

(2008) 04 CHH CK 0013
In the Chhattisgarh High Court
Case No : Writ Petition (S) No. 2674 of 2005

Bajnath Bande

APPELLANT

Vs

State of M.P. (Now) Chhattisgarh and Another

RESPONDENT

Date of Decision : 28-04-2008

Acts Referred:

Land Revenue Code — Section 256

Citation : (2008) 04 CHH CK 0013

Hon'ble Judges : Satish K. Agnihotri, J

Bench : Division Bench

Advocate : K.R. Nair, for the Appellant; Satish Gupta, Deputy Govt. Advocate, for the Respondent

Judgement

Satish K. Agnihotri, J.—The Petitioner had filed this petition before the Madhya Pradesh State Administrative Tribunal, Raipur, which was registered as Original Application No. 945/1998. After dissolution of the Tribunal this petition has been transferred to the High Court and it is registered as W.P.(S) No. 2674/2005.

2. The Petitioner impugned the order dated 25.10.1997 (Annexure A) (1), passed by the State Government, whereby the appeal preferred against the order of the Commissioner dated 24.10.1995 was dismissed.

3. The brief facts, in nutshell, are that the Petitioner was appointed as second Grade Clerk vide order dated 30.5.1973 (Annexure A 15), passed by the Commissioner, Bilaspur Division, Bilaspur. He was made quasi permanent second Grade Clerk vide order dated 17.12.1976 (Annexure A/3). At the relevant time the Petitioner was working as Reader (second grade clerk) to (sic) Tahsildar Lormi. Distict-Bilaspur.

4. A departmental enquiry was initiated by the district Collector. By order dated 6.2.1989, passed by the district Collector, Bilaspur the Petitioner was dismissed from the office. The said order was confirmed by The Commissioner, Bilaspur Division on 1.9.1989. In an appeal to the State Government, challenging the

order of the Commissioner on the ground that the Commissioner did not apply his mind to the facts of the case, as the appointing authority of the Petitioner was the Commissioner and not the district Collector, the State Government holding that the subsequent confirmation by the Commissioner after order of dismissal passed by the district Collector was illegal. Accordingly, the State Government vide order dated 26.5.1990 (Annexure A 6) quashed the order dated 6.2.1989 passed by the district Collector and the order dated 1.6.1989 passed by the Commissioner, with consequential benefits. The State Government directed reinstatement of the Petitioner with full back wages after adjusting the amount, if any, earned by the Petitioner when he remained out of the service.

5. Subsequently, the Commissioner issued a fresh charge sheet on 28.6.1990 (Annexure A 7) which reads as under:

6. The Petitioner could not submit his reply in time. The Commissioner appointed the Deputy Collector, Bilaspur as Enquiry Officer and the Sub Divisional Officer, Lormi as Presenting Officer. The Enquiry Officer submitted his enquiry report on 5.12.1994 (Annexure A/10), holding that the charges No. 1 to 4 as proved and the charge No. 5 was found partially proved.

7. On notice, the Petitioner submitted his response to the enquiry report on 12.6.1995 (Annexure A/9), stating that the named persons in the list of witnesses Shri J.P. Shrivastava, Shri D.M. Das, Shri Narhar Prasad, Shri Vijay Kumar Singh, Shri Vishnu Prasad, Shri Daulath Ram, Shri Ramdev Prasad, Shri Ganga Ram Yadav, Shri Ramashray Yadav and Shri R.C. Mauriya were not summoned for recording their statements and only three persons namely Shri Chaitram, Shri Ganga Ram and Shri Ramashray were summoned and the Petitioner was not afforded an opportunity of to cross-examine them on the ground that on the very first day the Petitioner made an statement that the Petitioner had already said whatever he wanted to say.

8. It was further stated by the Petitioner that Shri J.P. Shrivastava, the then Tahsildar, Lormi and Shri R.C. Mauriya, Tahsildar Patta distribution were the important witnesses. They ought to have been examined and cross-examined in the enquiry. The Tahsildar, Lormi granted pattas for which charges have been framed against the Petitioner without examining the said officers, and the charge has been found proved against the Petitioner. The Petitioner further stated in his reply that the Petitioner could have been examined after all the witness were examined and cross examined. The Petitioner had further stated that the Petitioner has submitted his reply to the charge sheet on 19.11.1991 during pendency of the enquiry. The enquiry was done on the basis of the previous enquiry, which was held to be illegal. The enquiry report was submitted without conducting proper enquiry. The Presenting Officer was not present at any time during the course of the proceedings. The Commissioner, without applying his mind to the reply dated 12.6.1995 of the Petitioner, passed the order on 24.10.1995 (Annexure A/2), dismissing the Petitioner from service, holding that the charge of misconduct has been proved against the Petitioner.

9. Being aggrieved, the Petitioner preferred an appeal before the State Government (Annexure A/11), stating and urging the same grounds, which he had taken in reply to the notice on receipt of the enquiry report. The additional grounds were subsequently submitted by the Petitioner by letter dated 26.8.1996 (Annexure A/12), to the Secretary, State Government that the entire finding of the Enquiry Officer was based on the earlier enquiry report, which was held illegal later on and no witnesses were summoned or examined.

