Canara Bank vs V.K. Awasthy on 31 March, 2005

Equivalent citations: AIR 2005 SUPREME COURT 2090, 2005 (6) SCC 321, 2005 AIR SCW 2005, 2005 AIR - JHAR. H. C. R. 1435, 297 (4) KCCR 293, 2005 (6) SRJ 127, (2005) 34 ALLINDCAS 430 (SC), (2005) 4 JT 40 (SC), (2005) ILR(KER) 3 SC 441, 2005 (2) SERVLJ 463 SC, 2005 (4) COM LJ 249 SC, 2005 (3) SCALE 600, 2005 (3) ALL CJ 1829, 2005 (2) BLJR 1223, 2005 ALL CJ 3 1829, 2005 BLJR 2 1223, (2005) 4 KCCR 293, (2005) 5 ALL WC 4410, (2005) 4 COMLJ 249, (2005) 4 JCR 124 (SC), (2005) 2 LAB LN 996, (2005) 2 KHCACJ 279 (SC), (2005) 2 SERVLJ 463, 2005 (3) SLT 461, 2005 SCC (L&S) 833, (2005) 2 ESC 225, (2005) 2 LABLJ 461, (2005) 2 SCT 631, (2005) 3 SCJ 797, (2005) 3 SERVLR 421, (2005) 3 SUPREME 492, (2005) 3 SCALE 600, (2006) 1 BANKCLR 332

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Bench: Arijit Pasayat, S.H. Kapadia

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           CASE NO.:
Appeal (civil)  2300 of 2005

PETITIONER:
Canara Bank

RESPONDENT:
V.K. Awasthy

DATE OF JUDGMENT: 31/03/2005

BENCH:
Arijit Pasayat & S.H. Kapadia

JUDGMENT:
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JUDGMENT ARIJIT PASAYAT, J.

Leave granted.

Challenge in this Appeal is to correctness of the judgment rendered by a Division Bench of the Kerala High Court holding that the order directing respondent's dismissal from service was in violation of the principles of natural justice. Therefore, it was held that the order was passed without proper application of mind regarding the findings recorded by the Disciplinary Authority on the basis of report of the enquiry officer, and relating to imposition of punishment. However, High Court permitted the respondent - writ petitioner to make a detailed representation to the

Disciplinary Authority in respect of the enquiry proceedings and findings, within a stipulated time and direction was given to the Disciplinary Authority to consider the submission and pass a fresh order. High Court further directed that the period during which respondent was out of service was to be treated as period under suspension, and the employee was to be paid subsistence allowance. It would be relevant to note that the respondent filed a Writ Petition questioning the order directing his dismissal from service. Learned Single Judge came to hold that the quantum of punishment i.e. dismissal from service was disproportionate to the misconduct proved. It was however, held that no prejudice was caused to the writ petitioner and there was no violation of principles of natural justice. Both the writ petitioner and the present appellant had preferred writ appeals before the High Court, which were heard and disposed of by the impugned common judgment.

In support of the appeal, Mr. Sudhir Chandra, learned Senior Advocate submitted that the show cause notice was issued on 2.7.1992. Since the respondent was not working at the Branch where he was originally posted and was living at Kanpur, the notice was served on him on 6.8.1992 and 15 days, time was granted for the purpose of filing response. Order was passed on 17.8.1992. Even though the respondent-employee preferred an appeal before the prescribed Appellate Authority, in the Memorandum of Appeal there was no stand taken that there was any prejudice caused to him on account of the fact that the order was passed prior to the expiry of the indicated period. He was given personal hearing by the Appellate Authority. Before him also no such stand was taken and no plea regarding any prejudice was raised. That being the position, the learned Single Judge was right in holding that there was no prejudice caused. The Division Bench has clearly missed these vital factors and, therefore, its view regarding violation of the principles of natural justice cannot be maintained. Further, in view of the proved misconduct, the punishment imposed cannot in any way be held to be disproportionate. In any event, there was hardly any scope within the limited scope of judicial review to interfere with the quantum of punishment.

In response, learned counsel for the respondent-employee submitted that prejudice is writ large and did not be pleaded. Merely because no specific ground regarding prejudice was taken either in the Memorandum of Appeal or at the time of personal hearing that does not cure the fatal defect of violation of principles of natural justice.

