

ORISSA HIGH COURT : C U T T A C K

WPC(OA) NO.1236 OF 2007

In the matter of a Petition under Article 226 of the Constitution of India.

Bipin Kumar Mohapatra

: Petitioner

-Versus-

State of Orissa & anr.

: Opp.Parties

For Petitioner

:

Mr.K.C.Kanungo, Adv.

For Opp.Parties

:

Mr.S.Ghose, ASC

CORAM :

JUSTICE BISWANATH RATH

Date of hearing : 09.02.2022 & Date of Judgment : 25.02.2022

1. This Writ Petition was originally filed on the Board of the Orissa Administrative Tribunal, Bhubaneswar Bench. On abolition of the Tribunal, the Petition is transferred to this Court for being decided under the provision of Article 226 of the Constitution of India.

2. This Petition involves a challenge to the enquiry report, vide Annexure-6, the show cause notice, vide Annexure-8 and the final order of punishment, vide Annexure-11 respectively. Undisputedly, for the order of punishment being passed by the Hon'ble Governor, there was no scope for Appeal involving such order and straightway, an Application

was filed before the Tribunal to consider the punishment imposed on the Delinquent-Petitioner while considering the validity of the enquiry report as well as show cause notice referred to hereinabove. Background involving the case is that the Petitioner made an entry to the State Government Service, as a Specialist in Orthopedic on 16.1.1970. During course of his employment, the Petitioner was promoted to the post of Senior Class-I Post during 2002 and retired while working as Superintendent, T.B. Hospital (Basant Manjari Swastya Nivas), Tangi in the district of Khurda. It reveals from the disclosure in the Petition involved that during incumbency of the Petitioner, as a Specialist in Orthopedic at the District Head-Quarter Hospital in the district of Keonjhar, one Rabindra Nath Dehuri was admitted in Hospital at 4 p.m. on 10.1.2001 in the Surgical Ward on apprehension that he was suffering from Diabetics and Septicemia. Initially he was under the treatment of Surgical Specialist but later on he was referred to the Orthopedic Ward on 14.2.2001. It is while the Patient was under the treatment in the Orthopedic Ward, he succumbed to the disease finally on 23.2.2001. It appears, one Sudhansu Behera lodged a complain before the Vigilance Police alleging that the present Petitioner demanded illegal gratification of Rs.5000/- for better treatment to the Patient. Based on such complain, the Vigilance Police laid a trap on 20.2.2001 and in the process, the

Petitioner was caught in accepting the said amount, as illegal gratification leading to initiation of a Vigilance Police Case being registered as Vigilance P.S. Case No.9/2001 under Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988 (herein after called as “Act, 1988”). This Proceeding was closed on acceptance of final report, vide No.33/21.9.2001 submitted by the Vigilance Police, Balasore. This Criminal Case resulted in closure of the case on the ground of insufficient evidence. The Petitioner pleaded that it is after closure of the Vigilance Proceeding, a Departmental Proceeding was drawn, vide Charge-Sheet dated 11.4.2004 under the charges of gross misconduct, dereliction of Government duty, failure to maintain absolute integrity and to discharge duties properly, as a Government Servant in violation of Rule-3 of the Orissa Government Servants Conduct Rules, 1964. The Petitioner filed his response to the Charge-Sheet, vide Annexure-2. It is needless to indicate here that the Petitioner was placed under suspension on 2.8.2001 and after the criminal proceeding was dropped, he was reinstated on 2.10.2001. In the Disciplinary Proceeding conducted by the Commissioner for Departmental Inquiries, vide CDI Case No.7/2003, there has been oral and documental evidence. The Presenting Officer examined six witnesses and exhibited four documents to support the case of the Department, whereas the Petitioner submitted nine documents but

