

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC(OAC) No.2941 of 1998

In the matter of an application under Section 19 of the
Administrative Tribunal Act, 1985.

.....

Akshaya Kumar Das

....

Petitioner

-versus-

State of Odisha & Others

....

Opposite Parties

For Petitioner : M/s. Ullash Ch. Mohanty.

For Opp. Parties : Addl. Government Advocate
Mr. Y.S.P.Babu.

PRESENT:

THE HONBLE JUSTICE BIRAJA PRASANNA SATAPATHY

Date of Hearing:13.09.2022 and Date of Order:18.10.2022

Biraja Prasanna Satapathy, J.

1. This matter is taken up through Hybrid Mode.
2. Heard Mr. U.C.Mohanty, learned counsel for the Petitioner and Mr.Y.S.P.Babu, learned Addl. Government Advocate for the State-Opposite Parties.
3. The present Writ Petition has been filed by the Petitioner challenging the order of dismissal passed in a disciplinary proceeding initiated against the Petitioner under Annexure-6 and confirmation of the same by the appellate authority vide its order dated 4.5.1998 under Annexure-9.

4. Mr. Mohanty, learned counsel for the Petitioner submitted that the Petitioner while working in the establishment of Opposite Party No.2 was placed under suspension vide order dated 20.04.1995 and reinstated subsequently vide order dated 17.07.1995.

5. It is submitted that subsequently, the Petitioner was proceeded with the disciplinary proceeding with service of charge memo vide proceeding No.15 dated 7.8.1995 under Annexure-1.

6. Mr. Mohanty, learned counsel for the Petitioner submitted that the very initiation of the proceeding under Annexure-1 is a defective one as in the said proceeding there is no statement of imputation nor there is any reference with regard to documents basing on which the said proceeding was initialed against the Petitioner.

7. Mr. Mohanty, learned counsel for the Petitioner submitted that the Petitioner on receipt of the said charges vide Annexure-1 submitted a detailed reply on 20.09.1995 under Annexure-2.

8. It is also submitted that the disciplinary proceeding against the Petitioner under Annexure-1 was initiated because of his involvement in a criminal proceeding in G.R. Case No.701/1995 in the file of learned J.M.F.C., Cuttack.

9. Learned counsel for the Petitioner submitted that though the proceeding under Annexure-1 and the criminal proceeding initiated against the Petitioner in the aforesaid G.R. Case No.701/1995 were based on similar charges, but after receipt of the reply under Annexure-2, the

disciplinary authority-Opposite Party No.2 allowed the proceeding to continue by appointing the enquiry officer. It is also submitted that the Enquiry Officer submitted the enquiry report on 2.8.1997 under Annexure-5.

10. It is submitted that the Petitioner without being provided with the copy of the enquiry report so submitted on 2.8.1997 under Annexure-5, the Opposite Party No.2 on the face of his own order passed on 16.01.1996 under Annexure-4, passed the final order of dismissal in the said proceeding vide order dated 4.8.1997 under Annexure-6 by dismissing the petitioner from his service.

11. Mr. Mohanty, learned counsel for the Petitioner submitted that since the Petitioner prior to passing of the impugned order under Annexure-6 was never provided with the copy of the enquiry report and no show cause whatsoever was issued prior to imposing the order of punishment i.e. dismissal from service, the same is not sustainable in the eye of law in view of the decision of the Hon'ble Apex Court in the case of **Union of India & Others vs. Mohd. Ramzan Khan** reported in **(1991) 1 SCC -588**.

