IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

C.W.P. No.1331 of 2002.

Judgment Reserved on: 28.7.2006.

Date of decision:28th August, 2006.

Punjab National Bank and another ..Petitioners

-Versus-

Shri Durga Dutt Sharma and others ..Respondents

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

Whether approved for reporting? Yes

For the Petitioners: Mr.Ajay Kumar, Advocate.

For Respondent-1: Mr.D.D.Sood, Senior Advocate with Mr.Paresh Sharma, Advocate.

Deepak Gupta, J.

This writ petition by the Punjab National Bank (hereinafter referred to as the employer) is directed against the award of the Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Chandigarh (hereinafter referred to as the Tribunal) dated 20.6.2002 whereby he has held that the action of the employer in dismissing the respondent (hereinafter referred to as the employee) from the bank's services is not justified and has ordered the reinstatement of the employee into service with full back-wages, continuity of service and all consequential benefits including seniority etc. The employer has

also been held liable to pay interest @ 8% p.a. on the back-wages from the date they became due and payable.

Briefly stated the facts of the case are that the employee joined the services of the employer in the year 1978. He was posted at Shimla in 1982. On 9.8.1983 the CBI registered a case against the employee under Sections 420, 468, 467 and 471 IPC. The allegations, in brief, against the employee were that he has been filling in applications for grant of loan on behalf of certain bogus parties and had himself signed some of the documents on behalf of the so called loanees and mis-utilized the loan amounts. It was also alleged that he had been instrumental in having a loan sanctioned in favour of one lady who was not entitled to the said loan. The police case was in respect of loan of one Sh.Suresh Chand.

After the criminal proceedings were started the employee was suspended on 28th March, 1983. He was charge-sheeted on 25.4.1983 and disciplinary proceedings were started against him. Since the first charge in the disciplinary proceedings related to the case of Suresh Chand, was covered by the criminal proceedings the Inquiry officer held the said charge in abeyance pending conclusion of the criminal trial. Another charge levelled against the employee was that he had destroyed the bank records and the Inquiry Officer held that this charge had not been proved. The other two charges levelled against the employee were; (i) that he had filled in an application in the

name of one Sh.Jagdish Chand Sharma with wrong information to defraud the bank. It was alleged that he has signed the guarantee letter of Jagdish Chand Sharma by signing as one Sh.S.S.Thakur. The bank also alleged that the employee had withdrawn the loan amount of Rs.5000/- by impersonating as J.D. Sharma, and (ii) that the employee had knowingly given wrong information with regard to one Smt.Parkasho and had sanctioned her loan even though she was not entitled for the same. The Inquiry Officer held that these charges stood proved against the employee. The inquiry was concluded in November, 1985 and the Inquiry Officer submitted his report on 13.3.1986.

Before the disciplinary authority took any further action on the basis of the inquiry report the employee was convicted by the Chief Judicial Magistrate, Shimla for having committed offences under Sections 420/467/468/471 read with Section 120-B IPC. On the basis of the conviction order so recorded by the CJM the employee was dismissed from service on 15.12.1987. The appeal filed by the employee before the Sessions Judge, Shimla was dismissed in May, 1989. Thereafter, the employee filed Civil Revision No.1 of 1989 before this Court which was allowed by this Court on 7.3.1990 and his conviction and sentence was set-aside.

After the conviction and sentence was set-aside the employer re-opened the disciplinary proceedings and the employee was again put under suspension on 5.5.1990 under

Section 19.3 (d) of the Bi-partite settlement. It would be pertinent to mention that this suspension was made retrospective and a sum of Rs.50,449.78 was paid to the employee on account of suspension allowance for the period 27.10.1987 to 30.4.1990.

Thereafter, the disciplinary authority proposed punishment under Bi-partite settlement and the employee was afforded a personal hearing on 7.6.1990. The employee filed a Civil Suit and obtained an injunction restraining the bank from taking any disciplinary proceedings against him. The injunction was vacated on 16.8.1990 and thereafter the disciplinary authority imposed the punishment of dismissal from service upon the employee. It would be pertinent to mention that in the civil proceedings the matter reached this High Court wherein the interim orders were vacated and it was held that the civil proceedings were not maintainable since the employee had a remedy under the Industrial Disputes Act.

The employee thereafter approached the Central Government for a reference and reference was made by the Central Government to the Tribunal. The Tribunal decided the reference on 20.6.2002 more than 9 years after its filing and set-aside the order of dismissal and granted him the reliefs as stated above.

