

(1985) 02 OHC CK 0030

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1593 of 1982

Hare Krishna Jena

APPELLANT

Vs

The Additional Superintendent of Police and Others

RESPONDENT

Date of Decision : 20-02-1985

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1985) 1 OLR 438

Hon'ble Judges : R.C. Patnaik, J;D.P. Mohapatra, J

Bench : Division Bench

Advocate : K.N. Sinaha, for the Appellant; Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.C. Patnaik, J.—Our extraordinary jurisdiction has been invoked by the petitioner, a dismissed Assistant Sub-Inspector of Police, for the quashing of the order of dismissal (Annexure-10) passed by opposite party No. 2 and confirmed in appeal, by a certiorari.

2. The petitioner was posted as an Assistant Sub-Inspector of Police at the Fagu Anti-smuggling post located on the Bihar and Orissa border. There was clandestine movement of rice and paddy in huge quantity across the border. He has alleged that due to his earnest efforts he could curb the activities of the anti-social elements engaged in smuggling and thereby incurred their wrath and displeasure. Particularly he incurred the ire of the local Sarapanch Gopal Giri who was overtly and covertly associated with smuggling. Unfounded allegations were made by Gopal Giri against him to the higher authorities and an investigation ensued. It was conducted by the then Additional Superintendent of Police who recorded statements of various persons who stated before him that the petitioner had received illegal gratification from them. On the basis of the statements recorded during investigation and the report submitted by the Additional Superintendent of Police, a departmental proceeding was initiated by the then

Superintendent of Police (opposite party No. 2). A set of charges was framed. The charges along with a copy of the report on the basis whereof the charges were framed were communicated to the petitioner and he was called upon to submit his explanation to the charges. There were four heads of charges. The first three related to receipt of illegal gratification. Illegal gratification was received on two dates- March 19 and March 30, 1968. The other charge alleged misappropriation of one mound and twenty seers of rice seized by the petitioner. The petitioner categorically asserted that inasmuch as the charges were drawn up and based on the allegations made by certain persons before the Additional Superintendent of Police was made the preliminary enquiry, he ought to be supplied with copies of the statements of witnesses recorded during the preliminary enquiry and with a copy of the petition of complaint lodged by Gopal Giri which set the preliminary enquiry in motion. Copies of neither of the documents were supplied to him. The petitioner asked for copies of certain documents for his defence. The petitioner moved the Superintendent of Police, the disciplinary authority, who was himself conducting the enquiry for a direction to supply copies of certain documents which were necessary to disprove some charges, as per Annexure-6. No order thereon was passed by opposite party No. 2. Having regard to the nature of the allegations, the complexity of the case, the number of witnesses to be examined in the proceeding and the capability of the officer enquiring into the charges who was no other than the superintendent of Police, his disciplinary authority against whom the petitioner who was an Assistant Sub-Inspector of Police was no match, the petitioner pleaded for permission to defend himself in the proceeding by a lawyer. His prayer was turned down. He, however, participated in the proceeding in such adverse circumstance. The disciplinary-cum-enquiring authority himself acted as the presenting officer for the department examining the witnesses offered in support of the charges and cross-examining the witnesses examined by the petitioner in his defence. As many as nineteen witnesses were tendered by the department. Three witnesses were examined in defence. Nine documents were exhibited. The disciplinary authority was of the view that all the charges had been brought home to the petitioner and called upon him to show cause why he should not be dismissed from service. In his show cause, the petitioner made a grievance of denial of adequate opportunity, alleged capriciousness on the part of the disciplinary authority and assailed the findings on merit. He specifically alleged that the paddy alleged to have been misappropriated by him was, in fact, deposited in court.

The disciplinary authority negated the petitioner's plea that reasonable opportunity had not been provided and passed an order on July 19, 1972 dismissing the petitioner from service. In this appeal to the Deputy Inspector General of Police, besides questioning the correctness of the findings, the petitioner alleged infraction of natural justice. He categorically alleged that copy of the petition filed by Gopal Giri and copies of the statements of witnesses recorded during the preliminary enquiry were not supplied to him. His appeal

was of no avail. He then moved the Government and also moved the Chief Minister for redress of his grievance, He awaited the decision of the highest authority in the State. As he had not the means, he could not move this Court earlier. When he learnt about aid being given under the Legal Aid Scheme, with such aid he took shelter in this Court.

