
(2013) 05 OHC CK 0004

In the Orissa High Court

Case No : O.J.C. No. 1175 of 2001 and W.P. (C) No. 5067 of 2003

Dr. Ch. Nagendra Nath Mishra

APPELLANT

Vs

M/s. Tata Refractories Ltd. and Another
 M/s. Tata
Refractories Ltd. Vs Government of Odisha and Others

RESPONDENT

Date of Decision : 17-05-2013

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 311
Industrial Disputes Act, 1947 — Section 2(s)

Citation : (2013) 116 CLT 512 : (2013) 139 FLR 1059 : (2013) 2 OLR 52

Hon'ble Judges : S.K. Mishra, J

Bench : Single Bench

Advocate : S.K. Mishra, P.K. Mohapatra in OJC No. 1175 of 2001, J.K. Tripathy, B.P. Tripathy, P.K. Chand, D. Satpathy, P. Tripathy and Manisa Tripathy in W.P. C No. 5067 of 2003, for the Appellant; J.K. Tripathy, B.P. Tripathy, P.K. Chand, D. Satpathy, P. Tripathy, Manisa Tripathy in OJC No. 1175 of 2001, S.K. Mishra and P.K. Mohapatra in W.P. (C) No. 5067 of 2003, for the Respondent

Judgement

S.K. Mishra, J.—The petitioner-workman has filed OJC No. 1175 of 200V and M/s. Tata Refractories Ltd., hereinafter referred to as the "Management", has filed W.P. (C) No. 5067 of 2003 assailing the award passed on 22.11.2000 by the learned Presiding Officer, Labour Court, Bhubaneswar in I.D. Case No. 97 of 1992, upholding the dismissal of the petitioner by the management. The facts leading for filing of this writ petition before this Court may be briefly summarized as follows:

The Government of Odisha in Labour and Employment Department referred the dispute between the Resident Director, M/s. Tata Refractories Ltd., Belpahar and its workman Dr. Ch. N.N. Mishra to determine if the dismissal of the Workman by the Management is legal and/or justified? If not, to what relief Dr. Mishra is entitled?

2. The employee, hereinafter referred as the "petitioner" for convenience, has

filed his statement of claim to the effect that he joined on 16.01.1980 as a Pathologist in the Hospital of the management and was heading the Pathology department. He has worked as such under the management. On 03.11.1984 there was a mishap in the house of the petitioner and the wife of the workman committed suicide. The petitioner thereafter availed leave from 05.11.1984 to 17.11.1984 by submitting leave application to the appropriate authority. He extended his leave from 18.11.1984 to 16.12.1984 and then up to 27.12.1984 and telegraphically intimated the management to extend leave upto 16.04.1985, on which date the petitioner surrendered before the learned Sessions Judge, Puri, where from he was sent to judicial custody till 28.03.1990 in connection with the death of his wife. As per orders of the High Court in Criminal Appeal No. 202 of 1986, the conviction and sentence passed against the petitioner was set aside and the workman was acquitted from all the criminal charges levelled against him.

3. After acquittal of the petitioner in the criminal case and on his release from jail, he submitted a joining report in his letter dated 27.04.1990. In reply to the said letter, the management intimated the petitioner that his services have been terminated with effect from 16.02.1985 as per the provisions contained in Clause XXIX and (i) of 21 of the Standing Order of the company for his continuous absence from duty from 05.11.1984. It is contended by the petitioner that the action of the management is illegal, arbitrary, mala fide and unsustainable in law as the same is in utter violation of the principle of natural justice. According to the petitioner, no charges were framed against the petitioner nor there was any enquiry into the allegations and no opportunity of hearing was given to the workman and the action of the management was bad in law and is liable to be set aside. He also contends that though he was convicted by the Sessions Court, he was acquitted by the High Court and, therefore, he should be reinstated in service along with full back wages and continuity of service.

