

(2014) 11 OHC CK 0084

In the Orissa High Court

Case No : Writ Petition (Civil) No. 8863 of 2009

Purushottam Behera

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 11-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 5
General Clauses Act, 1897 — Section 27
Orissa Co-operative Societies Act, 1962 — Section 33A

Citation : (2015) 145 FLR 378

Hon'ble Judges : Dr. B.R. Sarangi, J

Bench : Single Bench

Judgement

Dr. B.R. Sarangi, J.—The petitioner, who was working as Branch Manager in Bhawanipatna Branch of Tribal Development Co-operative Corporation, Orissa Ltd., (hereinafter to be referred to as "TDCC") in the district of Kalahandi, has filed this petition challenging the order of his suspension dated 04.03.2008, vide Annexure-1 issued by the authority pending drawal of departmental proceeding, the order dated 17/19.07.2008 passed by the disciplinary authority imposing a major penalty of termination of service w.e.f. 23.06.2008, under Rule 36 of the TDCC Employees' Service Rules, 1990, vide Annexure-4 and the order passed by the appellate authority dated 27.02.2009 rejecting the appeal stating that since the termination of the petitioner has been made as per the provision contained under Rule 36(3) of TDCC Employees Service Rules, 1990, there is no provision for appeal and the President, TDCC is not the appellate authority.

2. The factual matrix of the case in hand is that the petitioner entered into service as a Shop Supervisor having been duly selected by a Selection Committee pursuant to interview held on 09.08.1989 and was posted at Umerkote in Koraput District now under Nawarangpur District on reorganization of the districts. While the petitioner was continuing, he was transferred and posted at Bhawanipatna in the district of Kalahandi as Branch Manager on 24.08.2007. During his incumbency as Branch Manager, the petitioner was

placed under suspension on 04.03.2008 pending drawal of departmental proceeding against him, vide Annexure-1. He was served with a charge-sheet on 26.06.2008, vide Annexure-2 on the allegation that during his incumbency in the Bhawanipatna Branch of TDCC as Shop Supervisor (in-charge of Branch Manager) in the year 2007-2008 he committed serious irregularities for which charges were framed under the provisions of the TDCC Disciplinary Proceeding and Appeal Rules, 1988, hereinafter to be referred to as "1988 Rules" vide Annexure-2. He was allowed 15 days" time to submit his written statement of defence from the date of receipt of the charges under the provision of Rules 1988. On 17.7.2008 vide Annexure-3 the petitioner sought one month's time to submit his written statement of defence. But on 19.07.2008 the order of termination was issued which was effective from 23.06.2008 under Rule 36(3) of the 1990 Rules. Challenging such termination order, the petitioner approached this Court by filing W.P. (C) No. 18926 of 2008. This Court vide order dated 11.8.2008 while disposing of the writ petition granted liberty to the petitioner to prefer an appeal before the appellate authority within a period of two months. Consequently, the petitioner filed appeal under Annexure-6 before the President, TDCC under 1990 Rules. Vide Annexure-7, the petitioner sought for time. Accordingly, the appellate authority on 31.10.2009 allowed him time till 11.11.2008 and directed him to appear at 11 A.M. But due to delay in consideration of the appeal, the petitioner again approached this Court by filing W.P. (C) No. 18926 of 2008 and vide order dated 28.1.2009 this Court disposed of the said writ petition directing the President, TDCC, the appellate authority to take a decision on the appeal within a period of three weeks failing which it would amount to contempt. Consequently, the appellate authority-cum-President, TDCC passed final order on 27.2.2009 vide Annexure-9 stating inter alia, that the termination of the petitioner had been made as per the provisions of Section 36(3) of the 1990 Rules and in the said Rules there being no provision of appeal, the President, TDCC being not the appellate authority, rejected the appeal filed by the petitioner vide Annexure-9.

