

(1977) 07 OHC CK 0003
In the Orissa High Court
Case No : O.J.C. No. 1207 of 1976

Radha Binod Mohanty

APPELLANT

Vs

Orissa State Electricity Board and Another

RESPONDENT

Date of Decision : 11-07-1977

Acts Referred:

Constitution of India, 1950 — Article 309
Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 — Rule 15,
15(2), 15(3), 19
Orissa Service Code, 1939 — Rule 90(1)

Citation : (1977) 44 CLT 339

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : L. Rath, B.S. Rath and H.K. Rath, for the Appellant; G. Rath and Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—Petitioner was appointed as an Assistant Engineer (Electrical) in the Electrical Engineering Cadre of the Orissa Service of Engineers in 1971 and was sent on deputation to serve under the Orissa State Electricity Board. In May-June, 1975, Petitioner was posted as Sub-Divisional Officer, Electrical Construction Sub-Division, Bhadrak. On 5th June, 1975, he was placed under suspension in contemplation of a disciplinary proceeding by the Chairman of the Board and was informed that necessary charges were being framed against him and issued separately. Charges were, however, not communicated until 30th of March, 1976 and he was informed that the initiation of the disciplinary proceeding was with the concurrence of the State Government in the Irrigation and Power Department. The charges were to the following effect:

1. Negligence in duty in not attending to the break down of the transformer at Hadgarh and resuming the normal power supply.
2. In spite of his telephonic discussion with the local M.P. about the disruption of

power supply at Hadgarh, he flatly denied to go to the spot and also he did not avail of the jeep provided to him to attend the break down. This goes to prove some ulterior motive on his part in not attending to the break down in time.

3. He failed in carrying out the orders of the Superintending Engineer, Electrical Circle, Balasore, for replacing the defective transformer.

Petitioner wrote to the Chairman of the Board on 19th of April, 1976, (Annexure-4), 28th of April, 1976, (Annexure-5), 15th of May, 1976, (Annexure-6) and 1st of June, 1976, (Annexure-7) asking for supply of copies of documents or in the alternative a statement of the allegations on which the charges when based. The first response from the Board came on 29th of May, 1976, wherein Petitioner was asked to submit a list of records required by him relevant to the charges. Petitioner thereupon wrote back on the 9th of June, 1976, (vide Annexure-9) for supply of the records on which the allegations and charges against him were based. On 17-9-1976, a statement said to be containing the memo of evidence was sent to the Petitioner. In October, 1976, an order was made reducing the subsistence allowance admissible to the Petitioner by half, i.e. to allow twenty-five per cent of the pay by way of subsistence allowance for the six months beginning from 16th of June. 1976. Petitioner challenged the reduction by a representation and ultimately filed this writ application asking for the following reliefs:

(i) to quash the suspension;

(ii) to quash the order reducing the subsistence allowance; and

(iii) for a direction that Petitioner be paid his full pay and allowances admissible under the terms of appointment.

2. On a rule nisi being issued opposite party No. 1 caused a counter affidavit to be filed through the Secretary to the Board. In spite of personal notice on the Secretary in the Irrigation & Power Department, there has been no return to the Court. In the counter affidavit given by the Secretary of the Board, it has been pleaded that the Chairman and the Chief Engineer of the Board had discussed the question of suspension of the Petitioner with the Secretary to Government in Irrigation and Power Department. The Minutes of Discussion were recorded in the connected file. In regard to the non-supply of the materials to enable the Petitioner to submit his explanation against the charger, it has been pleaded that the sufficient details had been indicated in the order communicating the charges and the delay in the matter of completing the enquiry is wholly on account of the Petitioner and, therefore, in terms of the provisions in the Orissa Service Code, the subsistence allowance has been reduced in the discretion of the disciplinary authority.

