to cross-examine a witness all that he says at the enquiry in the end remains an ex parte statement and the authorities seriously erred in not appreciating that such untested and unchallenged statements could not be used in finding a man guilty of the charges.

51. In course of his submission Mr. Bhattacharyya submitted that Niranjan Chowdhury who was a witness to the application for registration of marriage, also deposed against the petitioner in favour of the charge. I consider such emphasis to be a slight overstatement without considering the contents of what Mr. Chowdhury had stated at the enquiry. After all, Mr. Chowdhury never knew the petitioner before. According to him he agreed to sign the application form only because his superior had permitted him so to do. The statements of a person who comes and says that without knowing somebody and without witnessing a marriage he had agreed to become a witness

might not have been taken seriously.

52. While passing the order I am keenly aware of the legal position that it is not for the writ court to sit in appeal over the finding in a disciplinary proceeding or the orders passed by the disciplinary authority. It is true that a writ court cannot scan the evidence minutely. But a writ court certainly has the power to interfere when the finding is perverse and is based on no evidence.

53. The perversity of the finding is writ large on the fact of it. The enquiry officer gave a cryptic report and passed a speculative order that the certificate issued by the Marriage Registrar that no marriage was not registered from his office, did not rule out the possibility of a Hindu marriage being solemnized between the petitioner and Smt. Mithu Mondal. This is a finding based on negative surmise and conjectures. Even if the rules of evidence per se do not apply to a departmental enquiry an employer is ultimately not absolved of his primary responsibility of proving a case against an accused before he is penalized. Likewise the order passed by the disciplinary authority is also nothing more than some uncorroborated, untested and uncontested statements being conjointly put together to arrive at the conclusion of the offence of the petitioner. That apart he having appeared before the Enquiry Officer as a witness in support of the charge demonstrated his partisan attitude and the conclusion he drew must be reckoned to be a foregone and an obvious one.

54. It has already been found that by a note dated February 18, 2002 the disciplinary authority had requested the AAO to consult the books and intimate him about the major penalty that might be passed against the petitioner in accordance with the rules. If such a decision had already been taken to impose a major penalty against the petitioner, the subsequent purported opportunity of hearing granted in January, 2004 was a camouflage and insincerely done to cover up the own shortcomings of the enquiry.

55. It has already been noticed that the respondents authority had violated the principles of natural justice and the procedure for conducting the enquiry as provided in CCS (CCA) rule in so many aspects and in such obvious ways that the proceeding against the petitioner cannot be said to be a sustainable one. The examination of the petitioner before the prosecution witnesses were examined was not only an unusual procedure but also against the requirement of Rule 14(16) of the CCS (CCA) Rule. The said provision stipulates that after the case for the Disciplinary Authority is closed only then the Government servant shall be required to state his defence. Otherwise, it is the disciplinary authority which is, in terms of Rule 14(14) of those rules are required to produce evidence first by which the Articles of charge are proposed to be proved. In the case of State of Mysore Vs. S.S. Makapur, the Supreme Court held that fair opportunity to cross-examine should be given when the statements of witnesses were not recorded in presence of the charged employee. In the case of Union of India (UOI) Vs. T.R. Varma, , the Supreme Court had very specifically held that evidence of the witnesses to prove the charges should be recorded in the presence of the employee concerned.

56. The respondents seem to have been oblivious of the position that right of cross-examination is an essential element of reasonable opportunity and unless such opportunity is given to the petitioner, he is deprived of the principle of natural justice. In the earlier mentioned case, the Supreme Court had observed that opportunity to cross-examine the witnesses should also be given to the accused employee and no material can be placed on record unless the employee is given an opportunity of explaining the same. In the case of Town Area Committee, Jalalabad Vs. Jagdish Prasad and Others, the Supreme Court observed that the right of hearing includes an opportunity to cross-examine the witnesses and lead evidence in defence. Therefore, denying the same to the petitioner clearly amounted to the denial of right of hearing. The same view was taken by the Supreme Court in the case of State of M.P. vs. Chinatamin, reported in AIR 1961 SC 1623 where the Supreme Court reiterated the non-relaxable principle that a party should not only have the opportunity of adducing all relevant evidence but the evidence of the opponent should also be taken in the presence of the other party.

57. The respondents were keenly aware of these lacunae and that for these gross violations of the principle of natural justice the proceeding was liable to be vitiated. In order to overcome the obvious shortcomings their defence was that the principle of natural justice did not embody any inflexible rule and were not required to be complied with in the present case where the charges against the petitioner were proved by his admission.