3. In the return submitted by the opposite parties, the allegations are refuted. It has been urged that the inordinate delay disentitled the petitioner from any relief. The assertion of the petitioner that he was not supplied with copies of the petition filed by Gopal Giri and the statements of witnesses examined during the preliminary enquiry is denied; It is stated that the petitioner was supplied with copies. It is averred that the petitioner was not entitled to assistance of a lawyer in a departmental proceeding as a matter of right. Moreover as the officer who enquired into the charges was not himself a lawyer, no prejudice was suffered by the petitioner. It has been further stated that the appeal filed by the petitioner was dismissed and his memorial to the Government was rejected in June 1976. Regarding the petitioner's allegation that he had also made representations to the Chief Minister, opposite parties have stated that there was no material to show that he had made any such representation.

4. Mr. K. N. Sinha, the learned counsel for the petitioner, has contended that by denying copies of the complaint filed by Gopal Giri and the statements of witnesses recorded during the preliminary enquiry and of documents which were vital for the petitioner's defence, the disciplinary proceeding was vitiated. By denial of assistance of a lawyer when the petitioner was being prosecuted by a Superintendent of Police, the petitioner was denied adequate and reasonable opportunity of defending himself. Besides, he has also endeavoured to show that some of the charges were misconceived and disproved by the materials on record of the proceeding.

The learned Government Advocate repelled the submissions urging that the petitioner had been supplied with copies of the relevant papers. A copy of the enquiry report had been supplied. The petitioner was an Assistant Sub-Inspector of Police. Denial of the assistance of a lawyer did not and could not prejudice him. Documents, grant of copies was refused, were irrelevant.

5. The questions that can be distilled from the controversy aforesaid are : whether or not copies of the complaint petition and the statements of witnesses recorded during the preliminary were refused to the petitioner despite his asking for them and if the answer is in the negative, the consequences there of; if in the facts and circumstances, denial of assistance of a lawyer to the petitioner was denial of adequate and reasonable opportunity to defend himself.

6. The petitioner's allegation in the writ petition that despite his repeated requests for copies of the petition filed by Gopal Giri and the statements of witnesses recorded during the preliminary enquiry, the same were not granted is traversed in the return filed by the opposite parties as hereunder.

"... that with respect to the supply of the copy of the complaint petition filed by Gopal Giri, it is stated that as the proceeding was instituted on the enquiry report of the A. S. P. Rairangpur and the said report was supplied to the petitioner, it was not felt necessary to supply him the copy of the petition of the said Giri. So far as supply of the statement of the witnesses recorded by the A. S. P. is concerned, it is stated that the statements were supplied to the petitioner during the enquiry of the proceeding by the S. P. Mayurbhanj. ..."

In view of the assertion in the return, we called upon the learned Government Advocate to place materials in support of the plea that copies of the statements of witnesses had been supplied to the petitioner, No material could be produced. We called upon the counsel for the State to produce the record of the disciplinary proceeding. The same is not forthcoming though it appears to us that the return was prepared on the basis thereof. In the circumstances we draw adverse inference against the opposite parties that the record, had it been produced, would have negated the assertion of the opposite parties that copies of statement of witnesses had been supplied. We, therefore, hold that the plea of the petitioner that copies of the statements of witnesses examined during the preliminary enquiry were not supplied to him despite his repeated requests, is well founded. We are fortified in our view from the conduct of the petitioner persisting in his demand for copies not only during the pendency of the disciplinary proceeding but making a grievance thereof even in his second show cause submitted before the disciplinary-cum enquiring authority and in the appeal memorandum and in the memorial to the Government.

The petitioner also wanted copies of certain documents, inter alia, copies of the property challen lists in four cases. But the disciplinary authority specifically rejected his request by his order dated January 2, 1969, as per Annexure-6.

