

AFR

IN THE HIGH COURT OF ORISSA ATCUTTACK

WPC (OA) No.1033 OF 2008

(In the matter of a Petition under Articles 226 & 227 of the Constitution of India)

Shri Prasanna Kumar Das ***Petitioner***

-versus-

State of Orissa and others ***Opposite Parties***

Appeared in this case:

For Petitioner : Mr. Ajit Rath, Mr. R. Rath,
Mr. R. Mohanty and
Mr. D.K. Mitra

For Opposite Parties : Mr. P.C. Das,
Addl. Standing Counsel
for O.Ps.1 and 2

None appears for O.P. No.2

JUDGMENT

CORAM:
JUSTICE A. K. MOHAPATRA

DATE OF HEARING : 13.05.2022 | DATE OF JUDGMENT:30.06.2022

A.K. Mohapatra, J.

1. Initially the applicant-petitioner approached the Orissa Administrative Tribunal, Bhubaneswar Bench by filing an Original Application. On abolition of the Tribunal, the Original Application has been transferred to this Court and registered as WPC(O.A.). Since the pleadings are complete from both sides, the matter is being taken up for final hearing today.

2. Heard Mr. Ajit Rath, learned counsel for the Petitioner and Mr. P.C. Das, learned Additional Standing Counsel for the State. None appears for the OPSC-Opposite Party No.3 despite valid service of notice.

3. The brief facts of the case, in a nutshell, is that the Petitioner who is working as a Junior Engineer (Civil), Anandapur Barrage Sub-Division, Section No.III Agarpada in the district of Bhadrak under Executive Engineer, Baitarani Division, Salapada, Keonjhar, faced a departmental proceeding No.25467, dated 18.07.2002, drawn up jointly along with four others which includes three Junior Engineers and one Assistant Engineer in Class-II Gazetted rank, in connection with the work of improvement to the Soso Branch canal Road of Anandapur Barrage Project from RD.00 K.M. to 18.70 K.M. under Anandapur Barrage Sub-Division, which work was one of the works executed under the Agreement bearing No.51 F-2/97-98 and which was to commence on 20.08.1997 to be completed within a period of eleven calendar months, subsequently extended till 18.6.1999. In the said proceeding, the Petitioner was found guilty and punishment was imposed by the Department of Water Resources as per the Order of the Hon'ble Governor bearing No.396 dated 25.04.2008, directing recovery of Rs.12,57,800/- from him. The proceeding and the punishment being in violation of the provisions of the Orissa Civil Services (Classification, Control & Appeal) Rules, 1962 as well as the principles of natural justice and being arbitrary and discriminatory are under challenge in the present writ petition.

4. In filing this Petition, the Petitioner has challenged the procedure followed involving the punishment order by the Disciplinary Authority. The main thrust of the argument involving the punishment order by the Disciplinary Authority remains, when the Enquiring Officer on completion of enquiry suggests exemption of the Delinquents including the Petitioner from the charges if the Disciplinary Authority wants to differ from the view of the Enquiring Officer following the provision in the Orissa Civil Services (Classification, Control & Appeal) Amendment Rules, 2000, particularly keeping in view the Sub-Rule (10) of the Rule-15 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 before passing order of punishment, it was incumbent upon the Disciplinary Authority to first send a show cause notice along with report of the Enquiring Officer asking the Delinquent to submit his views. It is urged that even assuming that the Enquiring Officer had suggested in favour of the Delinquents and such contingency was not available and the Disciplinary Authority desired to differ from the view of the Enquiring Officer, the Disciplinary Authority was required to issue a show cause notice on punishment along with a statement of its finding taken together with brief reasons of disagreement, if any, with the findings of the Enquiring Officer stating penalty proposed to be imposed on them and calling the Delinquents to submit their response within a specific period of time.