58. This stand is not tenable for a very obvious reason. If on the basis of the so-called admission itself the respondents had decided to impose a punishment upon the petitioner that might have the one thing even though it would have been against the rules. But when they had decided to initiate a disciplinary proceeding in terms of the CCS (CCA) rules all the requirements of law and procedure for the proper conduct of the proceeding were required to be complied with by the employer. An employer after conducting a full-fledged enquiry cannot take the plea that the enquiry was redundant and even without the same the charge against the petitioner could be sustained. I have already observed the office note on the point which specifically recorded that an enquiry was necessary in the present case. That apart, in terms of Rule 11 of the CCS (CCA) rules no major penalty can be imposed except without conducting a disciplinary proceeding against an employee and once an enquiry starts the principle of natural justice must be complied with scrupulously.

59. It is true that in some cases the recent ratiocination of judicial thinking allows non-compliance of the principle of natural justice on the basis of what has come to be known as doctrine of empty formality. In other words, natural justice may not be strictly insisted upon where it would not lead to any difference in the result or the accused has admitted the charge against him. In the case of Union of India and another Vs. W.N. Chadha, , the Supreme Court had occasion to consider that aspect in the context of a criminal case. The Supreme Court observed that the rule of audi alteram partem is a rule of justice and its application is excluded where the rule will itself

lead to injustice or the rule can be excluded to a case where nothing can be inferred by not affording the opportunity to present and meet a case. It cannot also be applied to make the law 'lifeless', 'absurd', 'stultifying' and 'self-defeting' or when it is plainly contrary to the common sense of the situation. The Supreme Court further observed that the rule may be jettisoned in very exceptional circumstances where compulsive necessity so demands.

60. In some cases, the Supreme Court had held that if on the admitted and indisputable facts only one conclusion is possible and under the law only one penalty is permissible court may not compel the observance of natural justice. In that case court shall not issue futile writ.

61. I am afraid, the factual aspects of the present case do not conform to any of exclusionary exceptions where it can be said that natural justice need not be complied with. Merely by relying on an application made by the petitioner the admission cannot be proved, particularly in view of his subsequent denials. The factum of second marriage had to be decided on the basis of the so-called admission and his subsequent denials. It will be unwise to find him merely on the basis of an application signed by him. This is not a case where the admission was absolute on which the authority could act to reach the conclusion of commission of the offence of bigamy by the petitioner. The law on the point is very well-settled that where the conclusion is controversial natural justice with all its rigours is indispensable.

62. Mr. Bhattacharjee's submission that the petitioner had not been in the lest prejudiced cannot be accepted given the present set of facts. The Supreme Court in the case of S.L. Kapoor Vs. Jagmohan and Others, held that non-observance of natural justice is itself a prejudice to any man. It observed that it ill comes from a person who had denied justice to say that the other one is not prejudiced. Again in the case of Swadeshi Cotton Mills Vs. Union of India (UOI), the Supreme Court quoted with approval the classical passage from the judgment of Megarry J. in John vs. Rees, reported in (1970) 1 CH 345;

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a charge. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

63. Even if the petitioner had appeared at the enquiry on one occasion and he had been asked some questions for the reasons stated above it cannot be said that he was given a proper hearing as the connotation of the word postulates. What he was given in fact was an apology of a hearing. Hearing does not necessarily end with answering a few questions by the enquiry officer. It covers within its sweep the right to participate in the enquiry and cross-examine the

witnesses produced by the prosecution.

64. Mr. Bhattacharjee submitted that the second opportunity given by the disciplinary authority after the conclusion of the enquiry had really cured all the defects and the petitioner could not have any grievance about the denial of natural justice to him.

65. The initial failure to comply with the principles of natural justice is not cured by the by the subsequent acts of the disciplinary authority. The failure was never rectified nor did the disciplinary authority give the petitioner any opportunity to cross-examine the witnesses produced at the enquiry. The failure of the natural justice at the enquiry stage was incurable even if the disciplinary authority had truly provided the petitioner with any sincere opportunity the effect of the initial failure could not be overcome. In the case of Leary vs. National Union of Vehicle Builders, reported in (1970) 2 ALL ER 713, Megarry J. observed; "If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body this is the result of depriving the opportunity of his right of appeal from the expelling body. If rules and the law combine to give opportunity the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?" Even if the appeal is treated as a hearing de novo the principle restricts his right to appeal to another body from the effective decision to expel him. Although arising out of expulsion of a member by a trade union without giving him a hearing, the principle enunciated therein applies with all the force to the facts of the present case.