It is not in dispute that in the meantime the respondent has reached the age of superannuation, even if the order of dismissal is kept out of consideration. In the instant case, undisputedly respondent-employee did not raise any ground relating to violation of principles of natural justice in either the Memorandum of Appeal or, at the time of personal hearing before the Appellate authority.

Additionally, there was no material placed by the employee to show as to how he has been prejudiced. Though in all cases the post-decisional hearing cannot be a substitute for pre-decisional hearing, in the case at hand the position is different. The position was illuminatingly stated by this Court in Managing Director, ECIL, Hyderabad and Ors. v. B. Karunakara and Ors., [1993] 4 SCC 727 at para 31 which reads as follows:

> "Hence, in all cases where the enquiry officer.s report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals

should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Where after following the above procedure, the Court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the state of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law."

It is to be further noted that in the appeal before the Appellate Authority findings of the Inquiry Officer and Disciplinary Authority were challenged and, therefore, the question of any prejudice does not arise. Since employee had the opportunity to meet the stand of the Bank, it was to his advantage, and opportunity for personal hearing was also granted. Keeping in view what was observed in B. Karunakara's case (supra) there was no question of violation of principles of natural justice.

The crucial question that remains to be adjudicated is whether principles of natural justice have been violated; and if so, to what extent any prejudice has been caused. It may be noted at this juncture that in some cases it has been observed that where grant of opportunity in terms of principles of natural justice do not improve the situation, ``useless formality theory'' can be pressed into service.

Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

The expressions ``natural justice'' and ``legal justice'' do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigants. defence.

The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the ``Magna Carta''. The classic exposition of Sir Edward Coke of natural justice requires to ``vocate interrogate and adjudicate''. In the celebrated case of Cooper v. Wandsworth Board of Works, (1963) 143 ER 414, the principle was thus stated:

> "Even God did not pass a sentence upon Adam, before he was called upon to make his defence. ``Adam'' says God, ``where art thou has thou not eaten of the tree whereof I commanded thee that though should not eat''.
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> Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.
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> Principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi- judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

> What is meant by the term `principles of natural justice' is not easy to determine. Lord Summer (then Hamilton, L.J.) in Ray v. Local Government Board, (1914) 1 KB 160 at p.199:83 LJKB 86) described the phrase as sadly lacking in precision. In General Council of Medical Education & Registration of U.K. v. Sanckman, (1943) AC 627: [1948] 2 All ER 337, Lord Wright observed that it was not desirable to attempt `to force it into any procusteam bed' and mentioned that one essential requirement was that the Tribunal should be impartial and have no personal interest in the controversy, and further that it should give `a full and fair opportunity', to every party of being heard.

Lord Wright referred to the leading cases on the subject. The most important of them is the Board of Education v. Rice, (1911) AC 179:80 LJKB

796), where Lord Loreburn, L.C. observed as follows:

> "Comparatively recent statutes have extended, if they have originated, the practice of imposing upon departments or offices of State the duty of deciding or determining questions of various kinds. It will, I suppose usually be of an administrative kind, but sometimes, it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases, the Board of Education will have to ascertain the law and also to ascertain the facts. I need not and that in doing either they must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial....." The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari".

Lord Wright also emphasized from the same decision the observation of the Lord Chancellor that the Board can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view''. To the same effect are the observations of Earl of Selbourne, LO in Spackman v. Plumstead District Board of Works, (1985) 10 AC 229:54 LJMC 81), where the learned and noble Lord Chancellor observed as follows:

> "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any

> kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice".

Lord Selbourne also added that the essence of justice consisted in requiring that all parties should have an opportunity of submitting to the person by whose decision they are to be bound, such considerations as in their judgment ought to be brought before him. All these cases lay down the very important rule of natural justice contained in the oft-quoted phrase `justice should not only be done, but should be seen to be done'.

Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the frame-work of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression `civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

Natural justice has been variously defined by different Judges. A few instances will suffice. In Drew v. Drew and Lebura, (1855) 2 Macg. 1.8, Lord Cranworth defined it as `universal justice'. In James Dunber Smith v. Her Majesty the Queen, (1877-78)3 App. Case 614, 623 JC Sir Robort P. Collier, speaking for the judicial committee of Privy council, used the phrase `the requirements of substantial justice', while in Arthur John Specman v. Plumstead District Board of Works, (1884-85) 10 App.Case 229, 240, Earl of Selbourne, S.C. preferred the phrase `the substantial requirement of justice'. In Vionet v. Barrett, (1885) 55 LJRD 39, 41, Lord Esher, MR defined natural justice as `the natural sense of what is right and wrong'. While, however, deciding Hookings v. Smethwick Local Board of Health, (1890) 24 QBD 712, Lord Fasher, M.R. instead of using the definition given earlier by him in Vionet's case (supra) chose to define natural justice as `fundamental justice' In Ridge v. Baldwin, (1963) 1 WB 569, 578, Harman LJ, in the Court of Appeal countered natural justice with `fair-play in action' a phrase favoured by Bhagawati, J. in Maneka Gandhi v. Union of India, [1978] 2 SCR 621. In re R.N. (An Infaot) (1967) 2 B617, 530, Lord Parker, CJ, preferred to describe natural justice as `a duty to act fairly'. In fairmount Investments Ltd. v. Secretary to State for Environment, (1976) WLR 1255 Lord Russell of Willowan somewhat picturesquely described natural justice as `a fair crack of the whip' while Geoffrey Lane, LJ. In Regina v. Secretary of State for Home Affairs Ex Parte Hosenball, (1977) 1 WLR 766 preferred the homely phrase `common fairness'.

How then have the principles of natural justice been interpreted in the Courts and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is `nemo judex in

causa sua' or `nemo debet esse judex in propria causa sua' as stated in (1605) 12 Co.Rep.114 that is, `no man shall be a judge in his own cause' Coke used the form `aliquis non debet esse judex in propria causa quia non potest esse judex at pars. (Co.Litt. 1418), that is, `no man ought to be a judge in his own case' because he cannot act as Judge and at the same time be a party' The form `nemo potest esse simul actor et judex', that is, `no one can be at once suitor and judge' is also at times used. The second rule is `audi alteram partem', that is, `hear the other side' At times and particularly in continental countries, the form `audietur at altera pars' is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely `qui aliquid statuerit parte inaudita alteram actquam licet dixerit, haud acquum facerit' that is, `he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right' (See Bosewell's case (1605) 6 Co.Rep. 48-b, 52-a) or in other words, as it is now expressed, `justice should not only be done but should manifestly be seen to be done' Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated.

What is known as `useless formality theory' has received consideration of this Court in M.C. Mehta v. Union of India, [1999] 6 SCC 237. It was observed as under:

> "Before we go into the final aspect of this contention, we would like to state that case relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of `real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed (See Malloch v. Aberdeen Corpn., [1971] 2 All ER 1278, HL (per Lord Reid and Lord Wilberforce), Glynn v. Keele University, [1971] 2 All ER 89; Cinnamond v. British Airports Authority, [1980] 2 All ER 368, CA and other cases where such a view has been held. The latest addition to this view is R. v. Ealing Magistrates. Court, ex p. Fannaran, (1996) 8 Admn. LR 351,
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> 358) See de Smith, Suppl. P.89 (1998) where Straughton, L.J. held that there must be `demonstrable beyond doubt. that the result would have been different. Lord Woolf in Lloyd v. McMohan, [1987] 1 All ER 1118, CA has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in McCarthy v. Grant, (1959) NZLR 1014 however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is `real likelihood-not certainty- of prejudice.' On the other hand, Garner Administrative Law (8th Edn.

1996. pp.271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from Ridge v. Baldwin, (1964) AC 40: [1963] 2 All ER 66, HL), Megarry, J. in John v. Rees, [1969] 2 All ER 274 stating that there are always `open and shut

cases. and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J has said that the `useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that `convenience and justice are often not on speaking terms' More recently, Lord Bingham has deprecated the `useless formality theory' in R. v. Chief Constable of the Thames Valley Police Forces, ex p. Cotton (1990 IRLR 344) by giving six reasons (see also his article `Should Public Law Remedies be Discretionary?" 1991 PL. p.64). A detailed and emphatic criticism of the `useless formality theory. has been made much earlier in `Natural Justice, Substance or Shadow' by Prof. D.H. Clark of Canada (see 1975 PL.pp.27-63) contending that Malloch (supra) and Glynn (supra) were wrongly decided. Foulkes (Administrative Law, 8th Edn. 1996, p.323), Craig (Administrative Law, 3rd Edn. P.596) and others say that the court cannot prejudge what is to be decided by the decision-making authority. De Smith (5th Edn. 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (Administrative Law, 5th Edn. 1994, pp.526-530) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a `real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their `discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in State Bank of Patiala v. S.K. Sharma, [1996] 3 SCC 364 and Rajendra Singh v. State of M.P., [1996] 5 SCC 460 that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.