3. Admittedly .Petitioner in an employee of the State Government and is on deputation to the Board. Rule 19, Second Proviso of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 (hereinafter called the "Rules")

made by the Governor in exercise of powers vested in him under the Proviso to Article 309 of the Constitution provides:

Provided further that if the borrowing authority is other than the Union or a State Government, the concurrence of the lending authority shall be taken before such action is taken except that in the event of the Government servant being implicated in a criminal case such action can be taken by such borrowing authority against him in anticipation of such concurrence.....

Concurrence in the instant case thus was a pre-requisite to placing the Petitioner under suspension. While Petitioner has pleaded that no concurrence was taken, opposite party No. 1 has taken the stand that oral concurrence of the Secretary of the concerned Department of Government had been taken. Extracts of the notes and orders taken from a particular file of the Board have been produced under Annexure-B/I. The then Secretary of the Board put up a note on 5th of June, 1975, wherein it was mentioned:

....With regard to the S.D.O. in charge, draft order for his suspension is put up below for kind approval. Government concurrence is necessary in case of suspension of officers on deputation. This aspect may kindly be considered while issuing suspension order....

The Chief Engineer is said to have stated in the file:

Please recall our discussion with Secretary, I. and P. in this regard to-day in his office at 3 p. m. This suspension order has the concurrence of Secretary, I. and P. which has to be formally obtained.

The Chairman thereafter directed suspension. A letter of the Deputy Secretary to Government in the concerned Department has been produced under Annexure-All in support of the plea that formal approval has been obtained from Government in the matter of placing the Petitioner under suspension. The Government letter is dated 10th of December, 1976 and runs thus:

With reference to your letter No. 785/Con. dated 8-12-1976 on the above subject, I am directed to convey the formal approval of Government to the suspension of Sri R.B. Mohanty, Assistant Engineer, Electrical as communicated to him on Board's notification No. 10170 dated 5-6-1975.

Counsel for the Petitioner challenges the authenticity of the extract from the file of the Board (i.e. Annexure-B/I) and submits that approval of Government was for the first time communicated on 10th of December, 1976. We are indeed surprised that the Chief Engineer and the Chairman or anyone of them at the least of the Board who are still in service have not chosen to give affidavits in support of their stand that Government concurrence had been abstained prior to the order of suspension. The Secretary who has filed the affidavit has no personal knowledge. We are also surprised that the State Government in the concerned Department have chosen to avoid the proceeding and in spite of notice from the Court have not thought it proper to make a return to the rule

nisi. We are impressed by the submission of Mr. Lingaraj Rath for the Petitioner that in the democratic set up of administration wedded to Rule of Law, Governmental business cannot be carried on in an informal manner and by the oral process not being evidenced by supporting documentary material. It was quite possible that the particular Secretary who is said to have given oral concurrence may not have been available in the Department when formal concurrence was asked for in December, 1976. It is just chance that the same Secretary continues in the Department, but we can well imagine how embarrassing and uncomfortable the situation would have been if what is alleged to be within the

personal knowledge of the Secretary was not available to the Department when the Board wrote for the formal concurrence. In the absence of contemporaneous public record, uncertainty is likely to creep in. Again, there would be scope for embarrassing situations to arise. If there was indeed any contemporaneous memorandum left by the Secretary of his having been consulted and having concurred to the proposal of placing the Petitioner under suspension, the same should have been placed before the Court. The indifferent attitude of opposite party No. 2 in spite of notice has given rise to these contentions of the Petitioner.

We find that under order No. 7, a Bench of this Court directed opposite party No. 2 - State to produce the record relating to the fact of any discussion being made regarding the suspension of the Petitioner and concurrence having been taken prior to making of the order. This order was specifically communicated to counsel for opposite party No. 2 and there is an endorsement dated 4-2-1977 to that effect on the record. Notwithstanding the direction, opposite party No. 2 has chosen not to produce any record. We are indeed surprised at such callous conduct. Neither the Board nor Government have produced the letter No. 785/Con. dated 8-12-1976 in which Government had been requested to convey formal approval to Petitioner's suspension and ill response to which the Government letter under Annexure-A/I came. If that letter was produced it would have been convenient for the Court to find out whether there was any statement therein that oral approval had been received earlier. As already noted, the order of suspension was on 5th of June, 1975 and formal approval was not asked for until 8th December, 1976, i.e. more than a year and half. Notice in this case was served on the Board on 3-12-1976. Approval was asked for only after the notice of the case was received. This certainly reflects the manner in which the Board's affairs are administered.

