
(2015) 04 OHC CK 0037

In the Orissa High Court

Case No : O.J.C. No. 11614 of 2001 and W.P.(C) No. 9461 of 2003

Nirmal Acharya and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 06-04-2015

Acts Referred:

Orissa Municipal Act, 1950 — Section 61, 73, 73-A, 76, 77

Citation : (2015) 120 CLT 251

Hon'ble Judges : S.N. Prasad, J

Bench : Single Bench

Advocate : Rabindra Prusty, C.R. Kar, R.K. Mohanty and N.K. Mohanty, for the Appellant

Judgement

S.N. Prasad, J.—In both the writ petitions, the issue involved are same and as such the same are being disposed of with the common order.

2. In OJC No. 11614 of 2001 the petitioner has prayed for issuance of direction upon the opposite parties to sanction the arrear salary as well as current salary and to allow him to discharge duty in the office.

3. The brief facts of the case is that the petitioner having been appointed by the office vide Order No. 1074 dated 17.05.1984 as a driver under the Dhenkanal Municipality and accordingly the petitioner has started discharging his duty without any complaint from any quarter.

4. Vide order dated 13.07.1992 the petitioner was placed under suspension and served with a show cause notice to explain as to why he be not dismissed from service on the ground of certain allegations of financial irregularities.

5. However, the order of suspension was revoked with a direction of reinstatement of the petitioner in service with effect from 25.07.1992.

6. The opposite party has issued a show cause notice for initiation of departmental proceeding for which the petitioner has participated and after

conclusion of the departmental proceeding order of dismissal was passed on 21.7.1993.

7. The petitioner being aggrieved with the order dated 21.07.1993 has challenged the same before the Director of Municipal Administration vide office Memo No. 17853 dated 28.04.2001 by which period of suspension was directed to be treated as duty and the order of dismissal was withdrawn with a further direction upon the petitioner to join the post forthwith.

8. Grievance of the petitioner that even after passing of the order by the Director of Municipal Administration the petitioner has not been permitted to join his duty and he has not been given any arrear salary of the intervening period.

9. Further grievance of the petitioner that the moment the order of dismissal has been withdrawn by the Director of Municipal Administration he will be deemed to be in service and as such he will be entitled to get back wages.

10. W.P.(C) No. 9461 of 2003 has been filed by the Dhenkanal Municipality challenging the order dated 28.04.2001 on the ground that the Director has no jurisdiction to entertain the appeal because the petitioner was not holding the post under the establishment as per the provision as contained under Section 77 of the Orissa Municipal Act, 1950 (hereinafter referred to as "the Act") because in the said provision power of appeal has been vested to look into the appeal of the regular employees but since appointment of the petitioner was temporary in nature, as such Director had no authority to entertain the appeal.

11. Heard learned counsel for the parties and the documents on record.

12. To adjudicate the grievance of the petitioner-employee it is necessary to first look into the legality and propriety of the order passed by the Director of Municipal Administration since on the basis of the said order only the petitioner-employee can raise his grievance for reinstatement into service and arrear of salary.

13. To adjudicate this issue it is necessary to look into various provisions of the Orissa Municipal Act, 1950, for determining the issue provisions as contained in Sections 73,76,77 and 73-A is necessary to look into and for better appreciation the provisions are being quoted hereinbelow:

"73. Municipality may determine its establishment- (1) Every Municipality may, with the previous sanction of the State Government and subject to the provisions of this Act, and the rules made thereunder, from time to time determine the officers and servants required to be employed by it or by any joint Committee, constituted under Section 61 or by any Committee of the Municipality area and shall fix or alter the number, designation, grades, salaries, fees and allowances payable to such officers and servants.

(2) Notwithstanding anything contained in Sub-section (1), the Municipality may, in the case of an emergency, make provisions for temporary employment under

it of an officer or servant for a period not exceeding (forty four days);

(Provided that the qualification for employment and the salary and allowances in respect of such officer or servant shall not be different from those prescribed in respect of officers or servants of similar cadre:

Provided further that the creation of any post for the purposes of the sub-section shall immediately be communicated to the State Government.)