did not examine any defence witness. The Petitioner filed here Written Statement of defence and the copy of deposition, as Annexure-3, 3A and 4 series. The Petitioner even submitted a written brief on 7.10.2004, vide Annexure-5. The Petitioner alleged, even though there was no credible evidence yet the enquiry report was submitted establishing charges against the Petitioner, suggesting punishment of censure and to disallow 50% of his pension. Copy of enquiry report is available at Annexure-6. The Petitioner's objection to the enquiry report finds place at Annexure-7. It is based on the submission of enquiry report, the Petitioner was asked to show cause, vide notice dated 26.10.2006 proposing deduction of 50% of pension for two years. Upon receipt of such show cause notice, the Petitioner submitted his objection explaining his innocence and thereby objected the proposed punishment. Notice to show cause on the proposed punishment appearing at Annexure-8, whereas the objection of the Petitioner to the proposed punishment appears at Annexure-10. It is being dissatisfied with the response of the Petitioner to the show cause notice of punishment, vide Annexure-11, the communication dated 21.7.2007 final order of punishment was issued against the Petitioner resulting filing the present Petition involved herein.

3. Mr.K.C.Kanungo, learned counsel for the Petitioner taking this Court to the grounds of challenge involved herein and as disclosed in the

Petition contended that once there is already appreciation on the basis of evidence laid before the Criminal Court, it is no further available to be re-appreciated or deciding otherwise by the Commissioner of Departmental Enquiries. Mr.Kanungo, learned counsel for the Petitioner also alleged, the Disciplinary Authority has not followed the norms involving an enquiry report. Further the enquiry has been made based on conjectures and surmises and on hypothetical proposition. There has been no taking into account the deposition of P.Ws.1 to 3 in submitting to such report. It is claimed that it is only gathering of some materials here and there in the Vigilance Case Record, the Enquiring Officer made an attempt to re-appreciate the evidence. Even the I.O. has resorted to falsehood in the matter of interpretation to the leave application of the Petitioner. Mr.Kanungo, learned counsel for the Petitioner giving stress on the approach of the Enquiring Officer in the matter of evidence and alleged, the Enquiring Officer has not taken into account at all the deposition of P.W.3, the brother of the deceased and there is no appreciation of evidence of P.W.2, the wife of the deceased deposed before the C.D.I. There is also allegation of non-consideration of reply of the Petitioner, vide Annexure-7. Sri Kanungo also alleged, when the Enquiring Officer suggested punishment of censure and disallowed 50% of his pension, response of the Petitioner was asked involving such

proposed punishment and the show cause notice, vide Annexure-8, as an Indicator of imposition of punishment, punishment to the extent of deduction of 50% of pension for two years in the final punishment, vide Annexure-11 there is illegal imposition of punishment remaining contrary to the proposed punishment particularly by penalizing the Petitioner with punishment to the extent that the period of suspension treated as such. It is in the circumstance, Mr.Kanungo, learned counsel for the Petitioner contended that there has been mechanical disposal of the Disciplinary Proceeding by the Disciplinary Authority and the order at Annexure-11 is there not sustainable in the eye of law.

4. Referring to a catena of decisions of the Hon'ble Supreme Court and also this Court, such as ***Moni Shankar vrs. Union of India & anr.*** : (2008) 1 SCC (L & S) 819, ***Divisional Forest Officer, Kothagudem vrs. Madhusudhan Rao*** : (2008) 1 SCC (L & S) 788, ***Union of India & ors. Vrs. Naman Singh Shekhawat*** : (2008) 1 SCC (L & S) 1053 and ***Mathura Prasad vrs. Union of India & ors.*** : (2007) 1 SCC (L & S) 292 and a decision of this Court in ***Sashadhar Pradhan vrs. Union of India & ors.*** : (2020)(I) ILR-CUT-550, Mr.Kanungo, learned counsel for the Petitioner prayed for legal support on the contentions so raised in the challenge of Annexure-6, 8 & 11 and claimed, the Petitioner to have the support of the above decisions.

Mr.Kanungo, learned counsel for the Petitioner also contested the validity of the Disciplinary Proceeding on the premises that when the Disciplinary Proceeding is initiated on the basis of a complaint, non-examination of the Complainant becomes vital in continuance of such proceeding. It is on the premises that the vital witness not being examined, Sri Kanungo claimed that there is absolutely no foundation to such allegations and the Disciplinary Authority appears to have failed to appreciate the above vital legal aspect.