Hon'ble Apex Court in the said decision Para-13 & 15 held as follows:-

“13. Several pronouncements of this Court dealing with Article 311(2) of the Constitution have laid down the test of natural justice in the matter of meeting the charges. This Court on one occasion has stated that two phases of the inquiry contemplated under Article 311(2) prior to the Forty-second Amendment were judicial. That perhaps was a little stretching the position. Even if it does not become a judicial proceeding, there can be no dispute that it is a quasi-judicial one. There is a charge and a denial followed by an inquiry at which evidence is led and assessment of the material before conclusion is reached. These facets do make the matter quasi-judicial and attract the principle of natural justice. As this Court rightly pointed out in the Gujarat case, the

disciplinary authority is very often influenced by the conclusions of the Inquiry Officer and even by the recommendations relating to the nature of punishment to be inflicted. With the Forty-second Amendment, the delinquent officer is not associated with the disciplinary inquiry beyond the recording of evidence and the submissions made on the basis of the material to assist the Inquiry Officer to come to his conclusions. In case his conclusions are kept away from the delinquent officer and the Inquiry Officer submits his conclusions with or without recommendation as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him in the disciplinary authority. The report is an adverse material if the Inquiry Officer records a finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice would be affected. Prof. Wade has pointed out:

“The concept of natural justice has existed for many centuries and it has crystallized into two rules: that no man should be judge in his own cause; and that no man should suffer without first being given a fair hearing.... They (the courts) have been developing and extending the principles of natural justice so as to build up a kind of code of fair administrative procedure, to be obeyed by authorities of all kinds. They have done this once again, by assuming that Parliament always intends powers to be exercised fairly.

15. Deletion of the second opportunity from the scheme of Article 311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Article 311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such an inquiry are not affected by the Forty-second Amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with recommendation, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-second Amendment has not brought about any change in this position”.

12. Mr. Mohanty, learned counsel for the Petitioner further submitted that as the disciplinary proceeding was initiated on self-same charges as like the criminal proceeding, the Opposite Party No.2 passed an order under Annexure-4 to the following effect:-

“Enquiry may continue but final order will be kept pending till disposal of the criminal case”.

13. It is accordingly submitted that the Opposite Party No.2 without following his own order passed on 16.1.1996 under Annexure-4 and without complying the principle of natural justice in supplying the copy of the enquiry report under Annexure-5 passed the order of dismissal under Annexure-6. Therefore, on the ground of non-compliance of principle of natural justice and the decision rendered in the case of **Union of India vs. Md. Ramjan Khan**, the said order is a nullity in the eye of law.

14. It is also submitted that challenging the order of dismissal passed under Annexure-6, though the Petitioner preferred an appeal before the Opposite Party No.3 under Annexure-7, but the said appellate authority without proper appreciation of the grounds taken in the memo of appeal rejected the same by confirming the order of punishment vide his order dated 4.5.1998 under Annexure-9.

15. It is accordingly submitted that since the proceeding against the Petitioner with passing of the order of punishment has been passed in complete violation of the principle of natural justice and the provision contained under OCS (CC&A) Rules, 1962, the said orders passed

under Annexure-6 and confirmed under Annexure-9 are illegal and liable to be interfered with by this Court.

16. Mr. Mohanty, learned counsel for the Petitioner further submitted that during pendency of the matter before the learned Tribunal, the Petitioner when was acquitted in the criminal proceeding vide judgment dated 19.05.2012, the said fact though was brought to the notice of the learned Tribunal, but learned Tribunal when dismissed the O.A vide order dated 28.09.2015, the same was reviewed by this Court in its order dated 16.08.2022 in Review Petition (RPC) No.1223/2015.

17. Mr. Mohanty, also submitted that since the Petitioner was acquitted in the criminal proceeding, the Petitioner is also eligible and entitled for his reinstatement in view of the decision of the Hon'ble Apex Court in the case **Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. & Anr.** Hon'ble Apex Court in Para-34 and 35 has held as under:-

34. There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were based on identical set of facts, namely, the raid conducted at the appellants residence and recovery of incriminating articles there from. The findings recorded by the enquiry officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by police officers and punch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the enquiry officer and the enquiry officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the raid and recovery at the residence of the appellant were not proved, it would be unjust, unfair

and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand.

35. Since the facts and the evidence in both the proceedings, namely, the departmental proceedings and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instant case.

(Emphasis laid by this Court).

18. Mr. Mohanty also relied on another decision of the Hon'ble Apex Court reported in **AIR 2006 SC 2129**. Hon'ble Apex Court in Para-31 & 32 of the said judgment has held as follows:-

“31. The judgments relied on by the learned counsel appearing for the respondents are not distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a Departmental case against the appellant and the charge before the Criminal Court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer, Mr. V.B. Raval and other departmental witnesses were the only witnesses examined by the Enquiry Officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by his judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand.

