
(2009) 03 OHC CK 0044
In the Orissa High Court

Narayan Patnaik

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 04-03-2009

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2009) 107 CLT 782 : (2009) 1 OLR 971

Hon'ble Judges : L. Mohapatra, J;Indrajit Mahanty, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Indrajit Mahanty, J.—In this writ application, the Petitioner-Narayan Patnaik seek to challenge the Order Dated 9.9.1997 passed by the Orissa Administrative Tribunal, Bhubaneswar dismissing his Original Application No. 259 of 1989 as not maintainable.

2. From the records of the proceeding, it appears that the Petitioner was suspended vide the Order Dated 16.4.1986 and on 1986 under Annexure-2, the Petitioner was issued with the charge sheet in a disciplinary proceeding on the following charges:

(1) That on 11.4.86 at about 11.45 A.M. you were found in an objectionable and intimate position with a girl student of Rourkela Women's College, Rourkela inside the office room of the Principal of Rourkela Womens' College, Rourkela which amounts to serious misconduct on your part involving moral turpitude.

(2) That you being the Head Clerk of the institution are being in the habit of encouraging indiscipline in the college, whereas being the Head Ministerial staff of the College you were expected to exercise control over the staff and ensure a sense of discipline in the College.

(3) That the Governing Body of Rourkela Women's College in its resolution, item No. 3(d) dated 22.1.1986 resolved that you were not discharging your duties

properly and cautioned you for the same. In spite of the same there is no improvement of your conduct.

3. The Petitioner responded to the show-cause notice vide his reply dated 21.5.1986 under Annexure-3 denying the allegations. An enquiry was initiated and the Petitioner was noticed to appear. Accordingly, the Petitioner appeared before the Enquiring Authority and filed his objection alleging non-supply of documents and unfairness of the inquiry. In course of the inquiry proceeding, the Petitioner filed an application under Annexure-6 objecting to the manner/conduct of the inquiry and seeking for production of the person with whom he was allegedly seen in the Principal's office, in a compromising position.

4. After completion of the inquiry proceeding, an order of punishment by way of termination of services was issued to the Petitioner on 11.11.1987 under Annexure- 7. The Petitioner, thereafter, sought to challenge the said order of punishment before the State Educational Tribunal and since during the pendency of the said proceeding, the institution in question was taken over" by the State Government, the Petitioner withdrew his application before the Education Tribunal and permission was accorded by the Tribunal for such withdrawal with liberty to move the State Administrative Tribunal. Thereafter, the Petitioner sought to challenge the order of punishment before the State Administrative Tribunal and the Tribunal vide the impugned Order Dated 9.9.1997 under Annexure-9 dismissed the Original Application on the ground that the applicant was not a Government servant at the time of filing of the Original Application and since the order of dismissal was issued by the governing body of a private management college, the Tribunal held that it has no jurisdiction to entertain the Original Application, nor to enter into the merit of the matter. Being aggrieved by the said order of the Tribunal, the present writ application has been filed by the Petitioner.

5. Mr. Rath, Learned Senior Advocate appearing for the Petitioner contended that the present case is a case of no evidence and/or the patent error of facts and procedure and as such judicial review in the present writ application is the only remedy. In this respect, Mr. Rath submitted that the inquiry report was not supplied to the Petitioner and the same was considered behind his back. He further submitted that in this case the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 and in particular, Rule 22(12) and (13) have been completely violated. He submitted that the report of inquiry was never supplied to the Petitioner which is a mandatory, requirement and the said 1974 Rules applied to all members of the staff of aided educational institutions. Therefore, since the Petitioner was serving as the Head Clerk of the Rourkela Women's college, which was an aided educational institution, was covered u/s 3(b) of the Orissa Education Act, 1969. Mr. Rath further submitted that the inquiry in the present case had been conducted in a most perfunctory manner and even though the Petitioner had objected to the procedure adopted in course of the inquiry and

had requested for supply of necessary documents and had also prayed for production of the so called girl student with whom he was alleged to have been seen in a compromising position, as a witness, no order was passed by the inquiring authority and he was never afforded any opportunity of cross-examining any of the witnesses at all & the alleged victim was never examined. He submitted that although the Petitioner had filed his show-cause reply and raised objections under Annexures-5 & 6, he was never given a copy of the inquiry report and only the order of punishment dated 11.11.1987 was only served on him thereby-rendering the entire process of enquiring and the order of punishment invalid in the eye of law.