5. Mr.S.Ghose, learned Additional Standing Counsel appearing for the Opposite Parties in his opposition to the contentions raised by Mr.Kanungo, learned counsel for the Petitioner while supporting the impugned orders at Annexure-6, 8 & 11 urged that law has been settled holding that acquittal of an accused in the criminal proceeding has nothing to control the Disciplinary Proceeding. Mr.Ghose however did not dispute to the complain of the Petitioner that for there is a change in the mind of the Disciplinary Authority on the aspect of suggestion of the Enquiring Officer on punishment and in such situation, it became impediment on the part of the Disciplinary Authority to at least communicate its such change of mind in the matter of punishment to the Delinquent and calling for a show cause also. Mr.Ghose, learned Additional Standing Counsel however did not object to the contentions of

the Petitioner on his submission that the Disciplinary Proceeding became fatal for non-examination of the Complainant. Mr.Ghose further taking this Court to the observations of the Enquiring Officer at Annexure-6 contended that the Petitioner having been provided with full opportunity to contest the enquiry proceeding and his contentions and the documents having been taken into consideration by the Enquiring Officer keeping in view the observations of the Enquiring Officer remained valid but there is no scope for the Petitioner to challenge it any further. Mr.Ghose, learned Additional Standing Counsel taking this Court to the suggestion of the Enquiring Officer through Annexure-6 attempted to justify the suggestion of the Enquiring Officer particularly keeping in view his reasoning therein. Mr.Ghose further did not dispute to the allegation of the Petitioner that there is difference in the award of punishment in between the suggestion of the Enquiring Officer and the show cause issued to the Petitioner asking his response in the matter of punishment. Mr.Ghose further contended that there is no law prohibiting the Disciplinary Authority from disagreeing or taking a different view in the matter of imposition of punishment and suggested. It is suggested that the reports in enquiry never bind the Disciplinary Authority. Mr.Ghose thus contended that there is no flaw in issuing the impugned show cause notice, vide Annexure-8. As a consequence, Mr.Ghose also supported the final

punishment order at Annexure-11 contained that final decision of the Disciplinary Authority is based on not only providing opportunity of response to the Petitioner before passing such order but the final impugned order also appears to have been passed only after considering the objection of the Petitioner through Annexure-10. Mr.Ghose, learned Additional Standing Counsel however could not submit anything contrary to the decisions taken support by the learned counsel for the Petitioner. Finally Mr.Ghose attempted to support the impugned action on the premises that there has been full compliance of natural justice before passing the order at each stage, further the impugned order at each stage of the matter also involved consideration of the objection of the Petitioner and that looking to the graveness in the charges framed against the Petitioner involving the Disciplinary Proceeding, there should not be showing of any leniency, particularly keeping in view that this Court while exercising such dispute cannot sit as an Appellate Authority. Mr.Ghose ultimately requested this Court for dismissal of the Writ Petition for having no merit.

6. This Court on examination of the impugned order at Annexure-11 finds, being an order on imposition of punishment on the Petitioner involving the Disciplinary Proceeding, final order of punishment should have contained the reasoning in coming to such decision. The impugned

order at Annexure-11 since did not contain the reason on the decision of the Authority before coming to impose such punishment indicated therein, for the opinion of this Court, the order of punishment of this nature cannot be sustained. It is in the circumstance, this Court finds, the order at Annexure-11 is otherwise not sustainable in the eye of law. This Court here takes note of Paragraphs-23 & 24 in the case of ***Bangalore Development Authority and Others vrs. R.Hanumaiah and Others*** reported in (2005) 12 SCC 508, where Hon'ble apex Court observes, the order passed by Statutory Authority, it is trite, must be judged on the basis of the contents thereof and explained through affidavit. The order of punishment being passed in 2007 and in the meantime fifteen long years have passed involving the Petitioner retired since 2002, i.e., two decades prior to this judgment, there is no point in re-opening of such issue. This Court here taking into account the grounds of challenge of the Petitioner that when the Enquiring Authority recommended particular punishment, the Disciplinary Authority in issuing show cause dropped one punishment and only proposed one punishment suggested by the Enquiring Officer, the punishment in worse could have confined to the punishment as proposed and not beyond that. This Court here finds from Annexure-6, the enquiry report, particularly the recommendation finds place at Page-