4. The Management has filed its written statement admitting that the petitioner was working as a Pathologist in the hospital of the management at Belpahar in supervisory and managerial capacity and was drawing monthly salary of Rs. 2200/- as on the date of dismissal and, as such, the reference under the Industrial Disputes Act is bad in law. It is also contended by the management that the petitioner is not coming within the purview of Section 2(s) of the Industrial Disputes Act and therefore the Court has no jurisdiction to hear the case. The management further submits that the petitioner joined on 06.01.1980 as a Pathologist in the hospital of the management. The said post was in the officer grade and managerial cadre. The duty of the workman was mainly supervisory and managerial in nature. On 04.07.1984, the petitioner submitted an application for leave from 05.11.1984 to 17.11.1984 and without awaiting for the leave to be sanctioned, the workman left the headquarters. On 19.11.1984, the management wrote to the petitioner that his leave from 04.11.1984 to 17.11.1984 was not sanctioned and he should report for duty immediately. On the same day, a telegram dated 18.11.1984 sent from Cuttack was received by

the management extending his leave till 31.11.1984. On 21.11.1984 a letter dated 18.11.1984 posted from Jharsuguda was received from the petitioner sent by registered post. In the said letter the petitioner was stated to be sick but did not attach any document in support of his sickness. The workman prayed for leave from 18.11.1984 to 15.12.1984. On 21.11.1984, the management wrote to the workman that since the workman posted a letter from Jharsuguda and sent a telegram from Cuttack, he could not be sick at two different places on the same day. Again in a letter dated 12.12.1984 posted at Sambalpur, the petitioner asked for leave from 16.12.1984 to 17.12.1984 on the ground that he was not cured of hepatitis. In support of his illness, no document was filed. The petitioner was informed by registered letter dated 05.11.1984 that the leave was not granted and the workman was advised to come to the Chief District Medical Office for treatment. The petitioner was also informed that in case he failed to comply with the advice he would be liable for disciplinary action. Though the said letter was received by the workman, he did not respond. The workman sent another letter asking for leave from 28.12.1984 to 25.01.1985 on the ground of sickness of the same disease. The application of the petitioner was not supported by any document. Since no reply was received by the management on the letters issued to the petitioner, it was published in the daily Samaj dated 21.01.1985. One Trinath Das, Senior Welfare Officer was appointed as Enquiry Officer and that enquiry was posted to 04.02.1985 at 9.30 A.M. The petitioner was allowed to submit his explanation in advance. As the petitioner did not attend the enquiry on the date fixed nor took any steps, the enquiry was conducted ex parte. The Enquiry Officer submitted his finding and as the charges were proved, the management decided to dismiss the workman from 16.02.1985 and the post of Pathologist was filled up subsequently.

5. On the basis of such pleadings, learned Presiding Officer, Labour Court, Bhubaneswar cast four issues. They are:

- (i) Whether the doctor (Pathologist) working in the industry is a "workman" as defined in Industrial Disputes Act?
- (ii) Is the domestic enquiry conducted against the petitioner fair and proper?
- (iii) Is his dismissal with effect from 15.02.1985 proportionate to the gravity of misconduct established in the enquiry?
- (iv) If not to what relief?

6. After taking into consideration the evidence led by both the parties, the learned Presiding Officer, Labour Court, Bhubaneswar came to the conclusion that the petitioner was a workman within the meaning of Section 2(s) of the Industrial Disputes Act. He further found that the domestic enquiry conducted against him was fair and proper and, therefore, there was no reason to interfere with the findings thereof. The learned Presiding Officer held that the dismissal of the petitioner with effect from 16.02.1985 is proportionate to the gravity of misconduct and as such the petitioner is not entitled to any relief. The petitioner

i.e. the employee has assailed the findings recorded by the learned Presiding Officer, Labour Court, Bhubaneswar in filing a writ petition before this Court in OJC No. 1175 of 2001. He has challenged the findings recorded by the learned Presiding Officer on Issue Nos. 2 and 3. The Management, on the other hand, has preferred W.P. (C) No. 5067 of 2003 assailing the findings recorded by the learned Presiding Officer, Labour Court that the petitioner is a workman within the definition of Section 2(s) of the Industrial Disputes Act.

7. Learned counsel for the Management submitted that the conclusion arrived at by the learned Presiding Officer, Labour Court that the petitioner is a workman is erroneous. Learned counsel in his written argument has extensively quoted the evidence recorded for and against the Management and basing on such factual aspect, it is contended that the learned Labour Court has erred in coming to the conclusion that the petitioner is a workman. In this connection, learned counsel for the petitioner relies upon the reported case of Executive Engineer, Electrical, Jaipur Road Electrical Division Vs. Presiding Officer, Industrial Tribunal and Others, . In that case, this Court held that it is well settled principle of law that the High Court should not exercise its supervisory power under Article 227 of the Constitution of India and interfere with an order, if it is possible to form two opinions on the materials available on record and the Tribunal/authority/Court below has formed one opinion. It was further held that it is also well settled that the power under Article 227 of the Constitution is not-available to be exercised for indulging in re-appreciation or re-evaluation of evidence like a Court of appeal. This Court took note of the reported case of Ranjeet Singh Vs. Ravi Prakash, . It was further held that the scope of interference with findings of fact of the lower Tribunal is limited, while exercising jurisdiction under Article 226 of the Constitution in a writ of certiorari. Such findings can only be interfered with, if gross illegality or perversity is shown on the face of the order of the Tribunal.