6. Learned Counsel appearing for the State, on the other hand, supported the order of punishment passed against the Petitioner as well as the order of the Tribunal and stated that since at the time of imposition of punishment, the Rourkela Womens" college, the institution in which the Petitioner was working as the Head Clerk, was under private management, therefore, the Petitioner who had filed an appeal before the Orissa Education Tribunal had withdrawn the same at his own risk. Thereafter, dismissal of the Original Application by the State Administrative Tribunal on the ground of lack of jurisdiction is wholly justified in law.

7. In course of hearing of this matter, by the Order Dated 1.9.2008, the State Counsel was directed to obtain the original Departmental Proceeding records and at the closure of the hearing, the records obtained by the State Counsel from the Principal of the college in question were produced for our perusal. Learned Counsel for the State further submitted that the entire Disciplinary Proceeding against the Petitioner was carried out during the time when the institution in question was under private management. Accordingly, he produced before us the original register of Rourkela Womens" College containing proceedings of General Body Meetings. From the said proceedings it appears that in its review meeting dated 26.4.2008, the Governing Body took note of the letter of the Principal-in-charge of the college dated 26.4.1986 relating to the alleged misconduct by the Petitioner-Head Clerk and it was resolved that a "charge sheet" may be framed against the Head Clerk and served upon him immediately. Thereafter, by the General Body Resolution dated 6.7.1986 the explanation provided by the Head Clerk (present Petitioner) was stated to have been read out and discussed and on being found unsatisfactory an inquiry committee consisting of four persons was formed and was directed to submit the inquiry report within 45 days. By its Resolution dated 29.9.1996, the Governing Body directed the Inquiry Committee to finalise the report by 30.10.1986 and thereafter, once again by its Resolution dated 8.5.1987 the Governing Body directed to submit the inquiry report by 21.5.1987. From the subsequent resolution of the Governing Body Meeting dated 5.8.1987, it appears from Item No. 7 of the minutes that the Inquiry Report was finally placed before the President and it was resolved that the President is empowered to take suitable action and place the same before the next Governing Body Meeting. Accordingly, in the next Governing Body Meeting dated

10.11.1987¹ against Item No. 3 it was noted that the members discussed the matter threadbare and resolved to terminate the services of Narayan Pattnaik-Head Clerk with immediate effect and the period of his suspension was directed to be treated as such. This Resolution though passed by majority members, was dissented to by one member of the Governing Body.

8. Apart from the Governing Body Resolution Book, a file said to have contained the original records of the Disciplinary Proceeding was also perused by us. On perusal of the said file, we find that it does not contain any original record of the inquiry committee. Various Xerox copies are there in the said file including the complaint made by one Smt. Kasturi Naik who under cover of letter dated 16.4.1986 made the allegation against the Petitioner in her letter addressed to the President of the Governing Body on the basis of which the disciplinary proceeding was initiated against the Petitioner.

9. We are surprised to note that the record produced before us does not contain any minutes of meeting or proceedings of the Inquiry Committee, nor it contains any copy of the Inquiry Report based on which the Petitioner's service was terminated. Apart from this, it is again surprising to note that no copy of any oral testimony recorded by the Inquiry Committee nor cross-examination are available on record. There are only two hand-written sheets dated 7.7.1987 and 26.7.1987, purportedly recording the statement of the delinquent against whom three charges were levelled and the statement of Smt. Kasturi Naik on whose complaint the action was initiated against the Petitioner are available on record though unsigned. Neither of these two sheets of papers was signed either by the delinquent or Smt. Kasturi Naik nor signed by any member of the Inquiry Committee. Therefore, we have no other alternative other than to record that the Opposite Party-State has failed to produce the records of Inquiry Committee constituted to enquire into the allegations leveled against the Petitioner.

