
(2022) 05 OHC CK 0144
In the Orissa High Court
Case No : Writ Petition (C) No. 10034 Of 2021

Kartik Prasad Jena

APPELLANT

Vs

State Of Odisha And Others

RESPONDENT

Date of Decision : 27-05-2022

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2022) 05 OHC CK 0144

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

Bench : Single Bench

Advocate : S.N. Patnaik, S.K. Samal

Final Decision : Allowed

Judgement

S.K. Panigrahi, J.

1. The petitioner in this Writ Petition assails the illegal adverse remark communicated to him so also the arbitrary rejection of his representation for expunction of such adverse remark sans any specific substantiation. He also seeks direction from the Court to the Opposite Parties to extend all benefits to the petitioner including his promotion to the rank of Professor grade which was illegally denied to him on account of the said demoralising adverse remark against him. He further prays for quashing the adverse remark dated 07.10.2020/ Annexure-2 and the rejections of representations dated 29.12.2020/ Annexure -6 & dated 26.02.202/Annexure-9.

I. Factual back ground:

2. The facts, in nutshell, are that the petitioner was initially appointed as Lecturer-in Economics and later promoted to further ranks in the hierarchy. He has completed three decades of service with unblemished track record without any adverse remark in his entire service career. The petitioner served as the Deputy Director (NGO-II) in the Directorate of Higher Education from 03.01.2018 to 08.07.2019 and on transfer he is serving as Associate Professor & HOD in

Economics at SCS College, Puri since 09.07.2019.

3. In compliance with the guidelines issued by the GA & PG Department in the matter of writing and maintenance of CCRS, the petitioner submitted his Performance Appraisal Report (PAR) indicating therein brief description of duties entrusted to him, physical/ financial targets and achievements and significant work done by him during the period from 19.09.2018 to 31.03.2019 through Online to his reporting authority i.e. Director of Higher Education, Odisha within scheduled date on 26.4.2019(Annexure 1).

4. After about one year and three months of his joining at SCS College, Puri, the petitioner received a confidential letter from the GA & PG (SE) Department, Government of Odisha bearing D.O. No.2192/SE dated 07.10.2020 wherein he was communicated with the adverse remarks in his PAR during his incumbency as Deputy Director(NGO-II) in the Directorate of Higher Education, which reads as follows:

"On review of the confidential report on the work for the year 2018-19 (19.09.2018 to 31.03.2019) it reveals that "you do not try to study the guidelines and act as per merits". Government hope, you will try to improve."(Annexure 2).

5. On receipt of the D.O. letter dated 07.10.2020 issued by the GA & PG (SE) Department, Government of Orissa, the petitioner had made a representation dated 26.11.2020 to the said authority against the adverse remarks in his PAR. He narrated all the genuine grounds with supporting documents for expunction of adverse remark in his PAR, but his representation has been rejected with a cryptic order with the observation that there is no adequate ground for expunction or modification of the adverse remarks and communicated to the petitioner.

6. Being aggrieved by the adverse remark, the petitioner felt it appropriate to make a detailed representation before the Chief Secretary, Government of Odisha, pointing out his grievances and submitted the same on 08.02.2021. Since the petitioner is on the verge of his promotion such an attempt by his reporting officer and administrative department is likely to prejudicially impact his promotion prospect. However, he was disappointed by the Opp. Party No.3 vide a letter bearing No.382 dated 26.02.2021 intimating the fate of the Representation dated 08.02.2021 rejecting the same treating it as second representation in terms of Para-14(ii) of the PAR guideline issued vide Memo No.1199/ PRO, dated 26.02.2021. (Annexure-9). Challenging such communication of adverse CCR as well as the illegal rejection of his representations, the petitioner filed the present writ petition.

II. Submissions of the Petitioner:

7. Learned counsel for the petitioner submits that the adverse remark was given but there was no reasons assigned for delayed communication of such remark by

the authority. In fact, the communication dated 7.10.2020 was received by the petitioner when the PAR relates to 2018-19. The said communication was not in conformity with the law governing the field.