Similar is the view taken in Surya Dev Rai Vs. Ram Chander Rai and Others, wherein the Supreme Court has held that be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby. Such being the settled principle of law, this Court refrains from re-appreciation of evidence to determine whether the petitioner is not a worker within the definition of Section 2(s) of the Industrial Disputes Act. Thus, this Court upheld the findings of the Labour Court on Issue No. 1.

8. As far as Issue No. 2 is concerned it is relating to the fairness and adequacy of the departmental proceeding. It is apparent from the case records that the petitioner was not served with a notice to show cause. Rather, a paper proclamation was issued. No charge was framed. After finding him guilty, no second show cause notice on the question of quantum of punishment was issued

to him. Moreover, the petitioner was not issued with an order of termination and it was not communicated to him.

9. The Supreme Court in *Jai Shanker Vs. State of Rajasthan*, has held that the authorities can order a person to discharge from service, but the same cannot be passed without at least intimating him the purpose for which they are removing him and giving him opportunity of showing cause why he should not be removed. Any act in not giving an opportunity of showing cause is violation of Article 311 of the Constitution. Similar view has been taken in the case of *Narendranath Mohanty Vs. Union of India (UOI)*, .

In *Surath Chandra Chakrabarty Vs. State of West Bengal*, , the Supreme Court has held that if a charge is not capable of intelligent understanding and was not sufficiently definite to furnish materials to the appellant to defend himself, then it will be open for the delinquent to show any cause. Any such vague charge or allegation will make the departmental proceeding illegal. Applying the aforesaid principle of law to this case, it is seen that no charge was framed and a notice was published in the newspaper only on the ground that he was in judicial custody during the relevant time.

In *Union of India and Others Vs. Dinanath Shantaram Karekar and Others*, , the Supreme Court held that where disciplinary proceedings intended to be initiated by issuing charge sheet, its actual service is essential as person to whom charge-sheet issued is required to submit his reply and to participate in disciplinary proceedings. The Supreme Court further held that when the show cause notice is issued, the employee is called upon to submit his reply to the action proposed to be taken against him. It is further held that since in both the situations, the employee is given an opportunity to submit his reply, the theory of "Communications" cannot be invoked and "Actual Service" must be proved and established.

10. From the records, it is therefore clear that no charge-sheet was served upon the petitioner-employee. Secondly, he was not given any show cause notice to file his written statement or statement of defence. Only a paper proclamation was made. Such proclamation is made at a time when it is admitted that he was in custody and therefore he was under duress. In such circumstance, personal service of notice is mandatory. Thereafter, the finding recorded by the Enquiring Officer was not subject to the petitioner calling upon him to file his objections. Before imposing penalty of dismissal or termination, the petitioner was not given a second show cause notice and termination order was passed. Last but not the least; the petitioner was not communicated with the termination order. Such being the undisputed factual aspect of the case, this Court is of the opinion that gross failure of justice has occasioned in dismissing the employee from service and therefore, the order of termination, which has been upheld by the Labour Court cannot be allowed to be sustained.

11. In that view of the matter, Issue No. 2 is decided in favour of the petitioner

and against the Management.

12. It is brought to the notice of the Court that during the pendency of the writ petition, the petitioner has attained the age of superannuation. So he cannot be reinstated in service, but he is entitled to get his financial benefits in shape of back wages. Keeping in view the pay he was getting at the time of termination and the length of service he would have tendered, this Court comes to the conclusion that a fixed sum of Rs. 7,50,000/- (Rupees Seven lakh fifty thousand) shall be enough to meet the ends of justice. The opposite parties-Management are directed to pay a sum of Rs. 7,50,000/- (Rupees Seven lakh fifty thousand) to the petitioner within a period of two months, failing which it will carry an interest at the rate of 12% per annum from the date of filing of the writ application i.e. 05.02.2001.

In that view of the matter, OJC No. 1175 of 2001 is allowed and the W.P. (C) No. 5067 of 2003 is dismissed.