7. The complaint of Gopal Giri set the law in motion. Statements recorded during the preliminary enquiry formed the basis for the disciplinary proceeding. Some of the witnesses examined were sought to be examined in support of the charges. Thus, no doubt, as it has been contended on behalf of the opposite parties that the charges contained a synopsis of the allegations. In order to submit his show cause, the delinquent was entitled to know precisely and specifically what were the allegations on the basis of which the preliminary enquiry was initiated. He was also entitled to know the allegations which were made by the witnesses during the preliminary enquiry. Law did not oblige him to remain in the dark. To exercise his right effectively, he was entitled to an adequate opportunity and that in the circumstances obliged the authority to furnish copies of the complaint and statements of witnesses recorded during the preliminary enquiry. Those were essential for the filling of the show cause and an effective cross-examination of the witnesses. The petitioner was also entitled to copies of relevant documents on which he relies by way of his defence. One of the charges was misappropriation of paddy seized in course of investigation. His plea was that the same had been deposited in Court. The documents were, therefore, very vital for

his defence.

8. The law on this aspect is well settled. In *State of Madhya Pradesh v. Chintaman Sadshiva Vaishampayar* AIR 1961 S.C. 1623, the complaint was : firstly that Chintaman was not supplied with a copy of the application on the strength of which the preliminary enquiry was started against him and secondly, the statements of Rajab Ali and Noor Bhai were not supplied to him. The Constitution Bench of the Supreme Court observed :

"...Failure to supply the said copies to the respondent made it almost impossible for the respondent to submit the said two witnesses to an effective cross-examination; and that in substance deprived the respondent of a reasonable opportunity to meet the charge..."

On the denial of the copy of the application on the strength of which the preliminary enquiry was commenced, their Lordships observed :

"...Like the prior statements of Rajab Ali and Noor Bhai this document has been improperly characterised as secret and withheld from the respondent. If he had been given the documents which he had called for, the respondent would have been able to cross-examine the witnesses adequately, and in their absence be suffered from a handicap which in the result denied him a reasonable opportunity which is guaranteed to him under Article 311(2)."

Their Lordships then drawing attention to the observations of *Union of India (UOI) Vs. T.R. Varma*, observed :

"...Stating it broadly and without intending it to be exhaustive it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them."

and added

"It is hardly necessary to emphasise that the right to cross-examine the witnesses who give evidence against him is a very valuable right, and if it appears that effective exercise of this right has been prevented by the enquiry officer by not giving to the officer relevant documents to which he is entitled, that inevitably would be that the enquiry had not been held in accordance with rules of natural justice..."

In the *State of Punjab Vs. Bhagat Ram*, , the Supreme Court observed that it was unjust and unfair to deny the Government servant copies of statements of witnesses examined during investigation and produced at the enquiry in support of the charges levelled against the Government servant. A synopsis did not satisfy the requirements of giving the Government servant a reasonable

opportunity of showing cause against the action proposed to be taken. Though the Government servant was given an opportunity to cross-examine the witnesses unless the statements were given to him, he would not be able to have an effective and useful cross-examination.

9. The question is so elementary that it is unnecessary to multiply authorities. What is essential is just and fair play. Failure to supply copies of the complaint petition of Giri and statements of witnesses recorded during the preliminary enquiry denied the petitioner just and fair play in action. Gross violation of the constitutional guarantee renders the decision a nullity. The order in appeal upholding a void decision and the further order on the memorial are also infected.

Mr. Sinha, the learned counsel for the petitioner, has drawn our attention to the case of Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, , and submitted that when the petitioner neither trained in law nor possessing proficiency in the art of cross-examination was faced with grave allegations in the nature of criminal charge who was to cross-examine a large number of witnesses and was pitted against the experienced and trained person like his disciplinary authority, the denial of assistance of a lawyer deprived him of adequate opportunity. Their Lordships in Bhagat Ram's case reviewed some of the earlier decisions of the Supreme Court including C.L. Subramaniam Vs. Collector of Customs, Cochin, and observed :

"... In our view we have reached a stage in our onward march to fair play in action that where in an inquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated."

Their Lordships further observed :

"... Justice must not only be done but must seem to be done is not an euphemism for Courts alone, it applies with equal vigour and rigour to all those who must be responsible for fair play in action. And a quasi-judicial tribunal cannot view the matter with equanimity on inequality of representation....."

