
(2016) 03 OHC CK 0015
In the Orissa High Court
Case No : OJC No. 2228 of 2002

Basanti Mohanty and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Constitution of India, 1950 — Article 136, Article 226

Citation : (2016) 2 CLR 943

Hon'ble Judges : Dr. Akshaya Kumar Rath, J.

Bench : Single Bench

Advocate : Sarat Ch. Dash, Advocate, for the Appellant;

Final Decision : Allowed

Judgement

Dr. Akshaya Kumar Rath, J.—1. Assailing the letter dated 4.2.2002, vide Annexure-9, issued by the General Manager, Orissa State Warehousing Corporation, opposite party No. 5, and the order dated 1.12.2001, vide Annexure-7, passed by the Chairman-cum-Managing Director, Orissa State Warehousing Corporation, opposite party No. 4, respectively, Anadi Charan Mohanty, predecessor-in-interest of the petitioners has filed this writ application. By letter dated 4.2.2002, opposite party No. 5 intimated the petitioner that his appeal had been rejected by the Board of Directors of the Corporation on 15.1.2002 thereby upholding the order of compulsory retirement from services passed by opposite party No. 4.

2. Shorn of unnecessary details, the short facts of the case of Anadi Charan Mohanty (hereinafter referred to as "the petitioner") are that aggrieved by and dissatisfied with the action of the Orissa State Warehousing Corporation (hereinafter referred to as "the Corporation") in not according him promotion, he approached this Court number of times. In spite of the orders passed by this Court, promotion was not accorded. Though the petitioner had given vivid details of the same, but the same are not germane for consideration of this case. Suffice it to say that while he was continuing as the Senior Superintendent of the

Corporation, the General Manager of the Corporation issued a letter on 28.9.2001 intimating the petitioner that it was proposed to take action against him under Regulation 19 of the Orissa State Warehousing Corporation (Staff) Regulations, 1985 for imposition of penalty/penalties. The additional charges basing on the action proposed to be taken together with a list of allegations and documents had been supplied. He was directed to submit his explanation on the charges within thirty days. The Deputy General Manager, who was appointed as an Enquiry Officer, sent a letter on 29.9.2001 to the petitioner that in spite of repeated notices issued to him to appear before the Enquiry Officer in the disciplinary proceeding initiated vide corporation office order No. 4666 dated 23.7.1999 and No. 9227 dated 15.2.1999, he did not appear. He was directed to appear before the Enquiry Officer on 15.10.2001. He submitted his reply requesting the Enquiry Officer to give personal hearing. But no opportunity of hearing was provided to him. Thereafter, the Secretary of the Corporation sent a letter to the petitioner on 17.11.2001 stating therein that the C.M.D. of the Corporation acting on the enquiry report of the Enquiry Officer on 2.11.2001 had passed order on 16.11.2001 proposing to impose two punishments; compulsorily retired from service and to treat the period of suspension as such. He was called upon to submit the show cause. On 22.11.2001, he sent a reply. Again, he sent another reply on 24.11.2001 in addition to the earlier reply. While the matter stood thus, on 1.12.2001, the C.M.D. imposed the following penalties; "(1) He is compulsorily retired from Corporation service; and (2) The period of his suspension is treated as such". He filed an appeal before the Board of Directors under Rule 23(2)(a) of the Orissa State Warehousing Corporation Rules on 28.12.2001, which was eventually rejected by the Board on 15.1.2002.

3. It is stated that the charges had never been supplied to the petitioner. No opportunity of hearing was provided to him and, as such, the entire proceeding was vitiated. Furthermore, the Managing Director of the Corporation, who was the disciplinary authority imposed a major punishment, was the member of the Board of Directors. Thus the decision of the Board of Directors in confirming with the order of punishment passed by the Managing Director smacks mala fide.

