

(1992) 04 OHC CK 0023

In the Orissa High Court

Case No : Original Jurn. Case No. 2998 of 1989

Krishna Chandra Pallai

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 23-04-1992

Acts Referred:

Constitution of India, 1950 — Article 136, 141, 215, 226, 311

Citation : AIR 1992 Ori 261 : (1992) 74 CLT 90 : (1992) 2 OLR 102

Hon'ble Judges : B.L. Hansaria, C.J.;K.C. Jagadeb Roy, J;A.K. Padhi, J

Bench : Full Bench

Advocate : R.K. Mohapatra, B. Routray, U.K. Samal, R.C. Das and S.P. Mohapatra, for the Appellant; Ashok Mohanty, Standing Counsel, B.M. Patnaik, J. Panda, K.N. Jena and P.K. Choudhury, for the Respondent

Judgement

Hansaria, C.J.—:- The following question of law has been referred for our decision :---

"Whether it is open to a High Court in a writ proceeding to set aside an order of punishment if the same be, according to it, arbitrary or grossly excessive or out of all proportion to the offence committed; and if so, can it substitute any other punishment in its place which, in its opinion, be just and proper in the circumstances of the case?"

2. The aforesaid reference has come to be made in these circumstances : A view was taken by a Bench of two Judges in two unreported decisions of this Court, namely, Gopinath Das v. State of Orissa (1985 O. J. C. 146 disposed of on 12-10-1990) and Ramachandra Routray v. Anil Kumar Mukherjee (O. J. C. No. 1679 of 1989 disposed of on 23-10-1990), that it is open to the High Court to interfere with the quantum of punishment imposed by a disciplinary authority following a departmental enquiry where the High Court be of the view that the punishment is shockingly disproportionate, viewed in the background of the gravity of the charges. This view was taken in the aforesaid two O. J. Cs. relying on the decisions of the Supreme Court in Bhagat Ram Vs. State of Himachal

Pradesh and Others, and Shankar Dass Vs. Union of India (UOI) and Another,

3. When the aforesaid decisions were cited before another Bench of this Court in *Y. Venkatrao v. South-Eastern Railway* 71 (1991) CLT 512, that Bench took the view that the opinion expressed in the aforesaid two O. J. Cs. runs counter to the decision of the Supreme Court expressed in *Union of India (UOI) Vs. Parma Nanda*, in which case both the aforesaid decisions of the Supreme Court were noted, whereafter in paragraph 28, it was observed that what was stated in *Bhagatram's* case was no authority for the proposition that the High Court has jurisdiction to impose any punishment to meet the ends of justice. As to *Shankar Dass's* case, the same was regarded as an exception to the proposition. The *Venkatrao* Bench then referred to the Constitution Bench decision of the Supreme Court in *State of Orissa Vs. Bidyabhusan Mohapatra*, in which it was opined that it would not be open to a High Court, while exercising certiorari jurisdiction under Article 226 of the Constitution, to interfere with the punishment once the misdemeanour alleged is found and proved. The Bench also noted that *Bidya Bhusari's* case had been followed by the Supreme Court in a number of decisions, of which reference has been made in paragraph 3 of the judgment. That Bench, therefore, disagreed with the view expressed in the aforesaid O.J.Cs. and observed that in normal course it would have referred the matter to a larger Bench, but in view of that fact that several cases of the Supreme Court including the Constitution Bench case had not been noticed in those O. J. Cs., reference to a larger Bench was not thought necessary.

4. When the present case came up for hearing, *Shri Mohapatra* appearing for the petitioner contended that the *Venkatrao* Bench ((71) 1991 CLT 512) had itself missed to note a later Constitution Bench decision of the Supreme Court in the case of *Union of India and Another Vs. Tulsiram Patel and Others*, in which, according to *Shri Mohapatra*, the apex Court had held in paragraph 127 that where the punishment is arbitrary or grossly excessive or out of proportion to the offence committed, the High Court can substitute any other punishment in its place, which, in its opinion, would be just and proper in the circumstances of the case. This view finds place in paragraph 127 of the judgment. *Shri Mohapatra* further contended that *Tulsiram Patel's* case being a later Constitution Bench decision, the view expressed therein would prevail over that taken : in *Bidya Bhusan's* case, and in this connection he referred to some decisions of different High Courts, which we shall note later. So, this reference.

