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(1977) 04 OHC CK 0011

In the Orissa High Court

Case No : O. J. C. No. 2131 of 1975

Bishnu Charan Swain — APPELLANT

Vs

District Magistrate and Collector and Another — RESPONDENT

Date of Decision : 27-04-1977

Acts Referred:
Constitution of India, 1950 — Article 311(2)
Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 — Rule 15
Penal Code, 1860 (IPC) — Section 409

Citation : (1977) 44 CLT 241

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : B.B. Ratho, for the Appellant; Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—Petitioner was employed as an upper division clerk-cum-accountant in the office of the Block Development Officer. Kukudakhandi Block, in the district of Ganjam. In addition to his duties, he was also discharging the functions of cashier. On 1-1-1970, he was placed under suspension in contemplation of a disciplinary action and on 20th of October, 1970, a set of charges was framed against him for misappropriation of a total amount of Rs. 811.80 paise between 1963 and 1966. Petitioner was directed to submit his explanation to the Revenue Officer attached to the Sub-Divisional Officer''s office at Berhampur. Petitioner denied the charges and contended that there was absolutely no misappropriation. Petitioner applied for copies of a set of documents for preparation of his defence and pressed for the same from time to time. One set of documents was produced before the enquiring officer on 3-2-1971, when Petitioner was not present on account of no service of notice on him. The remaining documents including the Cement Supply Register were called for but there was no production of the documents inspite of repeated notice by the enquiring officer. The Block Development Officer reported that the Cement

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Stock Register was taken away by the Petitioner though according to the Petitioner, the same has been produced in an election dispute before the Munsif at Berhampur and it had been taken return of by the Grama Panchayat. A single witness was examined in support of the prosecution who did not say anything with reference to the charges nor did he depose with reference to any document. Petitioner asked for representation through a counsel which was, however, rejected. The record of enquiry was produced before us and it transpires therefrom that the enquiring officer made personal enquiries all by himself to gather materials in support of the charges. During the pendency of the departmental proceeding, Petitioner was put on trial for the alleged offence of criminal misappropriation punishable u/s 409 of the Indian Penal Code and was acquitted on a finding that the prosecution had failed to establish the charge. The enquiry was last posted to 15-7-1971. One and half years thereafter on 4-12-1972, the enquiry report was submitted. On 9-4-1974, the disciplinary authority accepted the enquiry report and directed the second show-cause against proposed punishment to be given. Petitioner showed cause and asked for a personal hearing. Petitioner was informed that he would be personally heard on 1-7-1974, He made a representation for an adjournment on the ground that his son was being married on 29-6-1974 and the nuptial ceremony was to be celebrated on 2-7-1974. Prayer for adjournment was rejected and the order of dismissal from service was passed. An appeal against the punishment has been dismissed. Petitioner has asked for a writ of certiorari to quash the punishment on the ground that he has not been afforded a reasonable opportunity of defending himself against the charges; the enquiry is vitiated inasmuch as no evidence was at all led and the enquiring officer acted as a prosecutor with bias; on the self-same allegations, Petitioner was tried in a regular criminal case and has been acquitted; and denial of assistance of a legal practitioner has violated the principles of natural justice and the Petitioner has been prejudiced.

2. A counter affidavit has been filed by the Additional District Magistrate of Ganjam in support of the disciplinary action.

3. As we have already stated, learned Government Advocate produced the record of the disciplinary proceedings. We find that a regular order-sheet was maintained by the enquiring officer. On 4-1-1971, a direction was given fixing the enquiry to 3-2-1971. Notice was, however, issued only on 1-2-1971 and Petitioner denies to have received the notice. On that day Petitioner was, therefore, not present at the enquiry. True copies of the Cash Books were produced and the originals were taken back. The enquiry was adjourned to 17-2-1971, when one Padmacharan Mohapatra was examined on behalf of the prosecution. He produced certain documents and said nothing more. No further evidence was led on behalf of the prosecution. The enquiring officer marked certain duplicates on 3-2-1971 though there is no evidence to show that these were true-copies of the original documents. It is true that the Evidence Act does not strictly apply to an enquiry in a disciplinary proceeding, but as was pointed out by the Constitution Bench of the Supreme Court in the case of Bachhittar

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Singh Vs. The State of Punjab, .