4. Pursuant to issuance of notice, opposite parties 2 to 5 filed a counter affidavit. It is stated that a disciplinary proceeding was initiated against the petitioner on 23.7.1999 for gross indiscipline and illegal dharana. The petitioner resorted to illegal dharana which had no basis in view of his claim of promotion to the post of Assistant Director with retrospective effect was rejected by this Court. The same amounts to gross misconduct. For misconduct and unauthorised absence from duty, additional charges were framed against him on 23.7.1999. He misbehaved with the Chairman on 29.9.1999 and was placed under suspension with effect from 13.10.1999. The additional charges were also framed and issued to him on 16.1.2001. Due to delay in completion of the enquiry proceeding and non-cooperation of the petitioner, the order of suspension was withdrawn and he was reinstated in service with effect from 18.7.2000. He did not cooperate with the departmental proceeding. By letter dated 10.10.2001, he intimated the C.M.D.

not to attend the enquiry. He did not submit the explanation to the charges. Therefore, by order dated 12.10.1999, the Enquiry Officer and Marshalling Officer had been appointed. Due to non-cooperation of the petitioner in the departmental proceeding, the Enquiry Officer conducted the enquiry ex parte and submitted the report. By order dated 17.11.2001, the Disciplinary Authority issued show cause along with a copy of the enquiry report. Even after the receipt of the second show cause notice, he did not submit any reply. On the other hand, he sent letters on 22.11.2001 and 24.11.2001 to accept him in the promotional post of Assistant Director. The disciplinary authority, after careful consideration of the enquiry report and aforesaid communication dated 22.11.2001, imposed punishment of compulsory retirement. Thereafter, he filed an appeal before the Board of Directors. The Board of Directors in its 118th meeting held on 15.1.2002 rejected the appeal. It is further stated that during enquiry, the reasonable opportunity was provided to the petitioner. Thus there is no violation of principle of natural justice.

5. A rejoinder was filed by the petitioners controverting the assertions made in the counter affidavit.

6. Mr. Dash, learned counsel for the petitioners, submitted that four charges had been framed against the petitioner at different points of time. Out of the same, three charges were never supplied to the petitioner. Pursuant to fourth charge, he submitted the reply. But then, the Enquiry Officer held the enquiry ex parte and came to a conclusion that the charge had been proved. Since charge sheet had not been served on the petitioner and he was not provided opportunity of hearing, the entire proceeding is vitiated. He further submitted that the Chairman-cum-Managing Director (CMD) of the Corporation being the disciplinary authority, imposed the punishment. He was a Member of the Board of Directors, who heard the appeal and rejected the same. In view of the same, the order of the appellate authority is tainted with mala fide. He further submitted that even if the fourth charge is proved, then the order of compulsory retirement is disproportionate to the gravity of the charges.

7. Per contra Mr. Nayak, learned Senior Advocate for the opposite parties 2 to 5, submitted that the petitioner had been provided with sufficient opportunity to defend his case. But then, for the reasons best known to him, he did not appear. The memorandum of charges had been sent to the petitioner asking him to reply. He refused to accept the same. Since the petitioner did not cooperate, the Enquiry Officer submitted the report. The punishment of compulsory retirement from service commensurate with the gravity of the charges. The charges levelled against the petitioner are grave and unbecoming on the part of an employee. With regard to participation of the C.M.D. in the Board of Directors meeting held on 15.1.2002, he further submitted that the Board of Director is a multi member board and participation of C.M.D. is of little consequence. The allegation of bias is unfounded and baseless.

8. The scope of interference of the High Court under Article 226 of the

Constitution of India to the order passed by the disciplinary authority is no more *res integra*.

In the case of *State of Andhra Pradesh and others v. S. Sree Rama Rao*, , AIR 1963 SC 1723, the Supreme Court in paragraph 7 of the report held:

"7. There is no warrant for the view expressed by the High Court that in considering whether a public officer is guilty of the misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the Court, must be applied, and if that rule be not applied, the High Court in a petition under Article 226 of the Constitution is competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court is not constituted in a proceeding under Article 226 of the Constitution a Court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent Officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution."

9. On the anvil of the decision cited *supra*, the case of the petitioner may be examined. Pursuant to the direction of this Court, Mr. Nayak, learned Senior Advocate produced the entire file pertaining to disciplinary proceeding of the petitioner and the peon books maintained by the Corporation from 28.1.1998 to 31.12.1998 and 28.6.1999 to 13.10.1999 respectively. Letter No. 7193 was sent to the petitioner by the office peon. There is an endorsement that the petitioner refused to accept the same. Similarly, letter No. 7789 was issued to him on 23.12.1998. The office peon made the same endorsement. Similarly, letter Nos. 4665 and 4666 had been issued to him by the office peon. The peon made the

same endorsement. He refused to accept the same. When a query was made as to whether the letters had been sent by any other mode, Mr. Nayak, learned Senior Advocate submitted that the said letters had been sent to the petitioner by the office peon. The peon books reveal that the petitioner had refused to accept the letters. Be it noted that the same are the memorandum of charges. The peon was not examined as a witness in the enquiry proceeding.