The main grounds of challenge raised by the employee before the Tribunal were that the inquiry conducted against him was not fair and not in accordance with the rules of

natural justice. According to the employee he was not permitted to engage the services of an Advocate though the employer was represented by a qualified Chartered Accountant which prejudiced him in the inquiry. It was also alleged that he was not permitted inspection of the original documents nor were the copies of the documents given to him nor was he allowed inspection of the copies of documents before recording the evidence of the employer. It was also alleged that the Inquiry Officer has wrongly proceeded ex-parte against the employee since the employee had given reasonable grounds by filing medical certificates and the Inquiry Officer should have permitted him to join the proceedings.

It would be pertinent to mention that the Tribunal came to the conclusion that the Inquiry officer had not conducted a fair and proper inquiry. The Tribunal recorded the evidence itself and finally came to the conclusion that the charges against the employee were not proved. It would not be out of place to mention that the employer did not raise any objection before the Tribunal that it should not record any evidence.

Sh.Ajay Kumar, learned counsel appearing for the employer has urged that the Tribunal has gravely erred in holding that the inquiry was unfair and not in accordance with the rules of natural justice. He submits that the employee was permitted to be represented through Sh.K.R.Nagpal a Union leader who was chosen by the accused as his defence officer.

Since the employer was not represented by an Advocate the employee could not claim to be assisted by an Advocate as a matter of right. He further submits that the record of the inquiry proceedings will show that on a number of dates the employee had been absent and had been delaying the inquiry proceedings. He further submits that since the original documents were not with the bank and had been seized by the CBI the employee could not have been given inspection of the original documents. According to him strict rules of evidence do not apply and the employee was permitted to examine the photo copies of the documents. He lastly submits that even if the order of termination is held to be illegal then keeping in view the long period which has elapsed the petitioner should not be reinstated in service nor should be given the entire back-wages.

On the other hand Sh.D.D. Sood learned senior counsel appearing on behalf of the employee submits that it is apparent from the facts of the case that the bank was hell bent on removing the employee from its service. He was not permitted to engage an Advocate to represent him in the proceedings. He submits that the employer was represented by a Chartered Accountant and keeping in view the nature of allegations the employee should have been permitted to engage the services of an Advocate. He further submits that the employee was never permitted to see the original documents and because the case of the employer was that the employee had forged some documents

it was essential that the employee should have been permitted to inspect the original documents. Even after the inquiry officer had permitted the employee to examine the documents then also the bank authorities did not permit the employee to note down the contents of the documents. According to Sh.Sood the employee due to his termination of services remained under psychiatric treatment and was sending medical certificates to the Inquiry officer and despite such certificates being sent the Inquiry officer proceeded ex-parte against him which was not in accordance with law.

There can be no manner of doubt that normally the Tribunal is bound to decide the case only on the basis of the evidence recorded in the domestic inquiry. However, it is well settled law that where the inquiry is defective then the Tribunal is entitled to take fresh evidence and to decide the merits of the charges on merits. Reference in this behalf may be made to **Neeta Kaplish vs. Presiding Officer, Labour court and another**, (1999) 1 SCC 517 decided by the apex Court.

In the present case as noticed above both parties without any demur led evidence before the Tribunal. The employer did not object to this procedure being adopted. The Tribunal came to the conclusion that the inquiry was defective since it was unfair and on the basis of the evidence came to the conclusion that the charges against the employee were not proved.

The jurisdiction of this Court in such like matters is limited. This Court cannot reopen the findings of the Tribunal on merits. It can only go into the jurisdictional aspect of the matter. It is only if the finding of the Tribunal is perverse or is based on no evidence or on total mis-reading of evidence that this Court in exercise of its writ jurisdiction may interfere in such like matters. In my opinion, the jurisdiction of the Court is limited and even if this Court is of the opinion that the finding of the Tribunal is incorrect the same cannot be set-aside except for the reasons stated hereinabove.

The first question to be decided is whether the inquiry conducted by the Inquiry Officer was fair or not? I have gone through the entire record including the record of the Inquiry Officer. In fact the record of the inquiry has not been properly maintained and a number of orders referred in the report of the inquiry officer are not part of the bound volume in which the disciplinary proceedings are noted down. Some orders are also contradictory to each other. However, without going into this aspect of the matter I find that mainly three questions are raised to challenge the fairness of the inquiry. Firstly that the employee was not permitted to engage the services of a counsel; secondly that the employee was not permitted to examine the original documents nor was he allowed proper and timely inspection of the documents and thirdly that the employee was wrongly proceeded against ex-parte.

