

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC (OAC) No. 1330 of 2008

Sri Kishore Chandra Barik

....

Petitioner

Mr. P.K. Nayak (1), Advocate

-Versus -

State of Odisha and Ors.

....

Opp. Parties

Mr. M Balabantaray, Standing Counsel

CORAM:

DR. JUSTICE B.R. SARANGI

ORDER

14.02.2022

Order No.
04

This matter is taken up through hybrid mode.

2. Heard Mr. P.K. Nayak (1), learned counsel for the petitioner and Mr. M. Balabantaray, learned Standing Counsel for the State.
3. The petitioner has filed this writ petition seeking to quash the order of termination/dismissal dated 22.10.2001 passed by the disciplinary authority, which has been confirmed by the appellate authority vide order dated 14.09.2006 as well as by the revisional authority vide order of dated 04.02.2008. The petitioner has further prayed to direct the opposite parties to reinstate him and extend all service benefits.
4. Mr. P.K. Nayak (1), learned counsel for the petitioner contended that the petitioner was appointed as a constable and due to his illness he approached the Habildar Major, who was with him, to show him sick. But he refused to do so. Accordingly, the petitioner submitted his C.L. application and went to home to take care of him. On the same day, i.e. on 06.05.2000 at the afternoon, he was admitted to the Tushra P.H.C, Bolangir and was under treatment of the Medical Officer till 28.05.2000. As his health condition could not improve, he

was brought under treatment of Medical Officer, Jail, Bolangir on 28.05.2000, where he was under treatment up to 11.06.2000. Subsequently, he was affected by jaundice and undergone treatment before Ayurvedic Doctor till 08.02.2001. After getting cured when he submitted his joining report on 23.01.2001, the same was not accepted and a proceeding was initiated against him on the ground of misconduct, dereliction in duty, disobedience of order and willfully absent from duty with effect from 06.05.2000, without permission of authority. Accordingly, show cause notice was issued to him. In response to the show cause, the petitioner submitted his reply and having dissatisfied with the same an inquiry was conducted. The Inquiry Officer submitted a report ex-parte on 04.10.2000. Thereafter, opposite party no.4 issued a notice to the petitioner to show cause by 20.10.2001 indicting as to why the proposed punishment of dismissal from service shall not be inflicted. But it is contended that the said notice was not received by the petitioner. In any case, finally on 22.10.2001 the disciplinary authority imposed the penalty of dismissal from service. Though the petitioner had preferred an appeal, the same was rejected vide order dated 14.09.2006 ex-parte without giving opportunity of hearing to the petitioner. Against such order of confirmation of punishment in the appeal, the petitioner preferred revision, which was also rejected vide order dated 19.02.2008.

5. Mr. Nayak, learned counsel for the petitioner contended that both the orders of appellate authority and revisional authority are an outcome of non application of mind and have been passed without giving opportunity of hearing to the petitioner, more so, the same have been passed without complying the principle of natural justice. Therefore, the petitioner has approached this Court in the present writ petition. It is further contended that the petitioner was not willfully remained absent, but because of his illness he remained absent.

Thereby, the authorities have to take into consideration whether the petitioner had remained absent willfully or not. To that extent, he has relied on the judgment of the apex Court in the case of ***Krushnakant B. Parmar vs. Union of India and another***, (2012) 3 SCC 178.

6. Mr. Balabantaray, learned Standing Counsel for the State contended that the petitioner was a habitual absentee and as such he used to remain absent frequently and, therefore, a drastic action has been taken against him by dismissing him from service, which has been made confirmed in the appeal as well as revision and, therefore, such orders do not warrant interference by this Court at this stage.

7. Having heard learned counsel for the parties and after going through the records, it appears that though the petitioner remained absent from 06.05.2000 to 08.02.2001, but the same was due to his illness and thereby, he could not attend his duty. To substantiate his contention, he has relied upon the medical reports given by the doctors under whom, he was undergoing treatment, but the same has not been taken into consideration by the authorities. On a flimsy ground, he has been proceeded with for alleged misconduct, dereliction in duty, disobedience of order and willfully absent from duty with effect from 06.05.2000 without permission of the authority. Even though inquiry was conducted, the same was done without giving any opportunity of hearing and, thereby, the disciplinary authority imposed the penalty of dismissal from service. Against that order, though an appeal was preferred, but the same was rejected ex-parte. On perusal of the appellate order, it appears that the appellate authority has also not applied its mind. The order so passed in the appeal reads as follows:-

“Perused the appeal petition, connected documents in the proceeding file and the Para-wise comments submitted by the S.P. Bolangir.

The appellant has been charged with gross misconduct, dereliction of duty, disobedience of order in that while posted to S.f. Town P.S. Bolangir he remained willfully absent from

duty fro 6.5.2000 P.M. without leave or permission from his appropriate authority in spite of receipt of the recall notice vide S.P. Bolangir VHF message No. 1556/RO, dtd. 18.5.2000 and No. 1735/RO., dtd. 3.6.2000.

It is seen from the records of the proceeding file that framing the charge, enquiry of Proceeding and final orders passed by the disciplinary authority are in conformity with the procedures laid down for conducting departmental proceeding. The proceeding enquiry has been conducted in a fair manner. All reasonable opportunities were given to the appellant of being heard. He did not avail the opportunity and did not attend the enquiry without any reason in spite of having received such notices. I don't wish to interfere in the orders of the S.P. Bolangir.