8. He further submits that the said adverse remarks do not reveal any defined act of omission and commission by the petitioner while discharging his duty in any specific assignment. Though, it has been mentioned that "the petitioner did not try to study the guidelines and act as per merits". No verbal or written warning was communicated or shown caused to the petitioner prior to the impugned communication. It is well settled that the objective of CCR writing and communicating adverse remarks clamour for a previous warning to mend the activities or to cure the defects, if any, which is the sine qua non for writing and communicating adverse against any employee. If such warning or displeasure communication was not issued to the employee, the adverse remarks are liable to be quashed.

9. He strenuously contended that in the present case, no warning has been issued to the petitioner to mend the alleged negligence, if any. It is implicit that such an adverse remarks should not be on the foundation of a subjective satisfaction or bias for any kind of unsatisfactory services. The State being a model employer must act fairly towards its employees which presuppose the good governance. Many juniors to the petitioner have been given promotion to the rank of Professor as per promotion notification bearing Notification No.39664 dated 30.09.2021 but the same has been denied to the present petitioner only on account of the present adverse remark though he satisfies all other conditions for promotion as it is reflected from the copy of the DPC proceeding dated 17.08.2021 obtained under RTI Act 2005. The element of arbitrariness has overpowered on the entire issue and subverted the spirit of fairness and reasonableness.

10. He further underlined that the adverse remark should be specific to the nature of defect and should correlate to the specific facts and circumstances so that an effective representation may be submitted by the employee for expunction of the same. The case in hand also openly endorses the inordinate delay in communication of adverse remark for the year 2018-2019 to the petitioner and the said remark is completely without any basis nor does it indicate any specific omission and commission.

11. He pointed with vigour that the G.A. Department has issued a comprehensive guideline for recording of PAR for Group-A officers of the State Government replacing the existing system of CCR. He specifically drawn the attention of the court to Para-14 of the said memorandum that deals with the provision for submission of representation against the adverse remark communicated to the employee. The said clause, of the memorandum deals with a representation to be submitted before G.A.(S.E.) Deptt. It has been further indicated therein that a second representation shall not in any circumstances be entertained. However, Clause No.16 of the said memorandum indicates that the adverse remark if

initiated by the Special Secretary to G.A. Deptt. being the author of the same then Chief Secretary will be competent to deal with the representation. In view of this the Opp. Party No.1 has every authority to deal with a grievance made by an employee, if for any reason, the competent authority to entertain the representation of the employee failed to appreciate and more particularly to reject the representation submitted by the employee without assigning any reason while rejecting the same.

12. He further contended that the authorities have admitted that they have issued the adverse remark to the petitioner on 10.02.2020 although the relevant period is for 2018 - 2019. The government guideline which makes it clear, more particularly at page no.19 of the counter Affidavit filed by the Opposite party that the different stipulated time period for the different stages of the maintenance and communication of CCRs. but the Opp. Parties have violated the same and thereby caused serious prejudice to the petitioner as much as such action is against very objective of communicating adverse remark if any. The said delayed communication has inflicted a deliberate carnage on the career of the petitioner.

13. The opposite parties have filed a copy of the CCR (PAR) wherein they have admitted that the views of the reviewing authority and accepting authority which is prevailing till date with respect to the CCR of the petitioner for the period from 19th September 2018 to 13th March 2019 with the overall grading "outstanding". That being the position after the views expressed by the reviewing authority and accepting authority, the remark issued by the reporting authority has lost his force and is of no consequence. However the GA department while maintaining the CCR has miserably failed to appreciate the aforesaid facts and he did not take into consideration overall grading reported by the reviewing authority and accepting authority as "outstanding" in favour of the petitioner rather being swayed by the remarks of the reporting authority has issued the adverse remark. The GA department miserably failed to treat the incomplete and improper substantiation report submitted by the reporting authority as an adequate substantiation report though the said substantiation report does not throw any light to justify the adverse remark in any manner. Moreover, the underbelly of a vindictive attitude and the wrong approach of reporting authority is tell-tale from the substantiation report as he tried to develop some more additional points which were never a part of the CCR at all while recording the CCR during the relevant period by him. Under such circumstances, not only did the Reporting officer commit a grave error but also the GA Department being the custodian of the CCR and the person responsible to communicate this adverse remark has failed to perform his part in a proper manner by applying the doctrine of reasonableness. Under such circumstances, the treatment of the CCR of the Petitioner for the period from 19th September 2018 to 31 March 2019 cannot be treated as adverse trivialising the unblemished track record of the petitioner.