As far as the first point is concerned the employee did not have a vested right to engage a counsel. According to the Bi-partite settlement between the bank and its employees, an employee as a matter of right is entitled to engage the services of an Advocate only in case the bank is represented by a legal professional. In the present case the bank was not represented by a lawyer. No doubt the bank was represented by a person who was duly qualified as a Chartered Accountant. However, this did not give a legal right to the employee to engage a counsel. His application for engaging an Advocate was considered and was rejected and he was permitted to be defended by a Union leader. I find that in the present case no prejudice has been caused to the employee on this count.

However, with regard to the supply of documents I find that neither the bank nor the inquiry officer have been fair to the employee. The case against the employee was that he had forged the signatures of some persons and that he had filled in the application forms and mis-utilized the amounts granted as loans. This sort of case is totally based on documentary evidence. Therefore, right at the initial stage itself the delinquent employee should have been given the copies of the documents. On behalf of the employee it has been stated that the employee has been prejudiced inasmuch as the original documents were not shown. In this behalf the explanation of the bank that it was not in a position to supply the original documents or allow inspection of

the original documents is not without merit. Admittedly the relevant documents had been seized by the CBI. The bank only had photo copies of the documents. Therefore, it was not possible for the bank to allow the delinquent official to inspect the original documents. However, there was nothing to prevent the bank from permitting the employee to at least inspect and note down the contents of the photo copies on which its case was based. The photo copies of the documents were certified to be true by the Presenting Officer even in the absence of original record. The employee right from the initial stage of the inquiry had been praying that he may be permitted to either inspect the original documents or copies of the same may be made available to him. He in fact moved an application to the inquiry officer for inspecting the documents. This application was rejected initially on 20.5.1985 and the statements of the witnesses of the bank were recorded. The evidence of the bank was closed on 30.5.1985 by which date the employee had not been permitted to examine the documents. The employee thereafter filed a representation to the Regional Manager to allow him the inspection of the documents and finally on 11.7.1985 a letter was sent to the employee that he may inspect the documents. Admittedly when the employee went to the bank to inspect the documents the Branch Manager did not permit him to note down the contents of the documents. The employee again complained to the Inquiry Officer and thereafter the Inquiry Officer sent a

letter to the employee that he may note down the contents also. Thereafter, the case was listed for 15.11.1985 and the employee sent a letter to the Inquiry Officer that he was unwell and the matter was adjourned to 22.11.1985. Again a letter was sent to the Inquiry Officer that the employee was unwell but the inquiry officer proceeded against the employee ex-parte and closed the inquiry proceedings. In my view the employee was seriously prejudiced in the matter. The inspection of the documents should have been permitted at the initial stage before the evidence of the bank was recorded. In fact the best course for the bank would have been to have hand over the photo copies of the documents to the employee in a case of this nature. How could the employee have effectively cross-examined the witnesses of the bank without having seen the documents upon which the case of the bank was based? Therefore, in my opinion there has been serious prejudice to the employee and the inquiry was unfair and liable to be set-aside.

With regard to the employee being proceeded against ex-parte I find that even the conduct of the employee during the inquiry proceedings has not been above board. He always attempted to delay of scuttle the inquiry for one reasons or the other. However, since the inspection of documents was permitted only at the last stage it would have been appropriate if the inquiry officer had permitted the employee to have cross-examined the witnesses after inspection of the documents.

Keeping in view all the above factors into consideration I feel that the inquiry officer did not conduct the proceedings fairly and prejudice was caused to the employee. Therefore, the same is liable to be set-aside.

Another ground raised by the employee and accepted by the Tribunal is that the services of the employee were terminated by the Chief Manager whereas he was appointed by the Regional Manager and therefore the order of termination is illegal. I find that there is sufficient material on record to show that the Chief Manager is at the same level as the Regional Manager. In fact from the documents which are on record it is apparent that in big branches a Regional Manager is designated as a Chief Manager. Therefore, it cannot be said that the services of the employee have been terminated by a person below the rank of Regional Manager.

Since, I have held that the inquiry against the employee was not proper his order of termination otherwise has to be set-aside. The Tribunal as observed above has recorded evidence and has come to the conclusion that the charges levelled against the employee have not been proved. There is nothing placed on record before me to show that the findings of the Tribunal are perverse or based on no evidence. Therefore, I find no reason to interfere with the same.

