Damoh Panna Sagar Rural Reg. Bank&Anr vs Munna Lal Jain on 16 December, 2004

Author: Arijit Pasayat

Bench: Arijit Pasayat, S.H. Kapadia

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           CASE NO.:
Appeal (civil)  8258 of 2004

PETITIONER:
Damoh Panna Sagar Rural Regional Bank & Anr.

RESPONDENT:
Munna Lal Jain

DATE OF JUDGMENT: 16/12/2004

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
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J U D G M E N T (Arising out of S.L.P.(C) 19412/2004) ARIJIT PASAYAT, J.

Leave granted.

Damoh Panna Sagar, Rural Regional Bank- the appellant no.1 (hereinafter referred to as the 'employer') calls in question legality of the judgment rendered by a Division Bench of the Madhya Pradesh High Court at Jabalpur directing the Board of Directors of the employer Bank (in short the 'Board') to reconsider the matter and pass any punishment other than dismissal, removal or termination of the respondent Munna Lal Jain (hereinafter referred to as the 'employee').

Background facts in a nutshell are as follows :

> On the allegation that while temporarily functioning as the Branch manager of Kabra Branch, the respondent-employee withdrew a sum of Rs.25,000/- unauthorisedly and such act amounted to misconduct warranting serious penalty. Because of such unauthorized withdrawal, charges were framed against him by charge sheet dated 14.10.1992 alleging that he had withdrawn a sum of Rs.25,000/- on 6.5.1992 for his personal use. The respondent-employee filed his explanation. Though not disputing the factum of withdrawal, plea was taken by him that during the relevant period condition of his wife had deteriorated and required immediate surgical interference. He had informed about withdrawal to the Head Office at Damoh. The explanation was not accepted, an enquiry officer was appointed who submitted his report on

> 20.7.1993 holding that the employee was guilty of the charges. The disciplinary authority concurred with the findings of the Enquiry Officer and after following the formalities i.e. issuance of show-cause notice, passed the order of removal. In appeal the said order of removal was maintained. Against the aforesaid order the employee preferred Writ Petition No. 2719 of 1995. Learned Single Judge held that the charges levelled have been duly brought home, but remitted the matter to the appellate authority for re-consideration with regard to the quantum of punishment. Pursuant to the direction, the matter was again considered by the Board and it was held that the order of removal did not require reconsideration. Employee filed a Writ Petition (W.P. No. 4812 of 1998). Learned Single Judge, who heard the matter, held that the Board had not considered the matter from all angles keeping in view the observations made in the earlier order dated 13.5.1998.

Direction was given to the Board to re-consider the penalty of removal. The matter was again re-considered and the Board refused to interfere with the quantum of punishment. The said order was assailed in Writ Petition No. 5236 of 2000. Learned Single judge declined to interfere on the ground that the charges had been proved and the Board had passed a detailed order. Learned Single Judge further held that the factum of illness of the wife had not been proved as no documents had been filed.

The matter was carried in a Letters Patent Appeal before the Division Bench. It was stand of the employee before the Division Bench that the money was withdrawn because of an emergency and he had some of money in his Provident Fund account. In any event, the money had been deposited in the bank with 24% interest which was much higher than the rate of interest that is payable on loan availed without security i.e. overdraft.

In response, it was submitted by the learned counsel appearing for the employer, that there was no scope for interference with the quantum of punishment.

The High Court observed that ordinarily the High Court should not interfere with the order of learned Single Judge. It, however, noticed that the amount has been repaid with 24% interest. It was observed that though adequate material was not placed to establish the wife's illness that could not be a ground to uphold the punishment of removal, particularly when he had paid back the amount with 24% interest. There was no allegation that earlier he had committed any kind of delinquency. It was noted that antecedents do not play positive role in all cases, but in certain cases they cannot be totally ignored. Reference was made to decision of this Court in Kailash Nath Gupta v. Enquiry Officer (R.K. Rai) Allahabad Bank and others (AIR 2003 SC 1377). It was also observed that in the said case this Court has taken note of the fact that a sum of Rs.46,000/-has already been repaid and no loss was caused to the bank. Though factual matrix was noticed to be different, yet it was held that the Branch Manager in a difficult situation had withdrawn the money and repaid with 24% interest. There was no loss caused. Again the High Court observed that it hastened to add that it was not its view that unless there is any loss there cannot be any misconduct. Ultimately it was concluded that this was a fit case where the Board should be compassionate and gracious enough to reconsider employee's case to pass any other punishment other than dismissal, removal or

termination. It was held that there was irregularity but not such an irregularity as to attract the punishment of removal. It was also indicated that even if lesser punishment is awarded the employee would not be entitled to any kind of back wages.

In support of the appeal, learned counsel for the appellant submitted that the High Court's judgment is full of contradictions. Having accepted that there was practically no scope of interference with the quantum of punishment, yet on irrelevant considerations High Court directed that punishment of removal, termination or dismissal should not be passed. The scope for interference with quantum of punishment has been highlighted by this Court in many cases and this is a case where no interference was called for. It has been found as a fact that the defence taken by the employee was false. Though he claimed that the amount was withdrawn on 9.5.1992, in fact it was withdrawn on 6.5.1992. There was no evidence adduced regarding the wife's ailment.

In response, learned counsel for the respondent-employee submitted that the appeal was not maintainable and the appeal was really unnecessary one. Ordinarily this Court should not interfere in service matters by appreciating evidence. The respondent-employee had intimated the head office about the withdrawal which is bonafide and he had repaid the amount with 24% interest.

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:
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> (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)".

The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Wednesbury's case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision- making process and not the decision.

To put differently unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed.

In the case at hand the High Court did not record any reason as to how and why it found the punishment shockingly disproportionate. Even there is no discussion on this aspect.

A Bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the Bank is required to take all possible steps to protect the interests of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a Bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the Bank. As was observed by this Court in Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik (1996 (9) SCC 69), it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a Bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct. The charges against the employee were not casual in nature and were serious. These aspects do not appear to have been kept in view by the High Court.

It needs no emphasis that when a Court feels that the punishment is shockingly disproportionate, it must record reasons for coming to such a conclusion. Mere expression that the punishment is shockingly disproportionate would not meet the requirement of law. Even in respect of

administrative orders Lord Denning M.R. in Breen v. Amalgamated Engineering Union (1971 (1) All E.R. 1148) observed "The giving of reasons is one of the fundamentals of good administration". In Alexander Machinery (Dudley) Ltd. v. Crabtree (1974 LCR 120) it was observed: "Failure to give reasons amounts to denial of justice". Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at". Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

These aspects were highlighted in Chairman and Managing Director, United Commercial Bank and Others v. P.C. Kakkar (2003 (4) SCC 364).

In the case at hand, the High Court's judgment is full of ifs and buts. There is no definite finding recorded that the punishment is suffering from any infirmity. No basis has been indicated to direct re-consideration of the quantum of punishment. It is to be noted that the respondent had miserably failed to prove bonafides. Though he took the stand that he had informed the head office about the withdrawal, no material was placed before any of the authorities to prove it. It is to be noted that on the basis of material on record, it was concluded that the withdrawal was on 6.5.1992 and not on 9.5.1992 as was claimed. The respondent-employee has withdrawn a sum of Rs.20,000/- from the account of bank with the State Bank of India on 6.5.1992 and had withdrawn a further sum of Rs.5,000/- from the cash.

Above being the position the impugned judgment of the High Court cannot be maintained and the same is set aside. The Writ Petition filed by the respondent-employee, stands dismissed.

The appeal is allowed. No costs.