5. Mr. Ajit Rath, learned counsel for the Petitioner while refuting the allegations made in the show-cause notice has

submitted that Petitioner as a Junior Engineer along with four Assistant Engineers and three other Junior Engineers have executed the work namely 'Improvement to the SOSO Branch Canal of Anandpur Barrage Project, RD 00 K.M. (RD for Reduced Distance) to 18.70 K.M. under AIBP (Accelerated Irrigation Benefit Programme) Assistance Scheme'. The charge is based on the inspection by S.E. Vigilance Technical Wing on dt.12.2.2000, the report of which was submitted on 23.2.2000. The allegation based on such inspection is confined to the road on the Right Embankment, which is metal road (admittedly due to paucity of funds black topping was not done). The said road work involves from RD 00 K.M. to RD 18.7 K.M. Inspection was done by S.E., Vigilance by inspecting the road condition at regular intervals with respect to 10 places from RD 00 K.M. to RD 10 K.M. by digging open the metal and the moorum surface below it. The technical Inspector Report was given on 23.2.2000 which has been annexed to the writ petition. On perusal of the said report, it is found that no deviation is noted in item wise quantity stipulated in the agreement till the 7th running bill. In fact, the total work was covered under the 7th running bill. On inspection, the S.E., Vigilance found that there is no appreciable difference between their measurements and the measurements taken by the Department. However, the S.E. Vigilance found that the top layer of metal surface is not uneven but the same is full of loose metals. For such deterioration of the top surface, the reasons given on visual assessment are as follows :-

- a) Metals used are not well graded as per specification
- b) Inadequate compaction.

He, however, gave further reason on such assessment that allowing loaded traffic over metal surface without black-topping is likely to cause damage to the top surface. He also stated that he was informed that soon after the work was finished, traffic was allowed. He further gave the reason that usually surface dressing is provided to avoid such damage to the metal surface. He further opined that damage noticed on the surface and on the road within two years is mainly due to inadequate rolling, dry and wet stage during construction operation and use of hand broken metals (not well graded). Such assumption has been denied by the present Petitioner as the opinion is based on conjecture and surmises. On the basis of such opinion, he made responsible to the JEs and AEs in charge of the aforesaid work. It is submitted that the charge is based on sole inspection report and neither the S.E. Vigilance nor any Competent Officer have been examined to prove the genuineness of the said report.

6. Further, in reply to the inquiry report, learned counsel for the Petitioner submits that the contents of such inquiry report, which finds mention in subsequent paragraphs, has taken into account the unprecedented Super Cyclone that took place on 30th and 31st October, 1999 that caused devastation to the Canal Bank and the area and water flowing on the surface of the road on the canal Bank. This has not been taken into account in the report dtd.23.02.2002. The delinquent officer gave detailed reply by

satisfactorily meeting all the charges and denying them as per Annexure-3.

7. Against such group of Engineers, the Government has appointed the Executive Engineer, Salandi Irrigation Division as Inquiring Officer and Assistant Executive Engineer, Baitarani Division, Salapada as Presenting Officer. As it reveals, the Inquiry Officer vide Annexure-6 took up the first hearing in his office on 27.02.2002 and second hearing was held on 20.01.2003, on which date, the hearing was associated with the spot visit. On the first hearing, the log book of the road roller was verified by the department and the same was called for to be produced. On the second hearing, cross-examination against the delinquent officers and verification of log book was made. The Inquiring Officer dug three patches each covering 1 sq. meter between the span RD 00 M.M. to RD 6.10 K.M. and examined the same and found that 10 to 20% of the hard granite metal layer to have been disturbed and loosened. Besides some depressions and pot hole were also developed. As per the agreement which finds mention in the written show cause statement to the charge. The grading of the metals, as per Indian Road Congress (IRC) standard is between 25 mm to 62 mm. The Inquiring Officer on digging, found that the metal used was between 25 mm to 62 mm. He found that 0.5 to 1% of the metals have skin surface. He further found that the compaction hours of rolling, as per schedule was 963 hours and the actual rolling was 1002 hours. He further found such cross-examination of the witness that during the Super Cyclone the road was submerged