The last question is with regard to the relief to be granted to the employer. Sh.Ajay Kumar has strenuously contended that

the employee has been out of service since 1983 when he was placed under suspension. Thereafter, his services were terminated in the year 1987 and after acquittal by this Court he was again suspended with retrospective effect in May, 1990 and his services were again terminated on 23.8.1990. Thereafter, the employee filed a case before the civil court which had no jurisdiction and finally thereafter a reference was made under the Industrial Disputes Act which was finally decided in 2002. He has submitted that the relationship of the bank and its employees is a fiduciary relationship and this Court should not thrust upon the bank a person on whom the bank has no faith. He has cited a judgment of the Division Bench of the Delhi High Court in this behalf i.e. **Delhi Transport Corporation vs. Presiding Officer and another, 2000-I-LLJ 714,** wherein a Division Bench of the Delhi High Court after considering the entire law on the subject held as follows:

> "26.The position, therefore, is that the order terminating the services of the workman amounts to retrenchment within the meaning of Section 2(oo) of the Act. Since the appellant has not complied with the provisions of Section 25-F of the Act, the order of termination is void ab initio and inoperative. The only question that now remains to be determined is the relief to be granted to the workman.
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> 27.We find from the decision of the Supreme Court rendered in the 1970s and 1980s that reinstatement with back wages was the norm in cases where the termination of the services of the workman was held inoperative. The

decisions rendered in the 1990s, including the decision of the Constitution Bench in **the Punjab Land Development and Reclamation Corporation Ltd., Chandigarh** seem to suggest that compensation in lieu of reinstatement and back wages is now the norm. In any case, since we are bound to follow the decision of the Constitution Bench, we, therefore, conclude that reinstatement is not the inevitable consequence of quashing an order of termination; compensation can be awarded in lieu of reinstatement and back wages.

28.Considering the facts of this case, we are persuaded to award compensation in lieu of reinstatement and back wages to the workman. The reasons are that if the workman is to be reinstated then it has to be as a Conductor on probation. Since his services were terminated in October, 1969, it would be impossible for anybody to hazard a guess what his career profile would have been over the last 31 years. By directing his reinstatement, we may be inviting a host of hypothetical questions such as seniority, promotions, etc. Moreover, the reason for the termination of the services of the workman was that the appellant was not satisfied with his work. Under these circumstances, we feel that it may be unfair to the appellant if the workman is thrust upon it, especially when the workman can be given adequate compensation."

On the other hand Sh.D.D.Sood has contended that there is no fault of the employee and since his dismissal is wrongful he must be reinstated with full back wages.

There is no doubt that earlier the law was that in case the order of termination of an employee or a workman is set-aside

then reinstatement with full back wages was the norm. The law has however been developing and keeping pace with the changing needs of the economy and industry. Now the decisions of the Apex Court have veered to the view that reinstatement with back wages is not the norm and that in appropriate cases compensation can be awarded in lieu of reinstatement.

In **Allahabad Jal Sansthan vs. Daya Shankar Rai and another, (2005) 5 SCC 124,** the Apex Court after considering the entire law on the subject held as follows:

> "16.We have referred to certain decision of this court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back wages was the usual result. But now with the passage of time, it has come to be realized that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at."

Again in **General Manager, Haryana Roadways vs. Rudhan Singh, (2005) 5 SCC 591,** a three Judge Bench of the Apex Court held as follows:

> "8.There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the

manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year."

In **U.P. State Road Transport Corporation Ltd. Vs. Sarada Prasad Misra and another, (2006) 4 SCC 733**, the Apex Court held as follows:

"13.But even otherwise, the award passed by the Labour Court as also the order of the High Court granting back wages deserves interference. In several cases, this Court has held that payment of back wages is a discretionary