5. The first point which we need to decide is whether the view expressed in paragraph 127 of *Union of India and Another Vs. Tulsiram Patel and Others*, has application to a case of the present nature. As is known, that case is concerned with applicability and scope of the second proviso to Article 311(2) of the Constitution. One of the questions for examination was as to whether despite dispensation with the enquiry in the cases attracting any of the provisos, hearing would be required to be given because of the demand of natural justice, regarding which it was stated in the judgment that Article 14 is the Constitutional

guardian of the principles of natural justice. (See paragraph 72). Then, while dealing with Clause (a) of the second proviso, the Bench observed as below in paragraph 127 :--

"A Government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe and excessive and not warranted by the facts and circumstances of the case..... If he fails in all the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service, the court will also strike down the impugned order. Thus in *Shankar Dass Vs. Union of India (UOI) and Another*, this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the court should always order reinstatement. The court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case."

6. Shri Mohapatra submits that the aforesaid observations, though made with reference to Clause (a) of the second proviso, would apply to the cases covered by Clauses (b) and (c) of the proviso; not only that, to the cases of the punishments imposed following a full-fledged departmental enquiry also. Shri Patnaik appearing for the opposite parties would not agree with this submission of Shri Mohapatra and refers in this connection to what was stated by a three-Judge Bench in *Union of India (UOI) Vs. Parma Nanda*, in which, after stating in paragraph 28 of the judgment that the High Court has no power or jurisdiction to impose any punishment to meet the ends of justice, which the Supreme Court can do in exercise of the equitable jurisdiction under Article 136, it was stated as below:--

"29. We may, however, carve out one exception to this proposition. There may be cases where the penalty is imposed under Clause (a) of the second proviso to Article 311(2) of the Constitution. Where the person, without enquiry, is dismissed, removed or reduced in rank solely on the basis of conviction by a criminal court, the Tribunal may examine the adequacy of the penalty imposed in the light of the conviction and sentence inflicted on the person. If the penalty impugned is apparently unreasonable or uncalled for, having regard to the nature of the criminal charge, the Tribunal may step in to render substantial justice. The Tribunal may remit the matter to the competent authority for reconsideration or by itself substitute one of the penalties provided under Clause (a). This power has been conceded to the court in *Union of India and Another Vs. Tulsiram Patel*

and Others,

7. Shri Patnaik contends that the aforesaid being the reading of the Supreme Court itself about the purport and effect of the afore-noted observations of the Constitution Bench in Tulsiram Patel's case, it is not open to this Court to take any other view. It may be stated here that in paragraph 29 of Union of India (UOI) Vs. Parma Nanda, the observations made in paragraph 127 of Union of India and Another Vs. Tulsiram Patel and Others, which finds place at pages 1477-78, which we have noted above, were quoted. The learned counsel further submits that in Parma Nanda's case as the apex Court had clearly held, despite what was observed in paragraph 127 of Tulsiram Patel's case, that the High Court has no power or jurisdiction to substitute punishment which the Supreme Court has under Article 136, and having further held that the view taken in Bidya Bhusan's case holds the field (despite Tulsiram Patel's case) this Court has no option but to accept what was stated in Parma Nanda's case on this aspect of the matter. It would be apposite to say that in paragraph 25 of that case, the Supreme Court had clearly stated that if there be any doubt regarding the competency of a High Court to review the merits of the penalty despite what was stated in State of Orissa Vs. Bidyabhushan Mohapatra, the view taken in which was repeatedly affirmed and reiterated in the cases noted in that paragraph, the same must vanish on reading the remarks of Mathew, J. in the case of Union of India (UOI) Vs. Sardar Bahadur, which were quoted in that paragraph itself.