(3) This qualifications of candidates for an employment shall be such as may be prescribed.

76. Power to punish Municipal Officers or servants- Subject to the provisions of this Act or any rules thereunder and to such control as may be prescribed, the Chairperson of a Municipality may, ensure fine, withhold promotion, reduce, suspend, remove or dismissal any officer or servant of the Municipality in its service, except the Engineer, the Health Officer and the Executive Officer for any breach of departmental rules or discipline or for carelessness unfitness, neglect of duty or other misconduct:

(1) a mere order of suspension shall not be declared or construed as a punishment;

(2) during the period of suspension the person suspended shall be entitled to such subsistence allowance as is admissible to an employee of the State Government of similar rank;

(3) the Executive Officer, the Engineer and the Health Officer shall have power to suspend, fine or otherwise punish or dismiss or discharge any employee appointed by them and all actions taken in exercise of the said power shall be intimated to the Chairperson.

77. Appeal against order of punishment - (1) An appeal against any order passed under Section 76 shall lie, if such order was passed by-

(a) the Executive Officer, Engineering or Health Officer to the Municipality; and

(b) the Chairperson to the State Government.

(2) An appeal under this section shall be preferred and disposed of in such manner as may be prescribed.

73-A. Penalties - (1) Where any holder of an elective office or any officer or authority makes any appointment, or causes any appointment to be made, in contravention of the provisions of this Act,-

(a) it shall be deemed in the case of the holder of an elective office that he has abused his position or power and accordingly the State Government shall initiate proceedings for his removals; and

(b) in the case of an officer or authority, it shall be deemed that he is guilty of

misconduct and the competent authority shall initiate action under the relevant disciplinary Rules;

and such holder of elective office or the officer or authority, as the case may be, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend upto two years and also with fine which shall not be less than five hundred rupees and which may extend upto ten thousand rupees.

(2) In addition to taking action under Sub-section (1), the pay and allowances paid to the person whose appointment is in contravention of the provision of this Act shall be deemed to be an illegal payment and a loss to the Municipality and the same shall be recoverable by surcharging it under the Orissa Local Fund Audit Act, 1948 against such holder of elective office, officer or authority who make such appointment.

(3) No Court shall take cognizance of an offence punishable under Sub-section (1) except with the previous sanction of the State Government."

14. Contention of learned counsel for petitioner-Municipal Administration that the Director has got no jurisdiction to entertain the appeal on the ground that the petitioner-employee was holding the post in temporary basis and not a permanent basis.

15. To see the jurisdiction of the Director of Municipal Administration it is relevant to see the power of appeal vested upon the Director of Municipal Administration, for this purpose provision as quoted herein above is necessary to be discussed.

16. As per the provision as contained in Section 76 of the Act which speaks regarding power to punish municipal officers or servants, subject to the provision of the Act for any breach of departmental rules or discipline or for carelessness, unfitness,, learned counsel for the Municipality by taking help of the nature of employment of the petitioner which is temporary in nature, it has been submitted that the Director has no power to adjudicate the appeal.

But if section 76 will be perused there is no reference of permanent or temporary servants, rather the word "servants" is given therein which suggest that irrespective of the nature of employment whether it is temporary or permanent, power to inflict punishment of withheld promotion, reduce, suspend, remove or dismissal any officer or servant has been vested with the competent disciplinary authority.

17. Power of appeal has been vested under the provision as contained in Section 77 of the Act which provides that an appeal against order passed under Section 76 of the Act shall lie if such an order was passed by the Executive Officer, Engineering or Health Officer to the Municipality or order passed by the Chairperson of the State Government.

18. In this case order of punishment has been passed by the Chairman of the Municipality and as such in view of the provision as contained in Section 77(b) of the Act appeal will lie before the State Government, accordingly the Director of Municipal Administration being Ex-officio Additional Secretary to Government, Housing and Urban Development Department has entertained the appeal.