14. It is further argued that the Commissioner-cum-Secretary, Department of Higher Secondary as reviewing as well as accepting authority. This is a complete

wrong statement on behalf of the opposite parties. The petitioner was never aware about the contents of the remarks given by the reporting officer as well as the reviewing authority-cum-accepting authority. However, the Counter Affidavit reveals that while the reporting authority has only given the comments with respect to adverse remark that the petitioner does not try to study the guidelines and act as per merit, the views expressed by the reviewing authority and the remarks and overall grading of the accepting authority who is none other than the reviewing authority is "outstanding". Therefore it is not at all a fact that the adverse remark given by the reporting officer has been accepted by the then Commissioner-cum-Secretary, Department of Higher Secondary Education in the capacity of reviewing as well as the accepting authority. Therefore, after the reviewing and accepting authority has decided that the overall performance of the petitioner to be outstanding, the opinion given by the reporting officer that the overall grading in respect of the petitioner for the relevant period is that of average with adverse is superseded by the views expressed by the reviewing as well as the accepting authority.

III. Submissions by the Opposite Parties:

15. Learned counsel for the Opposite Parties, It has been argued further that the reporting authority was provided with an opportunity to submit a substantiation report against the representation submitted by the petitioner whereas the reporting authority declined to review his remarks given. Accordingly, the GA and PG department by DO No. 3280 dated 29.12.2020 communicated the rejection of the prayer of the petitioner. In this context, the substantiation report submitted by the reporting officer who is presently holding the post of Director/Joint Secretary of Drinking Water and Sanitation, PR & DW Department, has submitted that the petitioner has submitted the self-appraisal report with claim of 100% achievement in terms of disposal of the pension cases, court cases and grievances made by him which is factually incorrect and amounts to submission of false information. With this observation the reporting authority through his substantiation report did not accept the contention of the petitioner and stick to his opinion with respect to overall grading of the petitioner as average, which is given during the period in Dispute.

16. He further contended that the adverse remarks under annexure- 2 is issued after necessary consideration by the Reporting Authority, i.e. Director, Higher Education and as per guidelines there is no requirement of assigning the grounds of adverse remarks, except in case of Outstanding rating.

17. He further argued that the Special Secretary, G.A Department is the competent authority to consider the representation of the petitioner against adverse remarks, In the present case, the representation filed before the Chief Secretary is not maintainable as the said representation is a second representation and further as the author of the adverse remarks is not the Special Secretary, G.A department. Only in cases where the Special Secretary of the G.A department is the author of adverse remarks then in those cases the

representation is to be filed before the Chief Secretary.

18. He emphatically stated that the counter affidavit filed on behalf of Opp. Parties 1 to 4 unerringly reveals that overall grading of the petitioner for the 2018-19 is Average. Further, the claim of the petitioner in his self appraisal regarding disposal of 100% of pensions, court cases and grievances found to be incorrect by the Reporting Authority. He sought to clarify the fact of inordinate delay for communication of adverse remarks to the petitioner. As the PAR for the assessment year 2018-19 in respect of Group-A & B officers were not completed and number of PARS were awaiting the remarks of the assessing authorities, the Govt. had extended the last date up to 20.02.2020 for completion of the e-PARS for the year 2018-19 through HRMS as per the Department letter No. 402/SE, dated 10.02.2020. After said date, the online e-PARS were undertaken for reviewing.

19. He relies on a judgment of the Apex Court, in Amrik Singh vrs. Union of India (2001) 10 SCC 424 wherein in it was held that the scope of judicial review on adverse remarks by the authority is quite limited. Accordingly, the instant Writ petition deserves to be dismissed being devoid of merit.