10. Thus the question does arise as to whether the enquiry suffers from procedural infirmity?

In *Dr. Ramesh Chandra Tyagi v. Union of India*, , 1994 (2) SCC 416, no charge sheet was served on the appellant. The Enquiry Officer himself stated that the notices sent were returned with endorsement "left without address" and on other occasion, "on repeated visits people in the house said that he has gone out and they do not disclose where he has gone. Therefore, it is being returned". The apex Court held that may be the appellant was avoiding it but avoidance does not mean that it gave a right to Enquiry Officer to proceed ex parte unless it was conclusively established that he deliberately and knowingly did not accept it. The endorsement on the envelope that it was refused, was not even proved by examining the post man or any other material to show that it was refusal by the appellant, who denied on oath such a refusal. No effort was made to serve in any other manner known in law. Under the postal Act and Rules, the manner of service is provided. Even service rules take care of it. No one was resorted to. From the endorsement it was clear that the envelope containing charge sheet was returned. It was held that the enquiry had suffered from procedural infirmity.

11. The enquiry report reveals that seven charges had been framed against the petitioner vide office order No. 4666 dated 23.7.1999. Three charges had been framed by the office order No. 9227 dated 15.2.1999, one charge by office order No. 625 dated 16.1.2001 and an additional charge by office order No. 9011 dated 29.9.2001. So far as previous three charges are concerned, the specific case of the petitioner is that the same had not been served upon him. As stated above, the same had been issued to the petitioner by office peon, who endorsed that the petitioner had refused to accept the same. Even the Enquiry Officer had not taken a little care to examine the office peon. On the assumption that the charges had been served upon the petitioner, he proceeded to enquire into the matter. So far as four charge is concerned, it pertains to disobedience of the order passed by the authority. The charge levelled against the petitioner was pending finalisation of the disciplinary proceeding, he was reinstated in service vide Corporation Order No. 7102 dated 18.7.2000 with immediate effect. But then, he preferred to continue under suspension and did not join. The petitioner submitted his reply with the said charge of course on untenable grounds. He did not prefer to participate in the hearing. Thus the said charge is proved.

12. The next question arises as to whether the order of the appellate authority is vitiated due to participation of C.M.D. as a member of the appellate committee?

13. In his inimitable style, Justice Krishna Iyer in *Chairman, Board of Mining Examination & another v. Ramjee*, , AIR 1977 SC 965 proclaimed that "natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt--that is the conscience of the matter".

14. In *Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others*, , AIR 1993 SC 2155, the apex Court held that:

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Prof. Wade in his *Administrative Law* has succinctly summarised the principle of natural justice to the following effect:

"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: not as to their scope and extent. Everything depends on the subject matter, the application for principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject- matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice depend on the facts and the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

One of the cardinal principles of natural justice is : "Nemo debet esse judex in propria causa" (No man shall be a judge in his own cause). The deciding authority must be impartial and without bias. It has been held by this Court in *Secretary to Govt. Transport Dept. v. Munuswamy*, , 1988 (suppl) SCC 651: (AIR 1988 SC 2232), that a predisposition to decide for or against one party without proper regard to the true merits of the dispute is bias. Personal bias is one of the three major limbs of bias namely pecuniary bias, personal bias and official bias. A classic case of personal bias was revealed in the decision of this Court in *State of U.P. v. Mohd. Nooh*, , 1958 SCR 595: (air 1958 sc 86). In the said case, a departmental enquiry was held against an employee. One of the witnesses against the employee turned hostile. The officer holding the enquiry then left the enquiry, gave evidence against the employee and thereafter resumed to complete the enquiry and passed the order of dismissal. This Court quashed the order of dismissal by holding inter alia that the rules of natural justice were

grievously violated."

15. The submission of Mr. Nayak, learned Senior Advocate that the Board of Directors is a multi member board and participation of C.M.D. does not vitiate the order is difficult to fathom. This is not a case where doctrine of necessity can be pressed into service. Apart from C.M.D., there are other members in the Board. Propriety demands that the C.M.D. ought to have recused to participate in the same. Strange. He participated in the proceeding and became a judge of his own cause. The action of the C.M.D. in participating in the meeting of the Board of Directors cannot be taken so lightly so as to take away services of the petitioner like a side wind.