32. In our opinion, such facts and evidence in the department as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings

on the basis of the approach and burden of proof would not be applicable in the instant case. Though finding recorded in the domestic enquiry was found to be valid by the Courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in Paul Anthony's case (supra) will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed.

19. Making all these submissions, Mr. Mohanty, learned counsel for the Petitioner submitted that not only the Petitioner is eligible for his reinstatement with quashing of the impugned order passed under Annexures-6 & 9, but also he is entitled to get the financial benefit for the period he remained out of employment i.e. from the date of dismissal till his reinstatement. In support of the same, Mr. Mohanty relied on the decision of the Hon'ble Apex Court in the case of **Allahabad Bank & Others vs. Avtar Bhushan Bhartiya** in Special Leave Petition (Civil) No.32554 of 2018 decided on 22.04.2022. Hon'ble Apex Court in the said decision confirmed the order passed by the High Court, wherein the Hon'ble High Court had directed for payment of 50% back-wages for the period the petitioner therein remained out of employment. Hon'ble Apex Court in the said decision in Paragraph-36 held as follows:-

“36. Therefore, even applying the ratio laid down in various decision, we do not think that the employee could be granted anything more than what the High Court has awarded”.

20. Mr. Babu, learned Addl. Government Advocate for the State-Opposite Parties on the other hand made his submission basing on the stand taken in the counter affidavit.

21. It is submitted that since the Petitioner during his continuance under Opposite Party No.2 contacted second marriage, the said action being in violation of Rule-24(2) of the Orissa Government Servant Conduct Rules, 1962, the Petitioner was duly proceeded with in the disciplinary proceeding and in view of such conduct of the Petitioner and the report submitted by the enquiry officer in finding the Petitioner guilty of the charges in its report under Annexure-5, the Petitioner was rightly dismissed from his service vide order under Annexure-6.

22. Mr. Babu, further submitted that in view of such conduct of the Petitioner in contacting the 2nd marriage, the Petitioner was not only rightly dismissed vide order under Annexure-6, but also the appellate authority rightly confirmed the same vide his order under Annexure-9.

23. Heard learned counsel for the Parties.

24. Perused the materials available on record. This Court after going through the same finds that even though the Petitioner was proceeded in the departmental proceeding initiated under Annexure-1 with submission of the enquiry report under Annexure-5, but there is no document filed by the Opposite Parties showing issuance of any show cause to the Petitioner by the disciplinary authority prior to imposing major punishment of dismissal from service. There is also no averment and no document enclosed to the counter affidavit filed by the State-Opposite Parties showing the submission of the enquiry report to the Petitioner to give his representation as against the finding of the enquiry report and the show cause proposing the

order of punishment. Since prior to passing of the impugned order, the Petitioner was never show caused nor the enquiry report was ever provided, the order of punishment passed under Annexure-6 as per the considered view of this Court is not legally sustainable. The case of the Petitioner clearly falls within the parameter decided by the Hon'ble Apex Court in the case of ***Union of India vs. Md. Ramjan Khan***. This Court is accordingly inclined to quash the order under Annexure-6 & 9.

25. This Court further finds that since the Petitioner was honourably acquitted in the criminal proceeding vide its judgment dated 19.05.2012, the Petitioner is eligible and entitled for his reinstatement in his service. Not only that since because of the illegal action of the Opposite Party No.2, the Petitioner was dismissed from his service and remained out of employment w.e.f 4.8.1997, the Petitioner will be entitled to get 50% of the back-wages for the period from 4.8.1997 till his reinstatement. This Court directs Opposite Party No.2 to issue necessary order of reinstatement in favour of the Petitioner within a period of one month from the date of receipt of this order. The back-wages to the extent of 50% shall also be released in favour of the Petitioner within a further period of two months from the date of such reinstatement.

26. With the aforesaid observations and directions, the WPC(OAC) stands disposed of. There shall be no order as to costs.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 18th of October, 2022/Subrat