19. Contention raised by learned counsel for the petitioner-Municipality that the Director of Municipal Administration should not have entertained the appeal because the petitioner-employee was not the regular employee, this contention cannot be accepted in view of the fact that under the provisions as contained in Section 76 of the Act where there is only reference of "servants" without making any distinction in between the regular or temporary or even ad-hoc employee and further more since order of dismissal has been passed against the petitioner-employee after conducting an enquiry which has been provided only under section 76 of the Act and no provision has been made in the Act to deal with the case of ad-hoc employee, it is not the case here that only on account of show cause notice the petitioner-employee has been dismissed from service rather the impugned order is suggestive of the fact that initially show cause notice was issued and thereafter draft charges was issued, enquiry was conducted, witnesses were examined and thereafter order of punishment was passed, which itself suggest that all the procedures has been adopted by the disciplinary authority which is contained under the provision under section 76 of the Act.

20. The impugned order has been passed under Section 76 of the Act, appeal will lie in terms of the provisions as contained in Section 76 of the Act.

21. Hence in view of the reasons aforesaid there is no bar of jurisdiction of the Director of Municipal Administration who is also an Ex-Officio Additional Secretary to Government.

22. Now so far as merit of the case is concerned, for determining the issue the order passed by the Chairman of the Municipality it is worthy to be considered.

From perusal of the order passed by the Chairman, it is evident that the petitioner-employee was working as Driver from 17.7.1986 and he was unauthorisedly absence from duty for which he was asked to show cause, however, he has not replied. Again on 29.7.1984 the petitioner took vehicle bearing No. ORD-4070 without prior sanction of the Executive Officer and for such act he was asked show cause and no explanation has been submitted by the petitioner.

Again on 17.2.1988 he collected rent for the hire of the municipality vehicle which has not been deposited in he Municipality account, for which a show cause was called for which was not replied by the petitioner.

Again on 23.1.1985 he was asked to repair the Mile meter of ORD-4071 and to drive the vehicle after repair in the mile meter but he drove the vehicle without repairing mile meter reported before the Executive Officer that the mile meter

has been repaired, on that account he was put under suspension on 24.1.1985.

Municipality vehicles are used to be kept in the office premises after day work is over but the petitioner used to keep the same outside in front of the staff quarters for which show cause was called for but no explanation was submitted.

Again on 10.5.1985 the petitioner was directed to remove the dirt from Ward No. 10 which was not done for which show cause notice was asked and he was suspended.

Again on 18.11.1985 he collected Rs. 240/- towards hire charges for use of Municipality vehicle but he did not deposit the amount till 9.12.1986, for which he was suspended.

Again on 1.3.1988, 7.3.1988, 28.5.1988, 23.6.1988 he remained unauthorised absence for which he was asked to show cause. Again on 13.7.1988 he remained unauthorised absence for which he was suspended. On 2.11.1992 up to 15.11.1992, he was unauthorised absence from duty and he was put under suspension.

23. All these series of allegations have been taken together from 1984 till 15.11.1992 and on this pretext show cause notice was asked for from the petitioner with a direction to submit reply to the show cause by 30.11.1992, no reply to the show cause notice was submitted and time and again he has sought for time on one pretext or the other. However, he has finally submitted reply after four months, the Chairman having been dissatisfied with the explanation, formulated draft charge containing all the allegations were framed and date was fixed on 25.8.1998 for his explanation to the draft charges but the petitioner had not appeared and thereafter enquiry was fixed to 7.6.1993 but on that date he again remained absence, ground taken by him that due to illness of his father, accordingly enquiry was adjourned to be fixed to 9.6.1993.

24. On 9.6.1993 enquiry was started and three witnesses were examined, cross-examined and witnesses were discharged. The petitioner at that time of examination has made an application to engage an Advocate, the same was objected to by the Chairman, in absence of any provision provided under the statute to engage an Advocate as defence representative.

25. The Chairman thereafter has passed an order of dismissal from service taking into account the conduct of the petitioner regarding unauthorised absence without giving any intimation to the competent authority, regarding financial irregularities in not depositing amount after being collected. The Chairman has passed the order of dismissal after taking antecedents, conduct mainly relying with the unauthorised absence and not depositing the amount which is public money after being collected by the petitioner-employee.