power which has to be exercised keeping in view the facts and circumstances of each case and neither straitjacket formula can be evolved, nor a rule of universal application can be adopted (vide P.G.I. of Medical Education & Research v. Raj Kumar; Hindustan Motors Ltd. V. Tapan Kumar Bhattacharya). In Kendriya Vidyalaya Sangathan v. S.C. Sharma this Court held that when question of determination of entitlement of back wages comes up for consideration, prima facie, it is for the employee to prove that he had not been gainfully employed. Initial burden is on the employee to show that he remained without any employment. In several cases, similar view has been taken by this Court in recent years. In M.P. SEB v. Jarina Bee it was observed that reinstatement in service and payment of back wages are two different things and payment of back wages is not a natural consequence of setting aside an order of dismissal. In Allahabad Jal Sansthan v. Daya Shankar Rai, it was indicated that the law is not in absolute terms that in all cases of illegal termination of services, a workman must be paid full back wages. In Haryana State Coop. Land Development Bank v. Neelam it was stated that the aim and object of the Industrial Disputes Act is to impart social justice to the workman but keeping in view his conduct. Payment of back wages, therefore, would not be automatic on entitlement of the relief of reinstatement. In G.M., Haryana Roadways v. Rudhan Singh the Court reiterated that there is no rule of thumb that in each and every case, where the Industrial Tribunal records a finding that the order of termination of service was illegal that an employee is entitled to full back wages. A host of factors which are relevant, must be taken into account."

The Apex Court in **Municipal Council, Sujanpur vs. Surinder Kumar, (2006) 5 SCC 173,** held as follows:

> "13.Equally well settled is the principle that the burden of proof, having regard to the principles analogous to Section 106 of the Evidence Act that he was not gainfully employed, was on the workman.
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> 15.Apart from the aforementioned error of law, in our considered opinion, the Labour Court and consequently the High Court completely misdirected themselves insofar as they failed to take into consideration that relief to be granted in terms of Section 11-A of the said Act being discretionary in nature, the Labour Court was required to consider the facts of each case therefor. Only because relief by way of reinstatement with full back wages would be lawful, it would not mean that the same would be granted automatically.
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> 16.For the said purpose, the nature of the appointment, the purpose for which such appointment had been made, the duration/tenure of work, the question whether the post was a sanctioned one, being relevant facts, must be taken into consideration."

To be fair to Sh.D.D.Sood, Sr.Advocate, counsel for the employee, he has cited a large number of judgments wherein the Apex Court has not only granted reinstatement to the workman but has also awarded full back wages. However, all these judgments are old judgments and as observed above the development of law now is that a golden mean should be adopted

and the relief should be moulded keeping in view the facts and circumstances of each case.

In the present case the salient features which need to be noted while considering the relief to be granted is that the employee is a bank employee. He was charged with having mis-utilized his position for embezzling the funds of the bank. He was convicted by the trial Court, which conviction was upheld by the appellate court and he was acquitted in Revision by this Court. His services were suspended barely five years after he had joined service. Since the last 23 years he has not worked in the bank. After his acquittal more than Rs.50,000/- was paid to him as subsistence allowance. Thereafter, he obtained stay orders and for about 2 years the matter remained pending in civil court which had no jurisdiction. Finally he approached the Tribunal which also took almost 10 years to dispose of the reference. No doubt the employee has filed an affidavit before the Tribunal that he has not been employed during this period and is being supported by his brother but in my opinion it is not believable that for more than 20 years one man and his family are being maintained by another person and that the employee has not tried to work at all. From the record of the present case it is apparent that the bank has deposited a sum of Rs.20,23,394.85 on account of back wages, interest etc. In fact in all cases which have been referred to interest has normally not been awarded in addition to the back wages. I am of the opinion that keeping in

view the present age of the employee, the fact that he has not worked with the bank for 23 years and the fact that bank has lost faith in the employee it would not be appropriate to reinstate the employee in service. Some compensation however has to be paid to him and in my opinion keeping in view the entire facts and circumstances of the case out of the sum deposited by the bank a sum of Rs.10,00,000/- (Rs.Ten Lakhs only) be paid to the employee as compensation in lieu of his reinstatement and back wages.

In view of the above discussion the petition is partly allowed. The order of termination passed by the employer bank is set-aside on the ground that the inquiry was not proper inasmuch as the employee was not permitted inspection of the documents in time and he was wrongly proceeded against ex-parte. The order of the learned Tribunal to the extent that he recorded the evidence and came to the conclusion that the charges levelled against the employee had not been proved is upheld. However, the order of the Tribunal in so far as it orders reinstatement of the employee alongwith full back-wages and interest is set-aside and it is directed that out of the amount deposited by the bank in this Court the employee shall be entitled to a sum of Rs.10,00,000/- only on account of compensation in lieu of reinstatement in service and back-wages in addition to

whatever amount has already been paid to him by way of subsistence allowance etc.

With the aforesaid directions the writ petition is disposed of with no order as to costs. All the misc. applications shall also stand disposed of.

August 28th 2006. **(Deepak Gupta),**
PV **Judge**