16. Thus the irresistible conclusion is that the order of the appellate authority is an infraction of the principle of natural justice. The petitioner had not been treated fairly.

17. Even if the fourth charge is proved, punishment of compulsory retirement from service is too disproportionate to the gravity of the charge.

18. The next question arises as to whether this Court can substitute the punishment imposed by the disciplinary authority?

19. In *B.C. Chaturvedi v. Union of India and others*, , AIR 1996 SC 484, the Supreme Court in paragraphs 17 and 18 held as follows:

"17. The next question is whether the Tribunal was justified in interfering with the punishment imposed by the disciplinary authority. A Constitution Bench of this Court in *State of Orissa v. Bidyabhusan Mohapatra*, , AIR 1963 SC 779 held that having regard to the gravity of the established misconduct, the punishing authority had the power and jurisdiction to impose punishment. The penalty was not open to review by the High Court under Article 226. If the High Court reached a finding that there was some evidence to reach the conclusion, it became unassessable. The order of the Governor who had jurisdiction and unrestricted power to determine the appropriate punishment was final. The High Court had no jurisdiction to direct the Governor to review the penalty. It was further held that if the order was supported on any finding as to substantial misconduct for which punishment "can lawfully be imposed", it was not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The court had no jurisdiction, if the findings prima facie made out a case of misconduct, to direct the Governor to reconsider the order of penalty. This view was reiterated in *Union of India v. Sardar Bahadur*, , (1972) 2 SCR 218: (1972) Lab IC 627). It is true that in *Bhagat Ram v. State of Himachal Pradesh*, , AIR 1983 SC 454, a Bench of two Judges of this Court, while holding that the High Court did not function as a court of appeal, concluded that when the finding was utterly perverse, the High Court could always interfere with the same. In that case, the finding was that the appellant was to supervise felling of the trees which were not hammer marked. The Government had recovered from the contractor the loss caused to it by illicit

falling of trees. Under those circumstances, this Court held that the finding of guilt was perverse and unsupported by evidence. The ratio, therefore, is not an authority to conclude that in every case the Court/Tribunal is empowered to interfere with the punishment imposed by the disciplinary authority. In *Rangaswami v. State of Tamil Nadu*, , AIR 1989 SC 1137, a Bench of three Judges of this Court, while considering the power to interfere with the order of punishment, held that this Court, while exercising the jurisdiction under Article 136 of the Constitution, is empowered to alter or interfere with the penalty; and the Tribunal had no power to substitute its own discretion for that of the authority. It would be seen that this Court did not appear to have intended to lay down that in no case, the High Court/Tribunal has the power to alter the penalty imposed by the disciplinary or the appellate authority. The controversy was again canvassed in *State Bank of India's case* (1994 AIR SCW 1465) (*supra*), where the court elaborately reviewed the case law on the scope of judicial review and powers of the Tribunal in disciplinary matters and nature of punishment. On the facts in that case, since the appellate authority had not adverted to the relevant facts, it was remitted to the appellate authority to impose appropriate punishment.

18. 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."

20. The same view was taken in the case of *Union of India and another v. G. Ganayutham (Dead) by LRs.*, , AIR 1997 SC 3387. The Supreme Court held that unless the Court/Tribunal opines in its secondary role that the administrator was, on the material before him, irrational, the punishment cannot be quashed. Even then, the matter has to be remitted back to the appropriate authority for reconsideration. It was further held that the principles in *B.C. Chaturvedi* (*supra*) that only in very rare cases Court might to shorten litigation think of substituting its own view as to the quantum of punishment in the place of the punishment awarded by the competent authority has been made in exercise of the power of the Supreme Court under Article 136 of the Constitution, which is different.

21. During pendency of the writ application, the original petitioner died and in his place, his legal heirs have been substituted. Remitting the matter back to the disciplinary authority to substitute the quantum of punishment will be a futile

exercise at this stage. In order to shorten the litigation, this Court modifies the order of compulsory retirement to treat the period of suspension as such. Accordingly, the letter dated 4.2.2002, vide Annexure-9, issued by the General Manager, Orissa State Warehousing Corporation, opposite party No. 5, and the order dated 1.12.2001, vide Annexure-7, passed by the Chairman-cum-Managing Director, Orissa State Warehousing Corporation, opposite party No. 4, are quashed. The authorities are directed to calculate the retiral benefits of the deceased employee within a period of two months from the date of production of a certified copy of the judgment and disburse the same to his legal heirs on proper identification.

The writ application is allowed.