26. Against the order of dismissal an appeal has been preferred by the petitioner-employee before the Director of Municipal Administration and the Director has allowed the appeal by saying therein that the major punishment has been

imposed which is in violation of the provisions contained in Rule 15 of CCA Rule 1962.

27. To examine the propriety of the order passed by the Director of Municipal Administration it is necessary to see the proceeding of the enquiry initiated by the Chairman of the Municipality and as to whether there is any violation of Rule 15 of the CCA Rules, 1962.

28. Provision as contained in Rule 15 of the CCA Rules, 1962 has been made for initiation of a disciplinary proceeding which provide for initiation of regular departmental proceeding and on that account order passed by the Chairman has been quashed by the Director of Municipal Administration.

29. The Director while allowing order passed by the appellate authority has taken note of the fact that specific charge has not been framed against the delinquent-employee which is required under Rule. Order passed by the Chairman has been perused wherein allegation has been levelled against the petitioner on various grounds right from 1988 till the year 1992 and on that ground a consolidated show cause notice has been asked for unauthorised absence from 1.3.1988 till 15.11.1992 and also alleged financial irregularities done by the petitioner on 25.7.1985.

30. The Chairman, by way of consolidated show cause notice directed the petitioner to give reply, the petitioner on one pretext or other has taken time and finally submitted reply to show cause after lapse of four and half months for which the Chairman was found unsatisfactory and accordingly draft charge has been framed.

31. The moment draft charge has been framed after being not satisfied with the reply to the show cause notice, Chairman has resorted to regular departmental proceeding only in order to inflict major punishment of dismissal from service, the Chairman has right to do so but he is supposed to follow the rule governing disciplinary action.

The moment draft charge has been framed, it is to be given by way of specific charge by mentioning therein the imputation of charge showing each and every details, so that the petitioner could be able to give proper reply, which is also important in view of the fact that the allegations of the year 1985 and 1988 has been inflicted upon the petitioner which is not possible for an employee to give a specific reply to the occurrence of unauthorised absence or financial irregularities occurred four years ago and for this reason the Chairman has framed draft charge, but this is not requirement of law because of the reasons that if disciplinary authority wants to inflict major punishment, the procedure is laid down under the provisions of Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 which provides that before inflicting major punishment the employee should be given adequate and sufficient opportunity of being heard.

32. Adequate and sufficient opportunity has got wide implication which include

that the delinquent-employee must be given the imputation of charge supported by all relevant documents so that he could be able to give his defence in proper manner and then only it can only be said that adequate and sufficient opportunity has been given.

In this respect, provision has contained in Public Servant (Inquiry) Act, 1950 is also worthy to be seen which provides the provision to provide adequate and sufficient opportunity to an employee to defend in proper manner before imposing major punishment of dismissal from service.

But the Chairman, only after taking into consideration of previous incidents has given a consolidated show cause notice after lapse of four years although the petitioner was suspended at the time of occurrence and subsequently it was revoked but no show cause notice was issued to the petitioner during the relevant time, in this pretext it was also necessary to frame specific charge to be given to the petitioner-employee, but only on the basis of the draft charge order of punishment of dismissal from service has been inflicted.

33. In this context, Hon"ble Apex Court in the case of Shri Anant R. Kulkarni Vs. Y.P. Education Society and Others, (2013) 3 ABR1404 : (2013) 7 AD 136 : AIR 2013 SC 2098 : (2013) 138 FLR 168 : (2013) LabIC 2341 : (2013) LLR 654 : (2013) 6 SCALE 425 : (2013) 6 SCC 515 : (2013) 2 SCC(L&S) 593 : (2013) 3 SCT 188 : (2013) AIRSCW 2573 : (2013) 3 Supreme 475 wherein at paragraph-17 it has been held:

"The purpose of holding an enquiry against any person is not only with a view to establish the charges levelled against him or to impose a penalty, but is also conducted with the object of such an enquiry recording the truth of the matter, and in that sense, the outcome of an enquiry may either result in establishing or vindicating his stand, and hence result in his exoneration. Therefore, fair action on the part of the authority concerned is a paramount necessity."