Keeping all these aspects in view, learned Counsel for the Petitioner was well justified in pressing upon us to draw adverse inference against the opposite parties, reject their stand and accept the Petitioner's submission that no concurrence had been obtained in terms of Rule 19, Proviso of the Rule before placing the Petitioner under suspension. The extract from the file of the Board is the only document upon which counsel for opposite party No. 1 relies in support of its stand that concurrence as a condition precedent had been taken. As the

Petitioner who denies that concurrence has been taken has no personal knowledge in the matter, we are inclined to accept the submission of counsel for opposite party No. 1 that it would not be appropriate to reject the correctness of the statement in Annexure-B/1. In these circumstances, while indicating our disapproval to the manner in which the opposite parties have conducted themselves in their defence in the proceedings in this Court, we would hold that Petitioner has failed to establish that prior concurrence has not been taken. Accordingly, Petitioner's contention that the order of suspension is bad being in breach of the second Proviso to Rule 19 of the Rules is not established. The first contention of the Petitioner, therefore, fails.

4. There is no dispute that the Petitioner was suspended on 5th of June, 1975 and though the order of suspension indicated that the charges were being separately communicated, almost ten months were taken to communicate the charges. While communicating the charges, a statement of the allegations on which they are based had not been sent as required under Rule 15(2) of the Rules. Sub-rule (3) of Rule 15 provides:

The Government servant shall, for the purpose of preparing his defence, be supplied with all the records on which the allegations are based....

As the statement of allegations had not been separately provided, Petitioner was obliged to keep on asking for the documents as also the statement. His keenness to obtain the document and submit the explanation in the background of he being kept out of service is well indicated in his repeated requests of four times within two months. After four successive letters of request had been received, the Board sent its first reply and the statement of allegations which is required under the Rule to be supplied was communicated to the Petitioner only on 17th of September, 1976, under Annexure-10. From these facts it is manifest that up to 17th of September, 1976, the delay, if any, in the proceedings was entirely on account of the Board, ten months having been taken for communicating the charge and about six months having been taken to comply with one of the mandatory requirements of Rule 15 of the Rules. Under Rule 90(1) of the Orissa Service Code which admittedly applies to employees of the Board, a suspended Government servant is entitled to a subsistence allowance at an amount equal to the leave salary which he would have drawn if he had been on leave on half average pay and half pay and in addition dearness allowance on such leave salary. If the period of suspension exceeds twelve months, the authority is competent to vary the amount of subsistence allowance for any period subsequent to the period of first twelve months by reducing the same if in the opinion of the authority the period of suspension has been prolonged for reasons directly attributable to the employee; such allowance may be enhanced from fifty per cent if the protraction is not on account of reasons attributable to the employee. In purported exercise of this power, by order dated 20th of October, 1976, the Board scaled down the subsistence allowance to a not twenty five per cent of the salary for the six months following 16th of June, 1976. As we have

already indicated, up to September, 1976, protraction of the proceeding was clearly on account of the Board. In the circumstances, the sealing down of the subsistence allowance seems to be without the least justification and the impugned order under Annexure-11, therefore cannot be maintained.

5. We would accordingly reject the Petitioner's prayer for quashing of the order of suspension, but allow the writ application to the extent that the order scaling down the subsistence allowance shall stand vacated. In case, the explanation has not already been furnished, Petitioner do furnish his explanation to the charges within a month hence and the Board is directed to conclude the proceeding in accordance with law within three months thereafter.

6. The writ application is allowed in part. We direct parties to bear their respective costs.

N.K. Das, J.

I agree.

Applications allowed.