This is one aspect while considering the request for assistance of a lawyer. Another aspect would be the nature of the enquiry, the allegations and the nature and volume of evidence. All these must be borne in mind while considering the request for assistance of a lawyer. Where the documents are voluminous, the number of witnesses is large or witnesses are experts or specialised in the line, the delinquent would be at a disadvantage. He would be overwhelmed and perplexed and would be inadequate in his attainments to cross examine an expert or specialist. Anybody and every body cannot be a good cross examiner, then cross examination would cease to be an art. It would not be appropriate to quote Gobrial Masonary in the context :

"It is not every man, who has the ability to defend himself on his own. He cannot being out the point in his own favour or the weakness on the other side. He may be tongue-tied or nervous confused or wanting in intelligence. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task?"

Not all delinquents are able and clever. The ability of the delinquent having regard to the circumstances is the relevant consideration. The request of the petitioner was turned down solely on the ground that a lawyer was not to be allowed in a disciplinary proceeding. As an absolute preposition it is unsound. As we have indicated, it would depend on the fact and circumstances of the case and whenever a request is made, the disciplinary authority is obligated to consider what should be fair play in action. Where the disciplinary authority the Superintendent of Police a person well versed in law and investigation is the enquiring authority and also acts as the presenting-cum-marshalling officer, examining the witnesses presented in support of the charges in chief and cross-examining the witnesses presented by the delinquent in defence, denial of a lawyer to the petitioner, an assistant Sub-Inspector, was unreasonable.

10. It has next been argued on behalf of the opposite parties that there was an inordinate delay of six years in the petitioner approaching this Court invoking our extra-ordinary jurisdiction;" The petitioner-was dismissed from service in, 1972. He was a petty officer. He had been knocking at the doors of the "statutory authorities for six years, He has explained that chill penury had disabled him from taking shelter under the protective umbrella of this Court earlier. After the Legal, Aid Scheme was launched in this State, with aid he entered the portals of this Court. Should we in the facts and circumstances refuse him the discretionary remedy and turn him out after perceiving the gross infirmities in the disciplinary proceeding? Jurisdiction under Article 226 of the Constitution of India is an ordinary, jurisdiction, at discretionary jurisdiction. An aggrieved party should approach this Court as expeditiously as possible. But there is no rule of law that wherever there has been delay or the claim is belated, : this Court should shut its doors whatever be the grievance, whatever be the circumstances. The , rule is not, that harsh.. It depends on the facts and circumstances of the case. Where third party"s " "interest is likely to be affected, settled rights are likely to be unsettled,, delayed - invocation of the extra-ordinary jurisdiction and belated claims do not find favour of the Court. But as field by His Lordships it would all depend on what the breach of the fundamental right and the remedy claimed are and how the delay arose.

11. The learned counsel for the petitioner has referred us to G.P. Doval and Others Vs. Chief Secretary, Government of U.P. and Others, , where despite lapse of 12 years on a motion by the petitioner belonging to the lower echelons of service under Article 32 of the Constitution of India, the Supreme Court while not shutting its doors observed

"...the petitioners belong to the lower echelons of service and it is not difficult to

visualise that they may find it extremely difficult to rush to the Court...

In *Ramachandra Shankar Deodhar and others v. The State of Maharashtra and others*; AIR 1974 S. C. 259, it was argued that delay of 10 to 12 years in filing the petition under Article 32 of the Constitution disentitled the petitioner to any relief. The Court observed.

" We do not think this contention-should prevail with us. In the first place, it must be remembered that the rule which says that the Court may not inquire into belated and stale claims is not a rule of law, but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is" delay, the Court must necessarily refuse to entertain the petition. Each case must depend on its own facts. The question as pointed out by Hidayatullah, C. J. in *Tilockchand Motichand v. H. B. Munshi*" is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit... it will all depend on what the breach of the Fundamental Right and the remedy claimed are and how the delay arose. ..."

The learned counsel for the petitioner also cited 40 CLT 619 and 1984 (I) S. L. T. 330 where applications were not rejected on the ground of laches.

12. Having regard to the facts and circumstances and the constitutional infirmities, we are of the opinion that it would be unjust and unfair to refuse the relief. We would accordingly quash Annexure-10. With the foundation crashing, the orders passed in appeal and by the Government also fall to the ground. The writ application is accordingly allowed with costs. Hearing fee is assessed at Rs. 200/- The petitioner shall be deemed to be continuing is service uninterrupted by the order of dismissal, Annexure-10, and shall be entitled to all consequential benefits

D.P. Mohapatra, J.

13. I agree.