We do not propose to express any opinion on the correctness or otherwise of the `useless formality theory' and leave the matter for decision in an appropriate case, inasmuch as the case before us, `admitted and indisputable' facts show that grant of a writ will be in vain as pointed by Chinnappa Reddy, J."

As was observed by this Court we need not to go into `useless formality theory' in detail; in view of the fact that no prejudice has been shown. As is rightly pointed out by learned counsel for the appellant unless failure of justice is occasioned or that it would not be in public interest to do so in particular case, this Court may refuse to grant relief to the concerned employee. (see Gadde Venkateswara Rao v. Govt. of A.P. and Ors., AIR (1966) SC 828). It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing. (See Charan Lal Sahu v. Union of India etc., AIR (1990) SC 1480.

The aforesaid position in law was again reiterated in Canara Bank and Ors. v. Debasis Das and Ors., [2003] 4 SCC 557.

Inevitably, the conclusion arrived at by the Division Bench that there was violation of principles of natural justice cannot be maintained.

Coming to the question whether the punishment awarded was disproportionate, it is to be noted that the various allegations as laid in the departmental proceedings reveal that several acts of misconduct unbecoming a bank official were committed by the respondent.

It is to be noted that the detailed charge sheets were served on the respondent-employee who not only submitted written reply, but also participated in the proceedings. His explanations were considered and the Inquiry Officer held the charges to have been amply proved. He recommended dismissal from service. The same was accepted by the Disciplinary Authority. The proved charges clearly established that the respondent- employee failed to discharge his duties with utmost integrity, honesty, devotion and diligence and his acts were prejudicial to the interest of the bank. In the appeal before the prescribed Appellate Authority, the findings of the Inquiry Officer were challenged. The Appellate Authority after analyzing the materials on record found no substance in the appeal.

The scope of interference with quantum of punishment has been the subject- matter of various decisions of this Court. Such interference cannot be a routine matter.

Lord Greene said in 1948 in the famous Wednesbury case (1948 (1) KB 223) that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satisfied, namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in the UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock in Council for Civil Services Union v. Minister of Civil Service, (1983) 1 AC 768 (called the CCSU case) summarized the principles of judicial review of administrative action as based upon one or other of the following viz., illegality, procedural irregularity and irrationality. He, however, opined that ``proportionality'' was a "future possibility".

In Om Kumar and Ors. v. Union of India, [2001] 2 SCC 386, this Court observed, inter alia, as follows:

> "The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of ``proportionality'' to legislative action since 1950, as stated in detail below.

By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority ``maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve''. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

xxx xxx xxx xxx xxx The development of the principle of ``strict scrutiny'' or ``proportionality'' in administrative law in England is, however, recent. Administrative action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of ``strict scrutiny''. In the case of these freedoms, Wednesbury principles are no longer applied. The courts in England could not expressly apply proportionality in the absence of the convention but tried to safeguard the rights zealously by treating the said rights as basic to the common law and the courts then applied the strict scrutiny test. In the Spycatcher case Attorney General v. Guardian Newspapers Ltd., (No.2) (1990) 1 AC 109 (at pp. 283-284), Lord Goff stated that there was no inconsistency between the convention and the common law. In Derbyshire County Council v. Times Newspapers Ltd., (1993) AC 534, Lord Keith treated freedom of expression as part of common law. Recently, in R. v. Secy. of State for Home Deptt., ex p. Simms, [1999] 3 All ER 400 (HL), the right of a prisoner to grant an interview to a journalist was upheld treating the right as part of the common law. Lord Hobhouse held that the policy of the administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re-emphasised in in R. v. Lord Saville ex p., [1999] 4 All ER 860 CA, at pp. 870,872. In all these cases, the English Courts applied the ``strict scrutiny'' test rather than describe the test as one of ``proportionality''. But, in any event, in respect of these rights ``Wednesbury'' rule has ceased to apply.