3. Mr. Ashok Pattnaik, learned counsel for the petitioner strenuously urged that the order of suspension, Annexure-1, the consequential order of termination of service, Annexure-4 and the order of rejection of appeal, Annexure-9 cannot be sustained in the eye of law and more so, pursuant to Annexure-2 the proceeding having been initiated under 1988 Rules, the authority could not have proceeded against him under the 1990 Rules. In addition to the same, referring to Annexure-4, it is urged that no retrospective termination could be made. Therefore, the order of termination is vitiated in law. In addition to that, it is stated that the termination being a major penalty, procedure has been prescribed under 1988 Rules but without following the said procedure, an action taken for dismissal and consequential rejection of the appeal cannot be sustained in the eye of law. More so, there has been gross non-compliance with the provisions of law 1988 Rules and thereby the authorities having acted arbitrarily, unreasonably, the order of termination of services and consequential rejection of

appeal cannot be sustained in law. Further, it is submitted that no due notice has been given, thereby the order impugned cannot be sustained. Thus, the impugned orders having been passed without complying with the principles of natural justice, the same need be set aside.

To substantiate his case, he has relied upon Chairman-Cum-M.D., Coal India Ltd. and Others Vs. Ananta Saha and Others, and Satwati Deswal Vs. State of Haryana and Others, .

4. Mr. B. Mohanty, learned counsel for the opposite parties strenuously urged that the petitioner while working as Shop Supervisor, was in-charge of Bhawanipatna Branch and was entrusted with full and independent responsibility of collection of paddy from the farmers by paying them minimum support price fixed by the Government and supply rice to FCI after milling it in different mills as per the guidelines of the Government in Food Supplies and Consumer Welfare Department for successful implementation of the mega operation undertaken by TDCC. But in course of inspection by opposite party No. 2, it was found that the petitioner in connivance with millers and other staff caused misappropriation to a tune of Rs. 22,46,180/- of the Corporation fund, thereby causing heavy loss to the TDCC and therefore, pending contemplation of disciplinary proceeding, he was placed under suspension on 4.3.2008. Thereafter, charge dated 26.6.2008, was communicated to the petitioner on 4.7.2008 and he was allowed 15 days" time to submit written statement of defence. But on 17.7.2008 the petitioner prayed for one month"s time for submitting his written statement of defence. On consideration of that, the petitioner was allowed to submit written statement of defence by 4.8.2008, which was communicated by registered post, but the petitioner refused to accept the same. However, subsistence allowance at the normal rate of 50% of pay and allowances was sanctioned in favour of the petitioner from 4.3.2008 to 29.6.2008 under the provisions of 1988 Rules. Sanction order was also communicated to the petitioner vide Memo No. 3434 dated 7.8.2008 through the Branch Manager, TDCC, Bhawanipatna. As the petitioner did not submit non-engagement certificate before the Drawing and Disbursing Officer for payment of subsistence allowance, the same was not disbursed to him. The appointing authority, namely, Managing Director after going through the records in detail terminated the services of the petitioner from service under Rule 36(3) of the 1990 Rules with three months "salary in lieu of three months" notice as his continuance was detrimental to the interest of the TDCC and to avoid any further loss the TDCC lost its confidence upon him. The order of termination, vide order No. 3208 dated 19.7.2008, along with a bank draft bearing No. 142815 dated 18.7.2008 for an amount of Rs. 20,763/- towards three months? salary was communicated to the Branch Manager, TDCC, Bhawanipatna for service on the petitioner. It was accordingly communicated to the petitioner in his home address by registered letter No. 896 dated 24.7.2008, but the same was returned by the postal authorities as the petitioner refused to receive the same. Therefore, paper publication was made in the daily news paper "The Samaj" on 1.9.2008. The petitioner approached this Court by filing W.P. (C)

No. 11135 of 2008 challenging the order of termination (Annexure-4). At the time of admission of the said writ petition, the petitioner withdrew the same with liberty to file an appeal before the appellate authority. He further submitted that since the petitioner was instrumental to cause colossal wastage of public money, the action taken against him by the authorities was wholly and fully justified and this Court may not interfere with the order passed by the authority terminating his services. To substantiate his contention, he has relied upon the decision of the apex Court in M/s. Madan and Co. Vs. Wazir Jaivir Chand, .