... There is just one continuous proceeding though there are two stages in it. The first is coming to a conclusion on the evidence as to whether the charges alleged against the Government servant are established or not and the second is reached only if it is found that they are so established. That stage deals with the action to be taken against the Government servant concerned. The High Court accepts that the first stage is a judicial proceeding and indeed it must be so because charges have to be framed, notice has to be given and the person concerned has to be given an opportunity of being heard. Even so far as the second stage is concerned Article 311(2) of the Constitution requires a notice to be given to the person concerned as also an opportunity of being heard. Therefore this stage of the proceeding is no less judicial than the earlier one....

In the case of Khem Chand Vs. The Union of India (UOI)and Others, , the Supreme Court indicated the scope of the provision of Article 311(2) of the constitution and to legal position is settled that the delinquent in a disciplinary proceeding is entitled to an opportunity to know the material against him; to have the evidence recorded in his presence; to have the right of cross-examining the witnesses examined and to have a chance to examine witnesses in support of his defence. In fact, Rule 15 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962, which deals with as enquiry where a major punishment is ultimately inflicted makes detailed provision as to the manner of enquiry. Having looked into the records, we are satisfied that Petitioner has been substantially prejudiced on account of withholding of relevant documents. Similarly, no evidence having been led and certain documents having only been placed at the enquiry, Petitioner has been denied an opportunity of being told as to what was the material sought to be used against him and he has, therefore, been deprived of an opportunity of defending himself. On examining the various orders passed by the enquiring officer from time to time, we are also satisfied that he himself acted with a bias and showed some amount of anxiety to gather evidence in support of the charges. That certainly was no part of the enquiring officer''s duty. In fact, we find that another officer had been asked to present the case on behalf of the department, but he did not participate in the enquiry and the enquiring officer was left to do his job. The orders dated 24-7-1971, 31-8-1971, 13-10-1971 and 31-10-1971 show that the enquiring officer was anxious to contact the Vigilance staff for information. The order-sheet dated 31-10-1971 runs thus:.

It is ascertained that no separate vigilance case or enquiry was instituted for this. To 31-11-1971 for perusal of some records at K. Khandi Block after which finding is to be written.

On 30-11-1971, the order-sheet runs thus:

Could not proceed to K. Khandi Block for pressure of work. Put up by 30-12-1971 for finding....

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No progress was made in the matter for more than a year and on 4-12-1972, the enquiring officer made the following endorsement at the foot of the finding:

Delay in writing out explained in the case record of work this had occasioned excused the finding has been Due to heavy pressure which may kindly be Almost one and half years rolled by before the disciplinary authority had occasion to handle the file. As we have already indicated, a personal hearing had been asked for and Petitioner seems to have had a genuine difficulty on the date to which personal hearing had been fixed. The casualness with which the disciplinary proceeding has been conducted certainly justifies a day''s accommodation as asked for and nothing would have happened if Petitioner had been given a fresh date of personal hearing.

4. Learned Government Advocate strenuously contended that when the documents were produced at the enquiry, they must be deemed to have been taken in evidence and it became the duty of the delinquent to peruse the documents and raise his own defence. While we agree with the submission that the Evidence Act does not in the strict sense apply to the disciplinary proceeding, we are not prepared to accept the contention of learned Government Advocate that once documents were produced in support of the charges at the enquiry, they became evidence. Voluminous cash books were produced. Similarly, other bulky documents were produced and it was never made known to the delinquent that any part of them is utilised. In the circumstances, we are bound to accept the contention of the Petitioner that there has been substantial prejudice and it would not be wrong to hold that there has been a denial of reasonable opportunity of being heard in support of the delinquent''s defence. The enquiry in the circumstances must be held to have been vitiated.

5. We are thus satisfied that the entire disciplinary proceeding has been conducted in a manner which has substantially prejudiced the Petitioner and, therefore, an order of dismissal could not be sustained. Accordingly, the writ application is allowed and the order of dismissal is set aside. Petitioner must be deemed to have been continuing in service and would be entitled to service benefits.

6. Learned Government Advocate contended that we may direct that a fresh proceeding on the same charges may begin. As we find, the charges relate to a period almost ten years before.

The enquiry has been vitiated from the very beginning and if the matter has to be enquired into, it must be completely by way of a fresh proceeding. On the self-same charges, a criminal case was tried and has failed. In these circumstances, we think it would not be appropriate to give liberty to the disciplinary authority to continue the proceeding again.

Petitioner shall have his costs of the proceeding. Hearing fee is assessed at rupees one hundred.

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N.K. Das, J.

7. I agree.

Application allowed.

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