10. The State Government dismissed the appeal on 25.10.1997 (Annexure A/1), holding that all the charges have been found proved. Thus the Petitioner has filed this petition.

11. Shri K.R. Nair, learned Counsel appearing for the Petitioner would submit that the Petitioner was issued the second charge sheet containing the same charges, which resulted into dismissal and subsequently, the State Government in appeal set-aside the order of the Collector and Commissioner and reinstated the Petitioner with all consequential benefits by order dated 26.5.1990 (Annexure A/6), the same is bad and illegal. Secondly, the charges framed against the Petitioner were infact baseless, as the alleged misdeed have been committed by the then Tahsildar, Lormi. The Petitioner being Reader had not issued any fake or false pattas to anyone. The Petitioner was on leave without prior sanction and without prior permission which amounted to indiscipline, not the misconduct. Non-submission of the loan waiver statement, even on the direction of the Tahsildar, also did not amount to misconduct. At the most, it can be held as disobedience. The Petitioner was not required to maintain any receipt book when he was incharge of the certified copy section. At the most, it amounted to violation of the provisions of Section 256 of the Land Revenue Code. The enquiry is vitiated on the ground that the Enquiry Officer proceeded on the basis of the statements recorded during the earlier enquiry. No witnesses were summoned despite the specific letter written by the Petitioner on 19.11.1991.

12. Learned Counsel further submits that on perusal of the enquiry report it is clear that the Enquiry Officer has proved all the charges without summoning the witnesses and recording their statements in the enquiry. The Enquiry officer recorded the statement of the Petitioner at the beginning itself, wherein, the Petitioner made a statement that the Petitioner did not want to say anything. No witnesses were summoned and their statements were not recorded, as is clear from the finding. Thus, the entire inquiry is vitiated. The Commissioner did not apply his mind to the reply filed by the Petitioner to the second show cause notice and the State Government also without considering the grounds urged in the memo of appeal and before Commissioner, dismissed the appeal. Thus, the enquiry is vitiated and deserves to be set aside,

13. Shri Satish Gupta, learned Counsel appearing for the Respondents, per contra, would submit that his submission is the return filed to the petition.

14. It was submitted that the Petitioner's signature was not verified from any

expert. From the date of issue of illegal patta, the Tahsildar Mauriya was not posted there. The Petitioner has not asked for the list of witnesses therefore the witnesses were not examined. The order passed by the Commissioner and thereafter an appeal dismissed by the State Government was perfectly valid and proper.

15. I have heard learned Counsel appearing for the parties. On perusal of the enquiry report, it is apparent that the Enquiry Officer has not examined the relevant witnesses on a simple statement made by the Petitioner that the Petitioner did not want to say anything, in the beginning, which is contrary to the well established procedure of the departmental enquiry, as the delinquent employee could have been examined after examination of the witnesses, as per the list of witnesses annexed with the memo of charges. The Enquiry Officer ignored the fact that the State Government vide order dated 26.5.1990 (Annexure A/6) has quashed the earlier order dated 6.2.1989 passed by the Collector, dismissing the Petitioner from service and the order dated 1.9.1989, passed by the Commissioner in appeal and reinstated the Petitioner with full consequential benefits.

16. The state Government in its order dated 26.5.1990 (Annexure A/6) remitted the matter to the Commissioner for fresh departmental proceedings, in accordance with law. In accordance with law means, the Commissioner ought to have complied with the provisions of Section 14 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966. The same was not done, as from all the witnesses, who were named in the list of witnesses, annexed with the memo of charges, the Enquiry Officer has chosen only three witnesses for examination and recorded their statements. Even the relevant witness Shri R.C. Mauriya was not examined.

17. The Enquiry Officer, it appears, had continued the enquiry in continuation of the earlier enquiry, which was held as illegal. Rule 14(22) of the Rules, 1966 provides for continuation of enquiry in the event that whenever any inquiring authority, after having heard and recorded the whole or any part of the evidence in an inquiry ceases to exercise jurisdiction therein, and is succeeded by another inquiring authority which has, and which exercises, such jurisdiction, the inquiring authority so succeeding may act on the evidence so recorded by its predecessor, or partly recorded by itself. This is not a case of continuation of the earlier enquiry but this was a fresh enquiry.

18. With regard to the prejudice, the entire allegation of the Petitioner is that the pattas were signed by the Tahsildar himself and the concerned Tahsildar and other officers were not examined. The Petitioner is seriously prejudiced by not affording him an opportunity of hearing and cross examining the witnesses, which were named in the list of witnesses. The Enquiry Officer did not summon the named witnesses for recording of the witnesses. The Petitioner in his reply dated 12.6.1995 to the show cause notice of the enquiry report had submitted that the Petitioner was prejudiced, as the relevant witnesses were not examined

and the Petitioner was not afforded an opportunity to cross-examine them. It was further stated that the Enquiry Officer was not present when the proceedings were recorded that was also not considered by the Commissioner and subsequently, by the appellate authority i.e. the State Government, while passing the impugned dismissal order.