10. In view of the facts noted hereinabove we are left with no other alternative than to conclude that the present case is a case where there exist no evidence in law to substantiate the punishment of termination of service against the Petitioner.

11. In the case of Ministry of Finance and Another Vs. S.B. Ramesh, of the Judgment, the Supreme Court held as follows:

12. It is necessary to set out the portions from the order of the Tribunal which gave the reason to come to the conclusion that the order of the Disciplinary Authority was based on no evidence and the findings were perverse. The Tribunal, after extracting in full the evidence of SW -1, the only witness examined on the side of the prosecution, and after extracting also the proceedings of the Enquiry Officer dated 18.6.91, observed as follows:

After these proceedings on 18.6.91 the Enquiry Officer has only received the brief from the PO and then finalized the report. This shows that the Enquiry Officer has not attempted to question the applicant on the evidence appearing

against him in the proceedings dated 18.6.91. Under Sub-rule (18) of Rule 14 of the CCS (CCA) Rules, it is incumbent on the Enquiry authority to question the officer facing the charge, broadly on the evidence appearing against him in a case where the officer does not offer himself for examination as a witness. This mandatory provision of the CCS (CCA) Rules has been lost sight of by the Enquiry authority. The Learned Counsel for the Respondents argued that as the inquiry itself was held ex parte as the applicant did not appear in response to notice, it was not possible for the Enquiry authority to question the applicant. This argument has force because, on 18.6.91 when the inquiry was held for recording the evidence in support of the charge, even if the Enquiry Officer has set the applicant ex parte and recorded the evidence, he should have adjourned the hearing to another date to enable the applicant to participate in the enquiry hereafter/or even if the inquiry authority did not choose to give the applicant an opportunity to cross-examine the witness examined in support of the charge, he should have given an opportunity to the applicant to appear and then proceeded to question him under Sub-rule (18) of Rule 14 of CCS (CCA) Rules. The omission to do this is a serious error committed by the enquiry authority. Secondly, we notice that the enquiry authority has marked as many as 7 documents in support of the charge, while SW-1 has proved only one document, namely, the statement of Smt. K.R. Aruna alleged to have been recorded in his presence. How the other documents were received in evidence are not explained either in the report of the enquiry authority or in the proceedings. Even if the documents which were produced along with the charge sheet were all taken on record, unless and until the applicant had requested the enquiry officer to mark certain documents in evidence on his side, the enquiry authority had no jurisdiction in marking all those documents which he had called for the purpose of defending himself on the side of the applicant while he has not requested for making of these documents on his side. It is seen that some of these documents which is marked on the side of the defence not at the instance of the applicant, has been made use of by the enquiry authority to reach a finding against the applicant. This has been accepted by the disciplinary authority also. We are of the considered view that this is absolutely irregular and has prejudiced the case of the applicant. These documents, which were not proved in accordance with law should not have been received in evidence and that, any inference drawn from these documents is misplaced and opposed to law. We further find that the enquiry authority as well as, the disciplinary authority have freely made use of the statement alleged to have been made by Smt. K.R.Aruna in the presence of SW 1 and it was on that basis that they reached the conclusion that the applicant was living with Smt. K.R.Aruna and that, he was the father of the two children of Smt. K.R. Aruna. The S.W. 1 in his deposition which is extracted above, has not spoken to the details contained in the statement of Smt. K.R. Aruna which was marked as Ex.1. Further it is settled law that any statement recorded behind the back of a person can be made use of against him in a proceeding unless the person who is said to have made that statement is made available for cross-examination, to prove his or her veracity. The disciplinary authority has not been

chosen to include Smt. K.R.Aruna in the list of witnesses for offering her for being cross-examined for testing the veracity of the documents exhibited at Ex. 1 which is said to be her statement. Therefore, we have no hesitation in coming to the conclusion that the enquiry authority as well as, the disciplinary authority have gone wrong in placing reliance on Ex.1 which is the alleged statement of Smt. K.R.Aruna without offering Smt. K.R.Aruna as a witness for cross-examination. The applicant's case is that the statement was recorded under coercion and duress and the finding based on this statement is absolutely unsustainable as the same is not based on legal evidence. The other documents relied on by the Enquiry Authority, as well as by the disciplinary authority for reaching the conclusion that the applicant and Smt. K.R. Aruna were living together and that they have begotten two children have also been not proved in the manner in which they are required to be proved.