8. Shri Mohapatra, however, states that Union of India (UOI) Vs. Parma Nanda, itself missed to note that in Bhagat Ram Vs. State of Himachal Pradesh and Others, the Supreme Court had held in paragraph 15 that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution, because of which an aggrieved person can approach even the High Court, as Article 226 has conferred power on it to enforce through its writ jurisdiction any of the rights conferred by Part III of the Constitution which deals with fundamental rights. The learned counsel submits that it is, therefore, within the competence of the High Court to interfere with the punishment if the same be disproportionate with the gravity of the misconduct, as by doing so, it would be enforcing the fundamental right of the incumbent conferred on it by Article 14 of the Constitution. In this connection it is urged that the decision in Parma Nanda's case on this point should, therefore, be taken as per incuriam, because of which Article 141 would not get attracted and the decision would not be binding on this Court. It is further contended that the jurisdiction conferred on the Supreme Court under Article 136 of the Constitution, of which mention has been made in paragraph 28 of Parma Nanda's case, being an appellate jurisdiction, the power of the appellate court cannot be wider than that of the original authority, inasmuch as the settled position of law is that the power of the appellate court is conterminous with that of the original authority; and so, what the Supreme Court can do under Article 136 of the Constitution, the High Court can also do.

9. We have given our considered thought to the rival submissions of the learned counsel. It is not within our domain to say anything about the extent of power of the Supreme Court under Article 136 of the Constitution. We cannot, therefore, say that a High Court can also do what the Supreme Court can do in exercise of its power under Article 136 on the face of clear statement to the contrary in paragraph 28 of *Parma Nanda*'s case.

10. As to the decision in *Union of India (UOI) Vs. Parma Nanda*, being per incuriam as it has not taken note of the fact that according to *Bhagat Ram Vs. State of Himachal Pradesh and Others*, disproportionate sentence violates Article 14 of the Constitution, let us first see what is meant by the aforesaid expression. In this connection, we may first refer to the Constitution Bench decision of seven Judges in *A.R. Antulay Vs. R.S. Nayak and Another*, in paragraph 42 of which it was stated that per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step of the reasoning on which it is based is found on that account to be demonstratively wrong.

11. The expression "per incuriam" was explained in paragraph 11 of *Municipal Corporation of Delhi Vs. Gurnam Kaur*, by stating that a decision should be treated as given per incuriam when it is given in ignorance in terms of a statute, or of a rule having the force of a statute.

12. In paragraph 40 of *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others*, it was stated that the latin expression in question means "through inadvertence". In that paragraph it was further stated that a decision can be said generally to be given per incuriam when a Court has acted in ignorance of a previous decision of its own, or when a High Court has acted in ignorance of a decision of the Supreme Court.

13. Finally, we may note what was stated in paragraph 40 of *State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another*, wherein Sahay, J. stated that in practice, per incuriam appears to mean per ignoratum. It was then stated that this principle was developed in relaxation of the rule of stare decisis inasmuch as "quotable in law" is avoided and ignored if it is rendered "in ignoratum of a statute or other binding authority".

14. Keeping in view the meaning of per incuriam as explained above, it cannot be said that when in *Union of India (UOI) Vs. Parma Nanda*, the Supreme Court did not note the observation in *Bhagat Ram Vs. State of Himachal Pradesh and Others*, that disproportionate penalty violates Article 14 of the Constitution, the view expressed in paragraph 28 relating to the incompetence of the High Court to impose any punishment to meet the ends of justice, is per incuriam, inasmuch as no statutory provision or binding authority had been ignored while expressing this view. It would also be apposite to state in this connection that *Bhagatram*'s

case is a decision of a two-Judge Bench, which has no binding authority on Parma Nanda Bench which consisted of three Judges.