19. In the matter of State Bank of Patiala and others Vs. S.K. Sharma, the Supreme Court after having considered all the decisions of the Supreme Court held as under:

28. The decisions cited above may make one thing clear, viz. principles of natural justice cannot be reduced to any hard and fast formulae. As said in *Russell v. Duke of Norfolk* way back in 1949, these principles cannot be put in a strait-jacket. Their applicability depends upon the context and the facts and circumstances of each case.) See *Mohinder Singh Gill v. Chief Election Commr.*) The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected. (See *A.K. Roy v. Union of India* and *Swadeshi Cotton Mills v. Union of India*.) As pointed out by this Court in *A.K. Kraipak v. Union of India*, the dividing line between quasi-judicial function and administrative function (affecting the rights of a party) has become quite thin and almost indistinguishable- a fact also emphasized by House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* where the principles of natural justice and a fair hearing were treated as synonymous. Whichever the case, it is from the stand point of fair hearing - applying the test of prejudice, as it may be called -that any and every complaint of violation of the rule of *audi alteram partem* should be examined. Indeed, there may be situations where observance of the requirement of prior notice/hearing may defeat the very proceeding - which may result in grave prejudice to public interest. It is for this reason that the rule of post-decisional hearing as a sufficient compliance with natural justice was evolved in some of the cases, e.g., *Liberty Oil Mills v. Union of India*. There may also be cases where the public interest or the interests of the security of State or other similar considerations may make it inadvisable to observe the rule of *audi alteram partem* altogether [as in the case of situations contemplated by Clauses (b) and (c) of the proviso to Article 311(2)] or to disclose the material on which a particular action is being taken. There may indeed be any number of varying situations which it is not possible for anyone to foresee. In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principles of natural justice, *audi alteram partem*, as such and violation of a facet of the said principle. In other words, distinction is between "no notice"/"no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity". To illustrate - take a case where the person is dismissed from service without hearing him altogether (as in *Ridge v. Baldwin*). It would be a case falling under the first category and the order of dismissal would be invalid - or void, if one chooses to use that expression (*Calvin v. Can*). But where the person is

dismissed from service, say, without supplying him a copy of the Enquiry Officer's report (Managing Director, ECIL v. B. Karunakar) or without affording him due opportunity of cross-examining a witness (K.L. Tripathi) it would be a case falling in the latter category - violation of a facet of the said rule of natural justice - in which case, the validity of the order has to be tested on the touchstone of prejudice, i.e., whether, all in all, the person concerned did or did not have a fair hearing. It would not be correct - in light of the above decision to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and test adopted in B. Karunakar should govern all cases where the complaint is not that there was no hearing (no notice, no opportunity and no hearing) but one of not affording a proper hearing (i.e. adequate or a full hearing) or of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touchstone of prejudice as aforesaid.

33. We may summarise the principles emerging from the above discussion, (these are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employees).

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/ employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under - "no notice", or "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/ or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the

body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the Enquiry Officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e. whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee, (b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person, proceeded against or in public interest. If it is found to be the former; then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in B. Karunakar. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it maybe called.

(5) Where the enquiry is not governed by any rules/regulations/ statutory provisions and the only obligation is to observe the principles of natural justice- or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action - the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and "no adequate opportunity, i.e. between "no notice"/"no hearing" and "no fair hearing", (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e. in accordance with the said rule (audi alteram partem), (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing

and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz. to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest may call for a curtailment of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision.

20. The ratio laid down by the Supreme Court in the matter of State Bank of Patiala (supra) has been discussed and approved in all the subsequent decisions. In the matter of M. V. Bijlani v. Union of India and others, the Supreme Court held as under:

25. It is true that the jurisdiction of the Court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.

21. The Supreme Court in the matter of Mathura Prasad Vs. Union of India (UOI) and Others, has held as under:

19. When an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedures laid down under the sub-rules are required to be strictly followed. It is now well settled that a judicial review would be even if there is an error of law apparent on the face of the record. If statutory authority uses its power in a manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact for sufficient reasons may attract the principles of judicial review.

22. Looking into all the facts, it is well established that the Petitioner has been prejudiced and applying the test of prejudice the enquiry report was vitiated.

Thus, on the basis of the vitiated enquiry report the subsequent order dated 24.10.1995 (Annexure A/2) and appellate order dated 25.10.1997 (Annexure A/1) are not sustainable in law.

23. Applying the well settled principles of law to the facts of the case, it is held that the enquiry is vitiated as no opportunity of hearing was afforded to the Petitioner and the Petitioner has been prejudiced by non-recording of the statements of the relevant witnesses and not affording the opportunity of cross-examining the witnesses. Thus, the order date 24.10.1995 (Annexure A/2) passed by the Commissioner and the order dated 25.10.1997 (Annexure A/1) passed by the State Government are quashed. It is directed that the Petitioner be accordingly, reinstated in service with all consequential benefits, including the back wages flowing from quashing of the impugned orders dated 24.10.1995 and 25.10.1997. However, it is open to the Respondents to take any action in accordance with law, as laid down in the matter of State Bank of Patiala (supra), if so advised.

24. The petition is allowed. In the facts and circumstances of the case, the parties shall bear their own costs.