54 of the Brief, suggestion of the Enquiring Officer finds place as follows

:-

“The Delinquent Officer has in the meantime retired from Government Service. He had acted inhumanly for extracting money from the wife and brother of a dying patient namely, Late Rabindra Dehury. He know that late Dehury was a poor man who working as a labourer. As a Government Servant, the Delinquent Officer was obliged to render services of a Specialist to the indoor patients on free of cost but he did not. Such a person deserved dismissal from Government Service. Since he has retired, this punishment cannot be awarded to him. Therefore, it may be appropriate (i) to censure his action (ii) to disallow 50% of his pension.”

Now reading through the show cause notice, vide Annexure-8 this Court finds, while calling for response of the Petitioner to the proposed punishment, the Disciplinary Authority proposed the punishment as follows :-

“Deduction of 50% of pension for 2 (two) years.”

It is here taking note from the order of punishment at Annexure-11, this Court finds, the Disciplinary Authority ultimately punished the Petitioner as follows :-

- “(i) Deduction of 50% (fifty percent) of Pension of Dr.Bipin Kumar Mohapatra for a period of 2(two) years only.
- (ii) Period of suspension is treated as such.”

All the leaves no doubt that there is change in the imposition of punishment at every stage and undisputedly, there is no communication to the Petitioner either on the enhancement and/or modified punishment

nor even asking the Petitioner to show cause involving a change in the mind of Disciplinary Authority as required under law. This Court is of the clear view that there is total non-application of mind by the Disciplinary Authority in the matter of imposition of punishment. For the opinion of this Court, when there is a suggestion involving one punishment by the Enquiring Officer, in the event the Disciplinary Authority was in mind of imposition of additional punishment and/or substituted punishment, in the fitness of things, such punishment order would have come only after providing the Delinquent with a copy indicating the opinion of change in the mind of the Disciplinary Authority in the matter of punishment and after affording opportunity to the Petitioner to respond to such change in the mind of the Disciplinary Authority. It is in this view of the matter, this Court finds force on the claim of the Petitioner that the impugned order at Annexure-11 was passed mechanically. Keeping in view the suggestion of the Enquiring Officer and the mind of the Disciplinary Authority through Annexure-8 to confine only to one of the proposed punishments, i.e., deduction of 50% of pension of the Petitioner and the additional punishment treating the period of suspension as such, even not being suggested by the Enquiring Officer, there was no room for imposing such punishment by the Disciplinary Authority.

7. This Court here takes into consideration the allegation of Mr.Kanungo, learned counsel for the Petitioner that non-examination of the Complainant vitiated the entire Disciplinary Proceeding, vetting through the enquiry report finds, there is in fact no examination of the Complainant in the enquiry proceeding. For the opinion of this Court, the Disciplinary Proceeding thus vitiates in absence of examination of vital witness, the Complainant itself. To support this observation of the Court, this Court takes into account the decision of this Court in ***Sashadhar Pradhan vrs. Union of India and & ors*** : (2020) (I) ILR-CUT-550. The decision in Paragraphs-9 & 10 reads as follows :-

“9. Coming to the Question (B), non-examination of vital witness if it vitiates the enquiry? This Court reading through the enquiry report finds admittedly the complainant, namely, Subha Patnaik has not been examined in the enquiry proceeding. This Court however finds Subha Patnaik, the complainant, who was examined during the preliminary enquiry, the statement of complainant produced as Ext.18 being introduced by P.W.9 clearly borne out from the discussion in paragraph-B running page 52-54 of the brief. Taking into consideration the evidence involving the same, this Court finds the Enquiry Officer has the following observation:

ii) The statements of Sh.Subha Pattnaik, Shri. Amaresh Pattnaik, Sh. Ranjit Patra and Sh. Debi Prasad Pattnaik produced as Exhibits-18, 19, 20 and 21 respectively by PW-09. Shri. R.N.Tripathy Insp. CBI (P.E.O.) and recorded during course of P.E. by the P.E.O. are not signed by the said witnesses. As per laid down procedure of law, the statements of the witnesses recorded during course of P.E. are necessarily required to be duly signed by the witnesses concerned and the P.E.O. will authenticate those statements. But the statements of the above said 04 Nos. of witnesses produced as Exhibits-18, 19, 20 and 21 have not been signed by the witnesses concerned. These statements produced as Exhibits only bears the sig. of P.E.O. Mr. R.N. Tripathy. None of the said produced as Exhibits by PW-09 (P.E.O.) in support of the allegations levelled against the Charged Official appeared before the E.O. and attended the D.E. to confirm the veracity/genuineness of their statements produced as Exhibits the PW-09

(P.E.O.). And hence Exhibits-18, 19, 20 & 21 can't be considered as a Proved document/ evidence until or unless the persons/PW's who prepared or given those statements and produced as Exhibits-18, 19, 20 & 21 states or confirms that they had given those statements to Sh. R.N. Tripathy during the course of P.E.

This Court further finds the enquiry report at Page-54, internal page-20 of the enquiry officer again observed as follows:

iii) Similarly, the Micro Cassette wherein the alleged telephonic conversation of dt:27.04.04 was recorded and produced as Exhibit-06 by the PW- 09 Sh.R.N.Tripathy Insp. CBI (P.E.O.) was not signed by the complainant Sh. Subha Pattnaik, Sh. R.K. Sarangi PW-13, Sh. S.N.Das PW-14 and even by PW-01 Sh. S.D.Mishra Insp. CBI who recorded the telephonic conversation and PW-09 itself resulting of which the genuineness and originality of the said Micro Cassette and Exhibit- 06 has come under clouds which can't be considered as a proved document.

10. Looking to the above clear recording of the Enquiry Officer, this Court finds not only the statement of the complainant claimed to be recorded during P.E. is not signed but there is even no examination of the complainant at least to establish that the statement produced by way of Exhibit-18 is of himself. Further, so far as material objects, the micro cassette wherein telephonic conversion dated 27.04.2004 was recorded being produced by PW-09, it was found that no signature of the complainant was also obtained on the same. Admittedly there is also refusal of request at the instance of the delinquent to have a polygraph/voice test of such recording to ensure that he is one of the participants. Therefore, there is no other way for the establishment to examine the conversion made in the telephonic through a competent agency. It is at this stage taking into consideration the disagreement note of the Disciplinary Authority, this Court finds the disagreement note only contents some development taking place during the complainant attending the CBI Office pursuant to High Court's order. Further, some developments appearing to be taking place involving the complainant during the P.E. and making a reference to some evidence here and there during the enquiry proceeding. It is surprised to take note here that the Disciplinary Authority has not discussed or communicated in any manner as to why and on which aspect of the Enquiry Officer being differed by him.

The above decision of this Court is also based on a decision of the Hon'ble Supreme Court as clearly indicated in the said judgment.

8. This Court in the above legal backdrop of the matter here finds, the entire Disciplinary Proceeding gets vitiated for such a major flaw ultimately taking away the entire progress thereafter, includes the report, the show cause notice and the final order of punishment as appearing at Annexure-6, 8 & 11 respectively all ought to be set aside.

9. It is keeping in view the above aspect, this Court finds, the enquiry proceeding becomes invalid, as a consequence, this Court finds, the impugned orders at Annexure-6, 8 & 11 all remained unsustainable. This Court therefore sets asides the impugned orders at Annexure-6, 8 & 11 and observes, in the event, there is retention of any money involving the Petitioner on account of such illegal imposition of punishment, same may be calculated and returned to the Petitioner along with at least 5% interest all through. The entire exercise be completed within a period of one and half months from the date of communication of this order.

10. The Writ Petition succeeds but however there is no order as to cost.

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(Biswanath Rath, J.)

Orissa High Court, Cuttack.
The 25th February, 2022/M.K.Rout, A.R.-cum-Sr.Secy.