15. This being the position, we are really not required to consider whether the view taken in Union of India and Another Vs. Tulsiram Patel and Others, should prevail over that of State of Orissa Vs. Bidyabhushan Mohapatra, both being renderings by Constitution Benches of five Judges, which is the submission of Shri Mohapatra; because, according to him, the law is that if divergent views have been expressed by cognate Benches of the Supreme Court, the later decision has to prevail. Though answering of this submission is not necessary, yet for the sake of completeness, we may put on record that Shri Mohapatra has referred in this connection to Gopal Krishna Indley Vs. 5th Addl. District Judge, Kanpur and Others, and R. Ramanujam Vs. D. Venkat Rao and Another, We have, however, noted that the view taken in this regard in Indo Swiss Time Limited Vs. Umrao and Others, is that in such a situation, courts are to follow that judgment which appears to them to state the law accurately. In the five-Judge Bench decision in Govindanaik G. Kalaghatigi Vs. West Patent Press Co. Ltd. and Another, the majority opined that the later of the two decisions has to be followed. The minority, however, took the view that in such a case, the High Court would consider which of the two conflicting decisions it would follow in the interest of administration of justice, and it should follow that which is better in point of law rather than in point of time. A Full Bench of the Delhi High Court in Management of M/s. Patiala Iron Works v. Union of India 1975 LabIC 1265 stated in this regard that where it is not possible to reconcile the observations made in the two decisions, the courts are at liberty to consider which of the two views is supported by the provisions of the Constitution. We do not propose to burden this judgment with the decisions of the Supreme Court on this point and we deem that for the purpose at hand it would be enough if we refer to what has been stated at page 2245 of Seervai's Constitutional Law of India, 3rd Edn. Vol. II (1984) where the author has stated in paragraph 25.106 that judgments of the Supreme Court on the binding effect of judgments of coordinate courts are "in an unsatisfactory state, and the Supreme Court has not yet resolved the conflict."

16. Shri Mohapatra has submitted that acceptance of the view taken by the Punjab & Haryana High Court, the Delhi High Court and the minority of the Karnataka High Court would introduce great uncertainty as different High Courts would then take different views regarding a proposition of law settled by the apex Court, which would not be in the interest of justice. Certainty of the position of law being one of the vital requirements of administration of justice with even hands and equal eyes, the submission of Shri Mohapatra has much to command. This view of ours has, however, no bearing on the case at hand for the reason that, as stated earlier, the decision in State of Orissa Vs. Bidyabhushan Mohapatra, holds good despite what has been stated in Union of India and Another Vs. Tulsiram Patel and Others, because of the observations made by the apex Court in Union of India (UOI) Vs. Parma Nanda,

17. Having come to the conclusion that the holding in Tulsiram Patel's case cannot assist the petitioner, it is not necessary to dilate on the point if reliance by this Court in the aforesaid two O. J. Cs. on Shankar Dass Vs. Union of India (UOI) and Another, was appropriate, in view of the approval of the view taken in that case by the Constitution Bench in Tulsiram Patel's case, as would appear from that has been stated in paragraph 127 of this judgment. It may, however, be stated that in Sankar Dass" case also, it was Clause (a) of the second proviso which had been pressed into service, whereas in the present case we are concerned with the punishment imposed after a full-fledged enquiry. This apart, if Tulsiram Patel's case cannot assist the petitioner. Sankar Dass" case, a fortiori, cannot. So, it is not necessary for us to deal with the submission of Shri Mohapatra that the reading of Sankar Dass" case by the Venkatrao Bench is not correct. We may only put on record the reason for Shri Mohapatra's advancing this submission. The same is that the observation by that Bench that in Sankar Dass" case, the apex Court substituted the punishment, because of the fact that the counsel appearing for the Union Government showed a letter written by the Deputy Secretary stating that the Hon"ble Minister of Agriculture desired him to say that the courts should decide the case on merits, is not correct, inasmuch as mention about that letter was made in the last paragraph of the judgment just to put this fact on record, which cannot be said to be the basis of the view taken by that Court.

18. Because of all that has been stated above, it has to be held, on the basis of state of law as prevailing today, that this Court has no jurisdiction to set aside the punishment awarded by the disciplinary authority even if it be of the view that the punishment awarded is arbitrary or grossly excessive or out of all proportion to the offence committed in those cases where the punishment had been imposed pursuant to a full-fledged enquiry; and so it cannot substitute any other punishment in its place, which, in its opinion, be just and proper in the circumstances of the case.