5. In view of the abovementioned factual matrix available on record, after hearing the learned counsel for the parties and going through the records available, it appears that in exercise of the powers under Section 33-A of the Orissa Co-operative Societies Act, 1962, the Registrar, Co-operative Societies has made Rules called "Tribal Development Co-operative Corporation Employees? Appeal Rules, 1988 for the purpose of regulation of disciplinary proceeding and appeals of the employees of TDCC of Orissa Ltd. Rule 4 of the 1988 Rules deals with suspension. Under sub-rule 1(a) of Rule 4 power is vested with the appointing authority or any authority of which it is subordinate or any authority empowered by the Committee or Managing Director in his behalf to place an employee under suspension where the disciplinary proceeding against him is contemplated or is pending. Therefore, there is no dispute that the authority has power to place an employee under suspension whether disciplinary proceeding is contemplated or is pending. Rule 5 deals with nature of penalties. Sub-rule (a) of Rule 5 states about minor penalties which have been classified as (i) to (v) and sub-rule (b) of Rule 5 deals with major penalties, which have also been classified from clauses (vi) to (ix), whereas Explanation to Sub-rule (b) of Rule 5 states that the following shall not amount to penalty within the meaning of these Rules, which has been mentioned as Clause (a) to (c) including termination of services under the heading clause (i) to clause (iii). Rule 6 deals with circumstances under which penalties may be imposed, which states that without prejudice to the generality of the provisions of Rule 5, the circumstance under which penalty may be imposed for dismissal has been contemplated under Sub-rule (i) of Rule 6. Sub-Rule 1(c) of Rule 6 states that dismissal can be done as a major penalty where an employee neglects his duty resulting in or likely to result in loss to the TDCC and serious misconduct has been elaborated in the shape of explanation. Under clause (v), it states about misappropriation. On perusal of the entire charges levelled against the petitioner in Annexure-2, it appears that allegation has been made that due to colossal and active connivance of misappropriation by showing favouritism to the millers of TDCC has sustained loss. Therefore, the following charges were framed:

"i. Misappropriation of Corporation stocks and funds in connivance with the Miller and Sri P.P. Panda, Shop Assistant, to the tune of Rs. 22 lakhs.

ii. Serious dereliction in duty.

iii. Gross Misconduct and suppression of facts of misappropriation of Paddy.

iv. Disobedience of orders and misguiding higher authorities."

6. The charges levelled against the petitioner being enumerated under Rule 6, the same are to be construed as serious charges within the meaning of sub-rule (b) of Rule 5 of 1988 Rules. Therefore, procedure has been envisaged under Rule 9 of the 1988 Rules, for imposition of major penalty and Rule 12 prescribes for appeal against the penalty imposed by the disciplinary authority. So also limitation for preferring the appeal has been prescribed in Rule 13 and consideration of appeal has to be made under Rule 14 of the 1988 Rules. The petitioner having been served with the charges vide Annexure-2 under 1988 Rules, his services were terminated from the TDCC with effect from 30.6.2008. Under Rule 36(3) of 1990 Rules. Rule 36(3) of 1990 Rules states about termination of services on loss of confidence. Rule 36(3) is quoted below:

"The services of an employee/workman who has been confirmed to a duty post, would be terminable by giving him 3 month's notice or 3 month's salary in lieu thereof by the appointing authority."

7. Mr. Pattnaik, learned counsel for the petitioner, strenuously urged that if the charge has been framed under 1988 Rules, the petitioner could not have been terminated from service under the 1990 Rules and the 1990 Rules having got approval from the Registrar, Co-operative Societies under Section 33-A of the Orissa Cooperative Societies Act, the same has got statutory force whereas initiation of the proceeding under 1990 Rules has not been approved as per Section 33-A of the Co-operative Societies Act and as such, if the proceeding is initiated under 1988 Rules, no action could have been taken under 1990 Rules without causing any enquiry in conformity with the provisions of 1988 Rules, as a consequence whereof, the action taken by the authorities in terminating the services of the petitioner under 1990 Rules on the plea of loss of confidence, is absolutely misconceived one. The proceeding having been initiated against the petitioner under 1988 Rules, without exhausting the same, the order of termination issued vide Annexure-4 under 1990 Rules amounts to non-application of mind by the authorities and the said order has been passed with undue haste, consequentially rejecting the appeal in Annexure-9 stating that against the order passed under Rule 36(3) of 1990 Rules, there is no provision of appeal. Therefore, the President, TDCC being not the appellate authority, the appeal has been disposed of without considering the grievances made by the petitioner.

8. While the action has been taken under Rule 36(3) of the 1990 Rules, compliance thereof has not been made by paying necessary compensation to the petitioner. Refusal to accept any registered letter and consequent publication thereof in the "Samaj" cannot be construed to be sufficient compliance with the provisions of the Rules.