Hence, the appeal petition is rejected being devoid of any merit and also being a time barred case."

8. On a bare reading of the appellate order, it is clearly evident that the appellate authority has not given any opportunity of hearing to the petitioner and as such no reason has been assigned while confirming the order of punishment imposed by the disciplinary authority. Apart from the same, the contention of the petitioner that he has not been given opportunity of hearing at the time of inquiry, has also not been answered by the appellate authority. As a consequence thereof, the order of the appellate authority cannot sustain in the eye of law.

9. The soul of natural justice is '*fair play in action*'

In ***HK (An Infant) in re***, 1967 1 All ER 226 (DC), Lord Parker, CJ, preferred to describe natural justice as '*a duty to act fairly*'.

In ***Fairmount Investments Ltd. v. Secy of State for Environment***, 1976 2 All ER 865 (HL), Lord Russel of Killowen somewhat picturesquely described natural justice as '*a fair crack of the whip*'

In ***R. v. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ***, 1977 3 All ER 452 (DC & CA), preferred the

homely phrase ‘*common fairness*’ in defining natural justice.

10. ***A.K. Kraipak and others v. Union of India***, AIR 1970 SC 150= (1969) 2 SCC 262, is a landmark in the growth of this doctrine.

Speaking for the Constitution Bench, Hegde, J. observed thus:

“If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far reaching effect than a decision in a quasi-judicial enquiry”.

In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597 = (1978) 1 SCC 248, law has done further blooming of this concept. This decision has established beyond doubt that even in an administrative proceeding involving civil consequences doctrine of natural justice must be held to be applicable.

11. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the meaning of ‘natural justice’ came for consideration before the apex Court and the apex Court observed as follows:-

“The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, “natural justice” has been used in a way “which implies the existence of moral principles of self evident and urarguable truth”. “Natural justice” by Paul Jackson, 2nd Ed., page-1. In course of time, judges nurtured in the traditions of British jurisprudence, often invoked it in conjunction with a reference to “equity and good conscience”. Legal experts of earlier generations did not draw any distinction between “natural justice” and “natural law”.

“Natural justice” was considered as “that part of natural law which relates to the administration of justice.”

12. In **Basudeo Tiwary v Sido Kanhu University** and others (1998) 8 SCC 194, the apex Court held that natural justice is an antithesis of arbitrariness. It, therefore, follows that audi alteram partem, which is facet of natural justice is a requirement of Art.14.

13. In **Nagarjuna Construction Company Limited v. Government of Andhra Pradesh**, (2008) 16 SCC 276, the apex Court held as follows:

“The rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice. Thus, whenever a man’s rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice. It is important to note in this context the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principles of natural justice, but in that event, the validity of that rule may fall for consideration.”

14. The apex Court in **Uma Nath Panday and others v State of U.P.** and others, AIR 2009 SC 2375, held that natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

15. Natural justice, another name of which is common sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that “*fundamental*

quality of fairness which being adopted, justice not only be done but also appears to be done”.

16. Reasons being a necessary concomitant to passing an order, the appellate authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority.

17. In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87, it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken by the apex Court in ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915 and also by this Court in the cases of ***Patitapaban Pala v. Orissa Forest Development Corporation Ltd. & another***, 2017 (I) OLR 5 and in ***Banambar Parida v. Orissa Forest Development Corporation Limited***, 2017 (I) OLR 625.

18. It also appears that the petitioner, who remained absent from duty with effect from 06.05.2000 to 08.02.2001 substantiated the same with the documents of his illness, but there is no finding to that extent, whether he remained on leave willfully or not. In ***Krushnakant B. Parmar*** (supra), at paragraphs-18 and 19, it has been held as follows:-

“18. Absence from duty without any application or prior permission may amount to unauthorised absence,

but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

19. In a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct.

19. In view of the settled principles of law, as discussed above, the opposite parties were to take into consideration the fact that absence from duty without any application or prior permission may amount to unauthorized absence, but cannot always mean willful. If the petitioner was suffering from some illness, as has been stated, whether he had taken permission or remained unauthorized absence is hardly of any matter, and the fact of such illness of the petitioner should have been taken into consideration before arriving at a conclusion whether absence of the petitioner was willful or not. If it was not willful, then it cannot be construed that the petitioner had misconducted himself so as to face the disciplinary proceeding. Instead of proving that the absence of the petitioner was willful, the imposition of penalty of dismissal from service, which has been confirmed in appeal as well as in revision, cannot also sustain.

20. In that view of the matter, this Court is of the considered view that the orders passed by the appellate authority as well as revisional authority vide Annexure-10 and Annexure-12 respectively cannot sustain in the eye of law and the same are liable to quashed and hereby quashed. The matter is remitted back to the appellate authority to reconsider the same afresh by giving opportunity of hearing to the petitioner and by passing a reasoned and speaking order as

expeditiously as possible, preferably, within a period of six months from the date of communication of this order.

21. With the above observation and direction, the writ petition stands disposed of. No order to costs.

22. Issue urgent certified copy as per rules.

(Dr. B.R. Sarangi)
Judge

Arun