IV. Analysis and Reasoning of this Court:

20. Heard learned Counsels for the parties. The centrality of the issue and the grievance of the petitioner are with respect to the adverse remark against the petitioner i.e. "you do not try to study the guidelines and act as per merits". If the impugned statement is analysed literally, one comes to an irresistible conclusion that the petitioner acts as per merit but don't try to study the guidelines. This sentence sounds quite oxymoronic. This statement by itself cannot construe to be so fatal that his legitimate expectation of promotion be denied unjustly. Further, one cannot decouple the fact that the Reviewing authority has awarded him the grade of Outstanding. Another facet of the instant case is that there was an inordinate delay in communication of adverse remark to the petitioner on 10.02.2020 for the year 2018-2019. The Opposite party might have a nice package of reasoning for such delay but it was duty bound to communicate in time. The impugned remark is completely without any basis and prima facie does not indicate any specific omission and commission. The substantiation report completely fails to justify anywhere the reason for the reporting authority to write such adverse remark. Even though there is absence of any construct in the substantiation of report implicating anything against the petitioner, nevertheless this being an important document having the propensity to make or mar of the future official career of an officer. It is imperative that such documentation should be prepared with utmost care and diligence and in an objective manner.

21. The Apex Court in plethora of decisions held that the controlling officer/reporting officer need to show objectivity, impartiality with and fair assessment without any prejudice whatsoever with highest sense of responsibility. In State

Bank of India V. Kashinath Kher MANU/SC/0351/1996, it was held that the controlling officer should show objectivity, impartiality and fair assessment without any prejudice whatsoever with highest sense of responsibility to inculcate in the officer's devotion to duty, honesty and integrity so as to improve excellence of the individual officer, lest the officers get demoralised which would be deleterious to the efficacy and efficiency of public service. Similarly, in the case State of U.P. vs. Yamuna Shanker Misra and Ors AIR 1997 SC 3671, the Supreme Court succinctly held that:

"8. It is seen from the record that the respondent maintained constantly good record earlier to the adverse remarks made for the aforesaid period. It would appear that subsequently also he had good confidential reports on the basis of which the clouds over his conduct were cleared and he was given further promotion. Mr. Rakesh Dwivedi, learned Advocate General, in fairness, therefore, has stated that since the respondent has been regularised after the subsequent good reports, the dispute does not survive for adjudication on merits."

22. Our own High Court in Suchismita Misra v. Registrar (Admn.), Orissa High Court, Cuttack 2018 (II) OLR 1112 wherein it refers to the case of Dev Dutt v. Union of India and others in paras -17, 25 and 26 as follows:

"17. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its up-gradation. Hence, non communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India; MANU/SC/0133/1978: (1978) 1 SCC 248 that arbitrariness violates Article 14 of the Constitution.

25. In the writ petition, it has been prayed to quash the communication of the adverse entry for the years 2010 and 2011 vide Annexure-1 and order of rejection of the representation made by the petitioner and also prayer for upgrading the CCR of petitioner as outstanding for the year 2010 and 2011.

26. In view of the aforesaid observation that the entry in the ACR 2010 and 2011 are liable to be expunged, the Court do so. Accordingly, we hereby direct the intimation vide Annexure-1 that the Character Roll of the petitioner in 2010 and 2011 as 'Poor' is also quashed."

Further, this High Court in State of Odisha v. Binod Kumar Das and ors. W.P. (C) No.35666 of 2020, has confirmed the decision of the learned Tribunal quashing the impugned adverse remark relying upon State of U.P. v. Yamuna Shankar Misra & Anr. 1997 (4) SCC 7 and taking into account the good service of the

petitioner throughout his career.

23. In view of the above discussion and guided by the decisions of the Apex court and this High Court, the impugned remark completely lacks basis and prima facie does not indicate any specific omission and commission. The substantiation report completely fails to justify anywhere the reason for the reporting authority to write such adverse remark picking something from the graveyard of whimsicality. Though this court is less empowered to substitute the opinion of the authority or question the subjective satisfaction which is by no means unfettered unless it leads to arbitrariness. In the present case, subjective satisfaction of the reporting officer seems to have dominated to shape the impugned remarks without reference to any specific substantiation. Guided by the submissions and perusal of documents, in the interest of justice, it is directed that the adverse CCR under Annexure-2 is hereby quashed and the Opp. Parties are directed to reconsider the case of the Petitioner for his promotion to the post of Professor ignoring the adverse CCR under Annexure-2 and his case for promotion be considered with all consequential service and financial benefits within a period of two months from today.

24. Accordingly, the Writ Petition is allowed. No order as to costs.

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