

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 17307 of 2020

An application under Articles 226 & 227 of Constitution of India.

AFR **Abhimanyu Mallick** ----- **Petitioner**

-Versus-

State of Odisha & others **Opp. Parties**

Advocate(s) appeared in this case:-

For Petitioner : M/s. K.K. Swain, S.C.D Dash &
J.R. Khuntia, Advocates

For Opp. Parties : Mr. R.N. Acharya,
Standing Counsel for School &
Mass Education Department.

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

25th July, 2022

SASHIKANTA MISHRA, J.

The petitioner, after facing due process of selection was engaged as Contract Teacher (P.E.T.) as per order dated 30.05.2012 passed by the District Education Officer, Dhenkanal (opposite party no.3) and joined as such on 08.06.2012. Such engagement being on

contractual basis, the petitioner executed an agreement renewable from year to year. As such, the petitioner completed six years of satisfactory service w.e.f. 08.06.2018. It is stated that as per the Odisha Group “C” and Group “D” posts (contractual appointment) Rules, 2013 (in short “Rules, 2013”), the petitioner is deemed to have been regularized upon completion of six years of satisfactory service. By letters dated 17.12.2019 and 24.10.2019 of the Director, Secondary Education, Odisha, the name of the petitioner finds place in the list of similarly placed Contract Teachers who are to be regularized in service. While the matter stood thus, the opposite party no.3 issued an office order on 27.12.2019 disengaging the petitioner from service on the ground that he had remained in jail custody for more than 48 hours having been arrested in connection with a criminal case relating to murder of his wife. Such order, according to the petitioner, was passed without following the due procedure prescribed in the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 (in short “OCS(CCA) Rules, 1962”) or without adhering to the

principles of natural justice. It is specifically claimed that neither any show cause notice nor any charge sheet was served upon him prior to passing of the impugned order. It is further stated that as per Rule 12 of the OCS (CCA) Rules, 1962, the petitioner could at best have been placed under suspension for being in custody for more than 48 hours. Thus, challenging the impugned order, the petitioner has approached this Court claiming the following relief:

“(a) an appropriate writ may be issued quashing the disengagement order dated 27.12.2019 passed by the District Education Officer, Dhenkanal under Annexure-5 and the petitioner may be reinstated in his former post with all consequential benefits. And the opposite party no.3 (District Education Officer, Dhenkanal) may be directed to issue formal order of regularization in favour of the petitioner treating him as a regular teacher with effect from 08.06.2018 as has been done in the case of other teachers.

“(b) any other order/orders or direction/directions may be issued so as to give complete relief to the petitioner;”

2. A counter affidavit has been filed on behalf of the opposite parties, wherein the basic facts relating to engagement of the petitioner and his disengagement etc. have been admitted. It is also admitted that the Government have taken a decision to regularize 449

Contractual Teachers including the petitioner as per Govt. Letter No.5801/SME dated 13.03.2021 communicated by the Director, Secondary Education vide memo no. 10342 dated 01.05.2020. However, since the petitioner had already been disengaged from service on the ground of misconduct w.e.f. 27.12.2019, the Director, Secondary Education instructed not to issue regularization order in his favour. It is further stated that upon report of information from the concerned Police Station regarding involvement of the petitioner in the criminal case, a show cause notice was issued vide letter dated 22.08.2019 calling upon him to submit written statement of defence within seven days which was sent by registered post as well as through the Headmaster of the concerned High School, but the postal department could not serve the letter as he was absent/had absconded from home. The Headmaster also reported that the petitioner was unauthorizedly absent from School from 17.08.2019. It is also stated that the petitioner was disengaged on the ground of gross misconduct as he was involved in a

criminal case, which is as per the terms and conditions laid down in the agreement executed by him.

3. The petitioner has filed a rejoinder refuting the averments made in the counter affidavit. It is stated that the petitioner acquired the status of regular employee by operation of law. Moreover, mere involvement in a criminal case cannot be treated as misconduct and at best he could have been placed under suspension as per the provisions under Rule-12 of the OCS (CCA) Rules, 1962. It is also stated that the petitioner was under treatment for his illness and thereafter was taken to custody. An additional affidavit has been filed by the petitioner to bring on record the fact that during pendency of the writ application he was acquitted in the criminal case as per judgment and order dated 26.11.2021 passed by learned Additional Sessions Judge, Kamakhyanagar.

4. Heard Mr. K.K. Swain, learned counsel for the petitioner and Mr. R.N. Acharya, learned Standing Counsel for School and Mass Education Department.

5. Mr. Swain contends that the impugned order is in gross violation of not only the principles of natural

justice but also in direct violation of the Rules 2013. Referring to Rule-9(6) of the Rules, 2013 it is submitted that the provisions of OCS (CCA) Rules, 1962 are fully applicable to all contractual employees which mandates that the procedure prescribed under Rule-15 thereof has to be followed before disengaging an employee from Government service. It is further argued that the petitioner being in jail custody for more than 48 hours, could have been placed under suspension but straight away dismissing him is something that cannot meet with the sanction of law. It is further argued by Mr. Swain that mere involvement in a criminal case cannot be treated as an act of misconduct particularly when the said case has ended in acquittal. Had the petitioner continued in employment he would have been regularized by now as per decision taken by the Government.

6. Per contra, Mr. R.N. Acharya has submitted that the petitioner remained unauthorizedly absent from duty and avoided to receive the show cause notice issued to him. Since the allegation against him in the criminal case was grave and serious in nature, it has to be treated

as an act of misconduct and therefore, the authority committed no error in disengaging him from service. Mr. Acharya further argues that being a contractual employee the petitioner can claim no right to remain in service in view of the terms and conditions specified in the agreement executed by him.