In the case of Narinder Mohan Arya Vs. United India Insurance Co. Ltd. and Others, the Supreme Court held as follows:

26. In our opinion the Learned Single Judge and consequently the Division Bench of the High Court did not pose unto themselves the correct question. The matter can be viewed from two angles. Despite limited jurisdiction a civil Court, it was entitled to interfere in a case where the report of the enquiry officer is based on no evidence. In a suit filed by a delinquent employee in a civil Court as also a Writ Court, in the event the findings arrived at in the departmental proceedings are questioned before it, it should keep in mind the following : (1) the enquiry officer is not permitted to collect any material from outside sources during the conduct of the enquiry. (See State of Assam and Another Vs. Mahendra Kumar Das and Others, . (2) In a domestic enquiry fairness in the procedure is a part of the principles of natural justice. (See Khem Chand Vs. The Union of India (UOI)and Others, and State of Uttar Pradesh Vs. Om Prakash Gupta, . (3) Exercise of discretionary power involves two elements- (i) objective, and (ii) subjective and existence of the exercise of an objective element is a condition precedent for exercise of the subjective element. (See K.L. Tripathi Vs. State Bank of India and Others, , (4) It is not possible to lay down any rigid rules of the principles of natural justice which depend on the facts and circumstances of each case but the concept of fair play in action is the basis. (See Sawai Singh Vs. State of Rajasthan, , (5) The enquiry officer is not permitted to travel beyond the charges and any punishment imposed on the basis of a finding which was not the subject-matter of the charges is wholly illegal. (See Director (Inspection & Quality Control) Export Inspection Council of India v. Kalyan Kumar Mitra) (1987) 2 Cal.L.J. 344 (6) Suspension or presumption cannot take the place of proof even in a domestic enquiry. The Writ Court is entitled to interfere with the findings of the fact of any tribunal or authority in certain circumstances. (See Central Bank of India Ltd. Vs. Prakash Chand Jain, and Kuldeep Singh Vs. The Commissioner of Police and Others, . 28. Yet again in Sher Bahadur Vs. Union of India (UOI) and Others, , this Court observed:

7. It may be observed that the expression "sufficiency of evidence" postulates existence of some evidence which links the charged officer with the misconduct alleged against him. Evidence, however voluminous it may be, which is neither relevant in a broad sense nor establishes any nexus between the alleged misconduct and the charged officer, is no evidence in law. The mere fact that the enquiry officer has noted in his report, "in view of oral, documentary and circumstantial evidence as adduced in the enquiry", would not in principle satisfy the rule of sufficiency of evidence. "Though, the disciplinary authority cited one witness Shri R.A. Vashist, Ex. CVI Northern Railway, New Delhi, in support of the charges, he was not examined. Regarding documentary evidence, Ext. P-1, referred to in the enquiry report and adverted to by the High Court, is the order of appointment of the Appellant which is a neutral fact. The enquiry officer examined the charged officer but nothing is elicited to connect him with the charge. The statement of the Appellant recorded by the enquiry officer shows no more than his working earlier to his re-engagement during the period between May, 1978 and November, 1979 in different phases. Indeed, his statement was not relied upon by the enquiry officer. The finding of the enquiry officer that in view of the oral, documentary and circumstantial evidence, the charge against the Appellant for securing the fraudulent appointment letter duly signed by the said APO (Const.) was proved is, in the light of the above discussion, erroneous. In our view, this is clearly a case of finding the Appellant guilty of charge without having any evidence to link the Appellant with the alleged misconduct. The High Court did not consider this aspect in its proper perspective as such the Judgment and order of the High Court and the order of the disciplinary authority, under challenge, cannot be sustained, they are accordingly set aside.