66. In support of his contention Mr. Bhattachajee relied on the case of M.M. Malhotra Vs. Union of India (UOI) and Others, In that case the Supreme Court observed that the appellant who had contracted a second marriage during the subsistence of the first marriage was guilty under the Service Rules for misconduct. The Supreme Court further observed that under the scheme of the Air Force Act, 1950 and the rules framed thereunder any act of misconduct of an officer involving moral turpitude or amounting to offence can be dealt with in two ways. It can be by way of a disciplinary action i.e., the disposal of charges and court marshal or administratively under Sections 18 and 19 of the Act. In that case the appellant was issued a show-cause notice as to why he should not be dismissed from service u/s 19 of the said Act. The Supreme Court observed that while dealing with the matter u/s 19 of the Act the procedure contained in Rule 16 had to be followed. This Rule incorporates the principle of natural justice. Thus, the requirement to comply with the principles of natural justice was never given a go-by. The Supreme Court further held with the reference to the exact connotation of the word 'misconduct' that the act must be such that the delinquency in performance and its effect on the discipline and the nature of the duty are the connotations of misconduct. The act complained of must bear a forbidden quality of character and its ambit has to be construed with a reference to the subject matter and context wherein the term occurs having regard to the scope of the stature of the public purpose it seeks to serve.

67. Judged from the said point of view, the act charged against the petitioner cannot be said to be a misconduct proved at the enquiry. That apart, the judgment goes against the respondents in a way that the Supreme Court held insisted upon observance of the principles of natural justice.

68. Mr. Bhattacharjee next relied on the case of Apparel Export Promotion Council Vs. A.K. Chopra, This judgment on the face of it has no application to the facts of the present case. That is a case while relying on the case of Vishaka and others Vs. State of Rajasthan and Others, the Supreme Court interpreted misconduct in the context of sexual harassment in the work place and held that the findings of the disciplinary proceedings should not be treated as one of the criminal trials. Court should examine the probabilities of the case and not get swayed by insignificant, discrepancies or narrow technicalities. First, this is not a case of sexual harassment in a work place. As such there is a difference in the factual substratum between the two cases. Moreover, this is not a case where because of any insignificant discrepancy or narrow technicalities the prosecution case shall fail. This is a case of non-compliance with the basic principle of natural justice which cannot be equated with narrow technicalities.

69. Mr. Bhattacharjee further relied on the case of State Bank of India Vs. Ram Lal Bhaskar and Another, for a proposition that the High Court in exercise of its power under Article 226 of the Constitution of India does not act as an appellate authority. The Supreme Court observed that when the findings of the competent authority were based on some evidence, the High Court should not appreciate evidence and arrive at a different conclusion. This proposition of law is very well-settled. I have already observed the outer limits of its jurisdiction and the parameters for a writ court to examine the orders passed in a disciplinary proceeding. Applying that standard only I have found the disciplinary authority's acts to be entirely perverse, if not biased. The records of the disciplinary proceeding clearly evince how the indispensable and inalienable principles of natural justice have been variously sacrificed in the present case.

70. Mr. Bhattacharjee, next referred to the case of Commissioner and Secretary to the Govt. and Others Vs. C. Shanmugam, In that case the administrative tribunal interfered with an order passed by the disciplinary authority and the Supreme Court held that the administrative tribunal was no right to re-appreciate the evidence and come to its own conclusion. The principle laid down in this judgment is very close to the one referred to a case of State Bank of India (Supra) and, therefore, for the reasons mentioned in connection with that case the judgment passed in this case also does not apply to the facts of the present case.

71. The next case referred to by Kuldeep Singh Vs. The Commissioner of Police and Others, That judgment squarely should go against the respondents themselves. In that case the Supreme Court had reiterated the settled principle of law that a High Court can interfere with the finding of the guilt in a departmental enquiry if

the same is based on no evidence or is such as could not be reached by an ordinary prudent man or is perverse or is made to the Superior Authority. I have already held that in view of the way in which the enquiry was conducted by the respondents it could not be described as any thing short of perverse or based on no evidence and that gives this High Court sufficient justification to invoke the writ jurisdiction to interfere with the finding of guilt in a case like this.