19. The reference is answered accordingly.

20. Before parting, we have, however, one observation to make. The same relates to the power of the High Court to pass such order as it deems fit and proper to do "complete justice", about which also there were some submissions from the bar. We are expressing our view on this aspect of the matter as a parting thought only because in Union of India (UOI) Vs. Parma Nanda, or, for that matter, in State of Orissa Vs. Bidyabhushan Mohapatra, the power of the High Court to pass an appropriate order on the question of punishment to do "complete justice" between the parties has not been adverted to. We may state that we are conscious of the fact that express power to pass such orders as may be necessary for doing "complete justice" in any case or matter has been conferred on the Supreme Court only by Article 142 of the Constitution. The question for examination is whether the High Court can also exercise such power even though there is no specific article in the Constitution empowering it to do

so. As to this, we may state that though there is no specific article in the Constitution empowering the High Court to review the judgment pronounced in a writ petition, as against the specific conferment of the power of review on the Supreme Court by Article 137 of the Constitution, it is an accepted position that the High Courts have inherent jurisdiction to review their judgments pronounced in writ applications; of course, subject to well known limitation. It would be enough in this connection to refer to *Shivdeo Singh v. State of Punjab* AIR 1963 SC 1909, which put to rest the controversy which was earlier existing on the aforesaid question, as different views had been expressed by different High Courts in this regard. It may also be pointed out that after the decision in *Shivdeo's* case, the power of the High Court to review its order passed under Article 226 in exercise of its inherent jurisdiction had not been disputed; indeed, the same has been followed in many decisions even of the apex Court.

21. So, merely because there is no express provision in the Constitution giving the High Courts power to pass such orders as may be deemed necessary for doing "complete justice" in any case or matter pending before it, the same should not be clinching. It is for consideration whether such a power should not be conceded to the High Court, because a very small segment of the Indian litigants can afford to fight legal battle in the Supreme Court, inter alia, because of the expenditure involved. So, a common man would be deprived of getting "complete justice", if the High Courts are not empowered to do so. This apart, the life of a litigation may get prolonged, because it may be that in a particular case the only relief which can justly be granted to the petitioner relates to awarding of proper punishment for the charges established, and on the same being done, the parties may not agitate the matter before the Supreme Court. Further, if this jurisdiction is confined to the Supreme Court alone, its workload would get increased, which would not be conducive on the face of already heavy pendency at that level. Finally, the decision relating to proper punishment is not such a difficult task which High Court cannot perform to the satisfaction of all concerned. It may be stated that the Constitution makers had reposed so much confidence in the High Courts that they had conferred power on them to even decide the constitutionality of a Central enactment. We may also say that social justice, which is a throbbing component of the Direct Principles embodied in Part IV of the Constitution would require a liberal approach in this regard. Rendering of full justice to the millions is the perennial and emphatic need of modern India. We would close this part of the judgment by stating that the Supreme Court itself has stated in some of its decisions that the High Court can pass such orders as it deems fit to do complete justice. It would be enough to refer to two such decisions : *Grindlays Bank Limited Vs. Income Tax Officer, Calcutta and Others*, wherein in paragraph 10 it was stated by Pathak, J. (as he then was) that the "order made by the High Court directing the Income Tax Officer to make a fresh assessment was necessary in order to do complete justice between the parties"; and *Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others*, in which Krishna Iyer, J. observed as below in paragraph 146:--

"Article 226, however, restrictive in practice, is a power wide enough, in all conscience, to be a friend in need when the summons comes in a crisis from a victim of injustice; and more importantly, this extraordinary reserve power is unsheathed to grant final relief without necessary recourse to a remand."

These observations were made while holding that the power conferred on the Labour Court, Tribunal or National Tribunal u/s 11-A of the Industrial Disputes Act, 1947, to substitute a punishment, can be exercised by the High Court also, though Section 11-A in terms has not conferred such a power on the High Court.

A.K. Padhi, J.

22. I agree.

K.C. Jagadeb Roy, J.

23. I agree.