45. The findings of the Learned Single judge to the effect that "it is established with the conscience (sic) of the Court reasonably formulated by an enquiry officer then in the eventuality" may not be fully correct inasmuch as the Court while exercising its power of judicial review should also apply its mind as to whether sufficient material had been brought on record to sustain the findings. The conscience of the Court may not have much role to play. It is unfortunate that the Learned Single Judge did not at all deliberate on the contentions raised by the Appellant. Discussion on the materials available on record for the purpose of applying the legal principles was imperative. The Division Bench of the High Court also committed the same error.

In the case of Union of India (UOI) and Others Vs. Naman Singh Sekhawat, , the Supreme Court held as follows:

In M.V. Bijlani v. Union of India this Court stated the law in the following terms:

25. ...Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on

record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.

No evidence could be brought on record by the State that the documents called for by the Petitioner-delinquent were ever supplied to him and, therefore, it is clear that non-supply of documents basing on which charges were framed caused grave prejudice to the Petitioner-delinquent, particularly when the Petitioner had vehemently denied the charges and demanded such documents in course of the enquiry.

In the case of *Kashinath Dikshita v. Union of India and Ors.* AIR 1986 SC 2118, the Supreme Court held as follows:

Where the Government refused to its employee who was dismissed, the copies of the statements of the witnesses examined at the stage of preliminary inquiry preceding the commencement of the inquiry and copies of the documents said to have been relied upon by the disciplinary authority in order to establish the charges against the employee and even in this connection the reasonable request of the employee to have the relevant portions of the documents extracted with the help of his stenographer was refused and he was told to himself make such notes as he could, and the Government failed to show that no prejudice was occasioned to the employee on account of non-supply of copies of documents, the order of dismissal rendered by the disciplinary authority against the employee was violative of Article 311(2) inasmuch as the employee has been denied reasonable opportunity of defending himself.

12. We are also further of the view that failure on the part of the employer to provide the copy of the inquiry report to the delinquent-Petitioner clearly vitiates the proceeding resulting the punishment in the proceeding unlawful.

13. The next issue that requires to be dealt with by us pertains to the order of dismissed of the Original Application by the Orissa Administrative Tribunal. In the present case at hand, it is not in dispute that the institution in question where the Petitioner was serving i.e. Rourkela Womens College, was an aided educational institution at the time when the disciplinary proceeding was initiated against the Petitioner. Thereafter, during the pendency of the Petitioner's challenge to the order of termination, before the Orissa Education Tribunal, the management of the institution was "taken over by the State". Therefore, at the time when the disciplinary proceeding was initiated against the Petitioner, the service condition of the Petitioner was governed by the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 and the requirement of the said Rule and in particular, Rule 22(12) and (13) were required to be complied with and have admittedly not been complied with. Since the management of the

institution in question has been taken over by the State, the only forum to which the Petitioner could have approached for legal remedy, was the State Administrative Tribunal. Therefore, we are of the view that the Orissa Administrative Tribunal though duly empowered, had failed to exercise its jurisdiction under law. As the matter of termination relates to the year 1986, we are of the view that remitting the matter to the Tribunal for consideration would not serve the purpose of justice and would only prolong the litigation. Apart from the above, since the State do not possess any original document of the inquiry proceeding, no purpose would at all be served by remitting the matter to the Tribunal for its consideration.

14. In view of the above, we allow the writ application, set aside the impugned order of the Tribunal dated 9.9. 1997 passed in O. A. No. 259 of 1989 (Annexure-9) and further direct quashing of the Order Dated 11.11.1987 terminating the services of the Petitioner (Annexure-7). We direct that the Petitioner shall be reinstated in service with all necessary and consequential benefits. But since the Petitioner has not served the institution during this entire period, the reinstatement shall be made on) notional basis for the purpose of computation of salary and he shall not be entitled to any back wages. Since the termination is quashed, the Petitioner shall also be entitled to all other service benefits such as seniority etc. and the said notional period shall be counted towards his pensionary benefits.

L. Mohapatra, J.

15. I agree.