From perusal of the ratio laid down by the Hon"ble Apex Court as referred hereinabove, it is settled that charges must be specific. No employee can be inflicted of major punishment of dismissal from service without providing adequate and sufficient opportunity of being heard which has not been done in this case as would be evident from the order passed by the Chairman, since the Chairman himself has admitted the fact that draft charge has been supplied to the petitioner. When the draft charge has been formulated containing allegations but no specific charge has been given to the petitioner which is requirement of law, in absence thereof the order passed by the Chairman cannot be said to be in accordance with law.

34. Contention of the learned counsel for the petitioner that the petitioner being a temporary employee has got no vested legal right to proceed departmentally by way of initiation of regular disciplinary proceeding, in the facts and circumstances of the case, this cannot be accepted because against the allegations the Chairman has issued draft charge, it is suggestive of the fact that

the petitioner has been given treatment at par with the regular employee and the moment draft charge has been issued, the petitioner has right to be proceeded byway of framing specific charge, which is the basis of initiation of disciplinary enquiry. However, enquiry has been conducted, witnesses have been called which also suggest that regular proceeding has been resorted to by the Chairman.

Though the Chairman has resorted to proceeding, the proceeding must be in consonance with the provisions of law and it cannot be mere formality, the draft charge has been issued, enquiry has been conducted, witnesses have been called for but no specific charge is being given to the petitioner, because the petitioner has got right to know the specific charge along with the relevant document based upon which draft charge has been framed.

35. It is also settled position of law that at the time of framing of charge, delinquent is required to be given relevant documents upon which the moment of charge is being issued which has already been settled by the Hon"ble Apex Court in the case of State of U.P. and Others Vs. Saroj Kumar Sinha, AIR 2010 SC 3131 : (2010) 124 FLR 857 : (2010) 1 JT 617 : (2010) 2 LLJ 334 : (2010) 2 SCALE 42 : (2010) 2 SCC 772 : (2010) 1 SCC(L&S) 675 : (2010) 3 SCR 326 : (2010) 2 SLJ 59 : (2010) 2 SLR 159 : (2010) 2 UJ 788 wherein in paragraph-36 it has been held as quoted below:

"The proposition of law that a government employee facing a department enquiry is entitled to all the relevant statement, documents and other materials to enable him to have a reasonable opportunity to defend himself in the department enquiry against the charges is too well established to need any further reiteration. Nevertheless given the facts of this case we may re-emphasise the law as stated by this Court in the case of The State of Punjab Vs. Bhagat Ram, AIR 1974 SC 2335 : (1974) 29 FLR 439 : (1974) LabIC 1442 : (1975) 1 SCC 155 : (1975) 2 SCR 370 : (1974) 6 UJ 664 :

"The State contended that the respondent was not entitled to get copies of statements. The reasoning of the State was that the respondent was given the opportunity to cross-examine the witnesses and during the cross-examination the respondent would have the opportunity of confronting the witnesses with the statements. It is contended that the synopsis was adequate to acquaint the respondent with the gist of the evidence.

The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the government servant is afforded a reasonable opportunity to defend himself against the charges on which inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the government servant. Unless the statements are given to the

government servant he will not be able to have an effective and useful cross-examination.

It is unjust and unfair to deny the government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the government servant. A synopsis does not satisfy the requirements of giving the government servant a reasonable opportunity of showing cause against the action proposed to be taken."

36. From perusal of the reference laid down by the Hon"ble Apex Court it is evident that the documents are necessary to be supplied in accordance with law to the petitioner. If the case of the petitioner will be looked into along with the ratio laid down by the Hon"ble Apex Court as hereinabove, it is fact that the nature of allegations since occurred four years back, the requirement of law is that the documents ought to have been supplied to the petitioner along with the charge, but only the draft charge has been supplied, it cannot be said to be the memorandum of charge in absence of relevant documents.

37. In view of the reasons given hereinabove, order passed by the Director of Municipal Administration cannot be said to be illegal and as such the petitioner is entitled to be given benefit in terms of the order passed by the Director of Municipal Administration.

38. In consequence, W.P.(C) No. 9461 of 2003 is dismissed and O.J.C. No. 11614 of 2001 is hereby allowed.