9. Mr. Mohanty, learned counsel for the opposite parties, relying upon Ms/. Madan and Co. (supra) states that once notice has been issued in correct address

and letter delivered to the post office, the opposite parties have no control over it. It is then presumed to have been delivered to the addressee under Section 27 of the General Clauses Act. Under the rules of the post office, a letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by the addressee. The difficulty is where a postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter, all that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding delivery of a registered letter. When the postman is unable to deliver it on his first visit, the general practice is for him to attempt to deliver it on the next one or two days before returning it to the sender. However, he has neither the power nor time to make enquiries regarding the whereabouts of the addressee, he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the addressee's absence. His responsibility cannot, therefore, be equated to that of a process server entrusted with the responsibility of serving processes of a Court under O. 5 of the C.P.C.

10. Pursuant to the order passed by this Court, the original records were produced for perusal. It appears that the envelop, that was sent to the petitioner had returned to the opposite parties with the endorsement "refused, hence returned to the sender" on 31.7.2008. It is stated that such envelop contained notice pay which was returned to the opposite parties. Paper publication was made on 28.8.2008 by the opposite party No. 2, where the petitioner was directed to receive the bank draft of Rs. 27,633/- from the Branch Manager, TDCC, Bhawanipatna within seven days from the date of publication of the notice on any working days. In spite of such notice being issued and publication in the newspaper, notice pay was not received by the petitioner. Therefore, whether the petitioner received the notice and the notice pay both or not under Rule 36(3) of 1990 Rules is not the consideration at this moment and whether there is service of such notice on the petitioner is not the issue in question in the present context. Question arises, where disciplinary proceeding was started under 1988 Rules without following the procedure under the said Rules, whether action was taken terminating the services of the petitioner under 1990 Rules, that can be sustained in law or not.

11. Referring to the decision in *Satwati Deswal* (supra), it would be clear that before imposing any major penalty against the employee, the petitioner herein, enquiry must be held in the manner specified in the said Rules, by which the disciplinary authority shall frame definite charges on the basis of the allegations on which enquiry shall be proposed and opportunity must be given to the employee to submit written statement stating therein whether he/she desires to be heard in person and no order of termination can also be passed without following due procedure of law. Therefore, the impugned order of termination

imposing major penalty under 1990 Rules having been passed under the provisions of 1988 Rules the same is without jurisdiction and consequently the order of termination cannot be sustained.

12. The apex Court in *Chairman-M.D., Coal India Ltd. (supra)* has observed thus:

"46. In *Managing Director, ECIL, Hyderabad etc. etc. v. B. Karunakar etc. etc.*, (Supra); and *Union of India (UOI) Vs. Y.S. Sadhu, Ex-Inspector*, , this Court held that where the punishment awarded by the disciplinary authority is quashed by the Court/tribunal on some technical ground, the authority must be given an opportunity to conduct the inquiry afresh from the stage where it stood before alleged vulnerability surfaced. However, for the purpose of holding the fresh inquiry, the delinquent is to be reinstated and may be put under suspension. The question of back wages etc. is determined by the disciplinary authority in accordance with law after the fresh inquiry is concluded.

47. The issue of entitlement of back wages has been considered by this Court time and again and consistently held that even after punishment imposed upon the employee is quashed by the Court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the Court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved. Nor a rule of universal application can be laid for such cases. Even if the delinquent is re-instated, it would not automatically make him entitled for back wages as entitlement to get back wages is independent of re-instatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/Court or tribunal. In such matters, the approach of the Court or the tribunal should not be rigid or mechanical but flexible and realistic (Vide *U.P. SRTC V. Mithu Singh*, AIR 2006 SCC 3018 : [2006(5) SLR 613 (SC)]: *Secretary, Akola Taluka Education Society and Another Vs. Shivaji and Others*, ; and *M.D., Balasaheb Desai Sahakari S.K. Ltd. Vs. Kashinath Ganapati Kambale*, ".

13. In view of the law laid down by the apex Court and considering the facts stated above, the order of termination in Annexure-4 and the consequential rejection of the appeal under Annexure-9 are hereby quashed. The matter is remitted back to the M.D., TDCC, OP. No. 1, who shall proceed with the same from the stage of filing of written statement of defence by the petitioner pursuant to the charge framed vide Annexure-2. Since it is year-old case, the authority is directed to conclude the disciplinary proceeding in compliance with the provisions of law within a period of six months hence.

14. With the aforesaid observation and direction, the writ petition is disposed of.