72. The case of Nagar Palika, Nataur Vs. U.P. Public Services Tribunal, Lucknow and Others, has no manner of application to the facts of the present case. That was a decision where the Supreme Court held that the principles of natural justice are not violated where opportunity is afforded to a delinquent but is not utilized. In that case despite repeated reminders the delinquent employee neither submitted his reply to the charges nor did he appear before the enquiry officer nor did he inspect the records. That is not the case here. The petitioner was not given any opportunity to inspect the records. No copy of the statements recorded behind him, except that of one, was given to him and he was not given any opportunity to cross-examine the witnesses. While the Supreme Court was dealing with the case of non-utilizing the opportunities afforded to a delinquent the present case is directed against non-affording of any opportunity which goes to the root of the matter.

73. The judgment in the case of Additional District Magistrate (City) Agra Vs. Prabhakar Chaturvedi and Another, is again has no application to the present case. In that case the respondent No. 1 had admitted in writing the fact of temporary misappropriation of money. Here there was no admission of any offence. The document which is sought to be interpreted as an admission of an offence was inadequate to sustain the charge of bigamy against the petitioner. That apart, in the case before the Supreme Court the delinquent himself had stated before the enquiry officer that he did not want to give any documentary or oral evidence and his subsequent request is to examine four witnesses was rejected.

74. Similarly, the case of Canara Bank and Others Vs. Shri Debasis Das and Others, cannot be made applicable to the facts of the present case. That case was based on the doctrine of prejudice. The Supreme Court observed that in the absence of prejudice to the delinquent a pre-decisional deficiency can be compensated with the post decisional hearing and the Supreme Court held that the concerned officer could not show any prejudice. Factually, the present case poses a very different aspect. Here the prejudice to the petitioner is discernable almost at every stage and he had complained of it to the authority itself and taken a point of violation of the principle of natural justice.

75. In the judgment in Baldev Singh Gandhi Vs. State of Punjab and Others, the Supreme Court had examined different parameters of the word misconduct.

76. I also could not find any application of the judgment in the case of General Manager, Appellate Authority, Bank of India and Another Vs. Mohd. Nizamuddin, to the facts of the present case. There the respondent was unauthorizedly absent for more than three years

from his office which was considered to be detrimental to the public interest. That was found to be unbecoming of an employee of a bank. Obviously that is not the fact here. Moreover, with regard to the intimation given to the office for overstaying his medical rest he has been given benefit of doubt. This is not a case where the petitioner in spite of direction did not attend the departmental enquiry or he ignored any notice.

77. The judgment in the case of Shriyans Pradad Jain Vs. Income Tax Officer and others, is an authority on certain aspects of the Income Tax Law. It was merely observed that the findings recorded by a judicial commissioner, even if not binding upon the appellant it would be wrong to say that they did not constitute the relevant material.

78. Thus, none of the judgments cited by Mr. Bhattacharjee help the respondents in any manner.

79. It has been noticed that the proceeding suffers from various lacunae. That the petitioner was not given fair hearing goes without saying and that being so there is no judicial authority in favour of the respondents dispensing with the requirement of giving a fair hearing. The Lord Wright said in connection with a certain case that if the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in absence of departure from essential principles of justice. The decision must be declared to be no decision (quoted in Wade and Forsyth, Administrative Law (10th Edn.) Page-422).

80. In such view of it, I hold that the impugned order of the disciplinary authority as well as the enquiry report are not sustainable. I set aside and quash both of them. The penalty imposed upon the petitioner is also set aside. The respondents are directed to reinstate the petitioner in service within a period of six weeks from the date of the communication of the order with full back wages. The respondents are to release the amount by notionally fixing his salary to which he would have been entitled had he been in service and after taking into consideration the revision of pay and, thereafter, adjusting the amount already paid to him by way of subsistence allowance, within a period of ten weeks from the date of the communication of the order.

81. The respondents shall, however, be at liberty to proceed against the writ petitioner afresh on the self-same charges.

82. The writ petition is allowed.

83. For all that have been discussed above and particularly in view of the way the respondents had conducted the disciplinary enquiry, I am of the view that the respondents must pay Rs. 20,000/- to the petitioner by way of costs within a period of eight weeks from the date of the communication of the order, failing which the petitioner will be at liberty to recover the amount in accordance with law.

84. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.

Final Result : Allowed