7. The basic facts of the case are not disputed, inasmuch as the petitioner was appointed on contractual basis and joined as a teacher on 08.06.2012. Such contractual engagement was renewed from time to time. It is also not disputed that the petitioner was arrested and taken to custody in connection with Kamakhyanagar P.S. Case No. 171 of 2019 corresponding to G.R. Case No. 287(A) of 2019 on the allegation of committing the murder of his wife. Mr. Acharya had relied upon Clause-9 of the agreement executed by the District Education Officer with the petitioner, which runs as follows:

“9. In case of any misconduct by the Second Party during the period of contractual engagement as would be construed by the First Party the Second party shall be disengaged by the First Party forthwith without assigning any reason and prior notice.”

8. The question is, can mere involvement in a criminal case be held as a misconduct? It is well known in criminal jurisprudence that an accused is presumed to be innocent till proven guilty. The condition in the agreement at clause-9 referred above speaks of 'misconduct', which obviously means misconduct that has been duly proved. Mere allegation cannot be treated as proof of misconduct. In the instant case, the petitioner has been acquitted from the charge as per judgment dated 26.11.2021 passed by learned Additional Sessions Judge, Kamakhyanagar in C.T. (SS) No. 10 of 2020. Such being the fact situation, it is obvious that the so called misconduct imputed to the petitioner for his alleged involvement in the criminal case must be treated a nullity. Be that as it may, the petitioner was undoubtedly arrested in connection with criminal case and remained in judicial custody for more than 48 hours. Rule-12(1) and (2) of the OCS (CCA) Rules, 1962 provides as under:

“12. Suspension. - (1) The appointing authority or any authority to which it is subordinate or any authority empowered by the Governor or the appointing authority in that behalf may place a Government servant under suspension

- the petitioner was straight away
ce for being in judicial custody in
riminal case. When it comes to diser
it is not open to the authorities to si
nment servant, whether contractual
ployment without following the
by law. In the instant case, the

“9 Conditions of Service of Contractual Employees appointed under sub-rule (2) of rule-5 :-

$$xx \qquad \qquad \qquad xx \qquad \qquad \qquad xx$$

Thus, recourse to the procedure prescribed under Rule-15 of OCS (CCA) Rules, 1962 is a must before any action as drastic as disengagement of a Government servant is taken. Such a course of action was not taken by the concerned authorities in relation to the petitioner. It has been argued that a show cause notice was issued to the petitioner, but the same could not be served upon him as he was absent/had absconded from home. According to the petitioner he was under treatment for his illness and thereafter he was arrested for which the show cause notice could not be served upon him. It is settled law that when a penal action is proposed to be taken against a Government servant, he must be given all opportunity to have his say in the matter. Mere issuance of show cause notice, which could not be served, cannot fulfill the requirement of law

9. In the case of ***Union of India and others vs. Dinanath Shantaram Karekar and others***, reported in AIR 1998 SC 2722: (1998) 7 SCC 569, the Apex Court held as under;

“10. Where the disciplinary proceedings are intended to be initiated by issuing a charge-sheet, its actual service is essential as the person to whom the charge-sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. So also, when the show-cause notice is issued, the employee is called upon to submit his reply to the action proposed to be taken against him. Since in both the situations, the employee is given an opportunity to submit his reply, the theory of “communication” cannot be invoked and “actual service” must be proved and established. It has already been found that neither the charge-sheet nor the show-cause notice were ever served upon the original respondent, Dinanath Shantaram Karekar. Consequently, the entire proceedings were vitiated.”

Since in the instant case actual service of show cause notice on the petitioner was not effected and the procedure prescribed under Rule-15 of the OCS (CCA) Rules, 1962 was not followed, the impugned order cannot be sustained in the eye of law.

10. There is also no dispute that the petitioner having been engaged as a Contract Teacher on 08.07.2012, completed six years of service on 08.06.2018. Rules, 2013 provides for automatic regularization of employees, who have completed six years of satisfactory service. In fact, appropriate steps appear to have been taken by the concerned authorities for regularization of contract teachers engaged in different Government High

Schools during the year 2011-12 including the petitioner. It is also admitted in the counter affidavit filed by the opposite parties that the Government took a decision to regularize 449 Contract Teachers including the petitioner but the regularization order was not issued in his favour since he had already been disengaged from service. It is stated at the bar that all other similarly placed employees as the petitioner have since been regularized in service. Since this Court has already held that the order of disengagement of the petitioner is illegal, not only that the same needs to be set aside but also the petitioner being deemed to be in service all through, must also be held to be entitled to regularization of his services from the date his immediate junior in the gradation list was so regularized. Obviously, had the petitioner continued in service, he would have been regularized in service along with his colleagues on 08.06.2018, the date on which the contractual teachers engaged during the year 2011-12 were regularized as per order enclosed as Annexue-6 to the writ petition.

11. In the result, the writ petition succeeds and is therefore, allowed. The impugned order passed by opposite party no.3 vide Annexure-5 is hereby quashed. The authorities are directed to reinstate the petitioner forthwith with all service benefits. The opposite party authorities shall also take steps to regularize his services with all consequential service benefits from the date his immediate junior in the list of Contract Teachers engaged in the year 2011-12 was regularized. The above exercise shall be concluded with a period of two months from the date of communication of this order or on production of a certified copy thereof by the petitioner.

12. The writ petition is disposed of accordingly.
No order as to costs.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 25th July, 2022/ A.K. Rana