

(2014) 11 JH CK 0060
In the Jharkhand High Court
Case No : W.P.(S) No. 2104 of 2008

Samuel Linda

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 26-11-2014

Acts Referred:

Constitution of India, 1950 — Article 311(2)
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(f), 2(t), 47, 72

Citation : (2014) 11 JH CK 0060

Hon'ble Judges : Sujit Narayan Prasad, J

Bench : Single Bench

Advocate : K.K. Singh, Advocates for the Appellant

Judgement

Sujit Narayan Prasad, J.—The petitioner has challenged the order of dismissal dated 1.10.2007 as contained in memo No. 2568 issued under the signature of Commandant, Jharkhand Armed Police Force, Bokaro.

2. The brief facts of the case as per argument advanced on behalf of learned counsel of the petitioner is that the petitioner all of a sudden on 9.11.2005, fell mentally ill and due to that reason, he lost his consciousness and absented from the duty from the Governor's residence, admitted to Kanke Mental Hospital for treatment of mental illness on 12.11.2005.

3. In course of mental illness while he was under treatment, the respondent No. 6 has issued a memo of charge alleging therein that the petitioner has absconded without permission of the Guard-in-Charge, from the residence of the Governor, in course of deputation as security guard vide memo No. 2098 dated 12.8.2006, the petitioner was treated in the Kanke Mental Hospital from 12.11.2005 to 9.9.2006 under the advise of Doctor U.N. Choudhary, Medical Officer, R.M.A. Kanke, Ranchi and was declared fit to discharge his duties on 9.9.2006 and thereafter, he had given his joining on 14.9.2006 along with medical prescription and medical certificate of fitness issued by the said Medical

Officer, but a memo of the charge has been issued on 12.8.2006 alleging therein that the petitioner has absconded from the office, as such he has committed irregularity against which he has given due reply stating therein that since he was suffering from mental illness, he was not be able to discharge his duty but without considering his reply the charges have been found to be proved, thereafter, the disciplinary authority has imposed punishment of dismissal upon petitioner vide order dated 1.10.2007.

4. The petitioner has taken twofold plea challenging the order of dismissal dated 1.10.2007.

"(i) He is entitled to be protected under sections 47 and 72 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (herein after referred to as the Act, 1995), since the petitioner was mentally ill and as such his services cannot be dispensed with in view of the protection having granted under Section 47 of the Act, 1995.

(ii) The defence of the petitioner has not at all been considered by the Inquiry Officer, hence the inquiry report is perverse and since the order of removal is based upon the perverse inquiry report, the same is not sustainable in the eye of law.

5. So far as the first point is concerned i.e. to give benefit of Section 47 of the Act, 1995, it is necessary to quote Section 47 of the Act, 1995, which reads as follows:--

"Section 47. Non-discrimination in Government employments.--(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if any employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section. "

6. Before reaching to the conclusion as to whether the petitioner is entitled to get the benefit of section 47 of the Act, 1995, it is necessary to see the definition of person with disability, as per the definition given under section 2(t) of the disability Act, 1995 speaks as follows:--

"Person with disability" means a person suffering from not less than forty percent of any disability as certified by a medical authority."

7. Admittedly, the petitioner has not brought any medical certificate on record relating to his mental unfitness so that he may come under the definition of person with disability as defined under section 2(t) of the Act, 1995 and further under Sections 3 and 4 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996 which deals with the application for issue of disability certificate and issue of disability certificate by the competent Medical Authority, rather the petitioner has only relied upon the medical prescriptions for getting the benefit of Section 47 of the Act, 1995.

8. The submission of the petitioner cannot be accepted in view of the fact that the petitioner has not brought on record any medical certificate in support of his disability of mental illness, as per the definition given under Section 2(f) of the Act, 1995.

9. Hence, the plea of the petitioner is rejected on the facts of the case as also on the basis of the legal propositions under the Act/Rule, 1995 or Rule, 1996.

10. So far the second contention, that the petitioner was mentally ill and this specific point has been raised by the petitioner before the Inquiry Officer, is concerned, he has not specifically pleaded in the writ petition, but has pointed out before the Court by referring to page 38 of the writ petition, which is part of the inquiry report, wherein the defence reply of the petitioner has been, discussed by the Inquiry Officer, in which the specific plea of the petitioner-is that he was being treated for his mental illness from 12.11.2005 and after being recovered from illness, he gave his joining on 14.9.2006.

11. Further, he has drawn attention of this Court with respect to the opinion of the Inquiry Officer wherein he has taken specific plea of illness, has not been considered by the Inquiry Officer, hence, specifying that the inquiry report is perverse, the order of punishment since based upon the said inquiry report, is not sustainable in the eye of law.

12. On the other hand the counsel for the State has submitted that the order of punishment has no infirmity, since the same has been passed after due procedure and the disciplinary authority has passed order after taking into consideration all facts.

13. This plea of the respondents in my view, cannot be accepted due to the reason that the petitioner has taken plea that he was mentally ill and to that effect he has annexed various medical prescriptions of the doctors as annexed from page 22 to 32 and the same fact has also been recorded under the heading "Defence Reply", of the petitioner, but however, under the heading "opinion" given by the Inquiry Officer, no such finding has been recorded to denying or accepting plea of mental illness.

14. On perusal of the enquiry report, it appears that the defence reply related to

mental illness of the petitioner has not at all been considered by the Inquiry Officer hence, the finding given by the Enquiry Officer is perverse in nature, here in this regard, the judgment reported in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., in the case of Managing Director, ECIL, Hyderabad and Others v. B. Karunakar and Others needs to be referred wherein at para 28, it has been held:

"Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry officer, particularly when they are borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could "themselves constitute new unwarranted imputations. What is further, when the proviso to the said Article states that "where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed", it in effect accepts two successive stages of different scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the enquiry officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry. The second stage follows the inquiry so carried out and it consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty."

15. That the Hon"ble Apex Court in the case of M.V. Bijlani Vs. Union of India (UOI) and Others, has held that:

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi criminal in nature, there should be some evidences to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing 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."

16. In view of the facts stated hereinabove, since there is purely non-application of mind by the Inquiry Officer as also by the Disciplinary Authority hence, the impugned order of dismissal dated 1.10.2007 is hereby quashed, the matter is remitted back before the Disciplinary Authority, who shall consider the defence

reply of the petitioner, already submitted by him before the Inquiry Officer, and decide the matter afresh on merit after affording opportunities to the petitioner, within a reasonable period preferably within period of 16 weeks from the date of receipt/production of copy of this order and communicate copy of the same to the petitioner. It is made clear that the disciplinary authority is directed to consider the case only on the basis of the documents already on record. The petitioner will not be permitted to place any further material on record before the disciplinary authority.

17. The writ petition is disposed of accordingly.