However, the principle of "strict scrutiny" or "proportionality"

and primary review came to be explained in R. v. Secy. of State for the Home Deptt. ex p Brind, (1991) 1 AC 696. That case related to directions given by the Home Secretary under the Broadcasting Act, 1981 requiring BBC and IBA to refrain from broadcasting certain matters through persons who represented organizations which were proscribed under legislation concerning the prevention of terrorism. The extent of prohibition was linked with the direct statement made by the members of the organizations. It did not however, for example, preclude the broadcasting by such persons through the medium of a film, provided there was a "voice-over"

> account, paraphrasing what they said. The applicant's claim was based directly on the European Convention of Human Rights. Lord Bridge noticed that the Convention rights were not still expressly engrafted into English law but stated that freedom of expression was basic to the Common law and that, even in the absence of the Convention, English Courts could go into the question (see p. 748-49).
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> "whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations"

and that the courts were "not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and nothing less than an important public interest will be sufficient to justify it".

Lord Templeman also said in the above case that the courts could go into the question whether a reasonable minister could reasonably have concluded that the interference with this freedom was justifiable. He said that ``in terms of the Convention'' any such interference must be both necessary and proportionate (ibid pp. 750-51).

In the famous passage, the seeds of the principle of primary and secondary review by courts were planted in the administrative law by Lord Bridge in the Brind case (1991) 1 AC 696. Where Convention rights were in question the courts could exercise a right of primary review. However, the courts would exercise a right of secondary review based only on Wednesbury principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:

> ` "The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment.'' But where an administrative action is challenged as "arbitrary" under Article 14 on the basis of Royappa [1974] 4 SCC 3 (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is ``rational'' or ``reasonable'' and the test then is the Wednesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. In G.B. Mahajan v. Jalgaon Municipal Council, [1991] 3 SCC 91 at p. 111 Venkatachaliah, J. (as he then was) pointed out that ``reasonableness'' of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury

> rules. In Tata Cellular v. Union of India, [1994] 6 SCC 651 at pp. 679-80), Indian Express Newspapers Bombay (P) Ltd. v. Union of India, [1985] 1 SCC 641 at p. 691, Supreme Court Employees. Welfare Assn. v. Union of India, [1989] 4 SCC 187 at p. 241 and U.P. Financial Corpn. v. Gem Cap(India) (P) Ltd., [1993] 2 SCC 299 at p. 307 while judging whether the administrative action is ``arbitrary'' under Article 14 (i.e. otherwise then being discriminatory), this Court has confined itself to a Wednesbury review always.

The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of ``arbitrariness'' of the order of punishment is questioned under Article 14.

xxx xxx xxx xxx xxx Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as ``arbitrary'' under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment."

In B.C. Chaturvedi v. Union of India and Ors., [1995] 6 SCC 749 it was observed:

> "A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

In Union of India and Anr. v. G. Ganayutham, [1997] 7 SCC 463, this Court summed up the position relating to proportionality in paragraphs 31 and 32, which read as follows:

> "The current position of proportionality in administrative law in England and India can be summarized as follows:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury (1948 1 KB 223) test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU (1985 AC 374) principles.

(3)(a) As per Bugdaycay (1987 AC 514), Brind (1991 (1) AC

696) and Smith (1996 (1) All ER 257) as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of ``proportionality'' and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the

freedoms under Articles 19, 21 etc. are involved and not for Article 14.

Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not therefore go into the question of ``proportionality''. There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety. As to ``irrationality'', there is no finding by the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in ``outrageous'' defiance of logic. Neither Wednesbury nor CCSU tests are satisfied. We have still to explain "Ranjit Thakur, [1987] 4 SCC 611)".

In Chairman and Managing Director, United Commercial Bank and Others v. P.C. Kakkar, [2003] 4 SCC 364 the rigid standards to be adopted when considering the case of Bank officials were highlighted.

Aforesaid being the position, the decisions of the learned Single Judge on the quantum of punishment and of the Division Bench regarding alleged violation of the principles of natural justice cannot be maintained and are, therefore, set aside. The inevitable conclusion is that the order of dismissal as passed by the Appellant-Bank does not suffer from any infirmity. Appeal is accordingly allowed, but with no order as to costs.