in water and therefore the condition of the road deteriorated. Subsequently, heavy vehicles were running for relief and other works resulting in further deterioration of the road condition. Accordingly, the Inquiring Officer concluded that the road being submerged for three days, there being plying of the relief vehicle before the sub-base was well drained, the same may have caused such damage to the surface. With regard to the water content, there was flexibility of the pavement before stability of the road which influences the soil texture of water contents. Besides the density, frost action, shrinkage and other climatic factors influenced the road surface, i.e. such plying being done before the road surface attended the precondition of construction. He accordingly concluded that the Super Cyclone alone partly damaged the road at different places. Besides that, the plying of the heavy vehicles on such surface thereafter and final conclusion was that the damage is due to the Super Cyclone is rather the correct factor than the execution of substandard work. He accordingly recommended the exoneration/exemption of the alleged officers against whom such allegation was made.

8. After receipt of such report, the Govt. recommended exemption of charges over the charged officers without giving an iota of reason with respect to the findings of the Inquiry and by mentioning the Gravity of Charges and as such proposed recovery of an amount of Rs.12,57,800/- from each of the five officers. It is further submitted that the action of the Government surprised the present Petitioner as to how such figure could be reached and on what basis. Therefore, to issue such a show cause

is grossly arbitrary and illegal. It is also stated that in view of the amendment caused to Rule 15(1) of the OCS (C.C. & A) Rules, 1962, if the disciplinary authority proposes to proceed with the proceeding and the inquiry, a simple show cause attaching the inquiry report is to be given only after receiving the reply on such show cause, if dissatisfied, a second show cause with a proposed punishment is to be issued. Therefore, there is gross-violation of the statutory provision in issuing such a show-cause proposing punishment. It is alleged by the Petitioner that Government on receipt of inquiry report issued show-cause notice on 16.09.2006 (Annexure-8) but in the said show-cause notice there was no whisper nor any reason has been given with respect to differing from the inquiry report and directed to recover an amount of Rs.12,57,800/- from the officers. It was stated that reply was given on 15.2.2007 (Annexure-9). In the meantime, the Government forwarded a copy of the proceeding record and asked for the opinion of the OPSC with regard to the penalty amount against the five delinquent officers. Accordingly, the Government straight away proposing punishment before complying with the Rule 15(10)(1)(A) of OCS(CCA) Rules, 1962. The delinquent in his defence gave his reply on 15.2.2007 (Annexure-9). He also enclosed Page 24 of Salandi Sanskar Report (showing the terrible devastation took place in the flood arising out of the Super Cyclone over the topping of the embankment and submerging a huge area around it. Para 2.2.5 was quoted therein showing huge quantity of water flow causing devastation to overtopping the bank, thousands of villages and lakhs of people being affected and lakhs of houses being

collapsed besides causing loss of human lives. The Government vide letter dated 26.6.2007 referred the matter to OPSC for their consideration and OPSC found that the entire amount of Rs.62,89,003/- of the work improvement to the SOSO Canal (instead of the alleged fault found with respect to the improvement to the right bank canal road has been divided by the government amongst five officers including one JE who is dead suggesting recovery and on the basis of the report of the OPSC, the Govt. proposed to recover the amount of Rs.12,57,800/- from each of the delinquent officers, excluding the dead officers. In the facts and circumstances of the case, the Petitioner submits that the proceeding and the punishment based on such proceeding is vitiated and the Petitioner's prayer needs to be allowed and all service benefits needs to be given to him on the said basis.

9. In support of his contention, he relies on the judgments in the case of *Abhimanyu Giri vs. State of Odisha & Others* in *WPC(OA) No.995 of 2008, decided on 03.03.2022* and in the case of *Mukunda Dev Upadhyaya vs. State of Odisha & Ors.* in *O.A. No.1179 of 2008 decided by the Tribunal on 05.05.2018.*

10. Mr. Ajit Rath, learned counsel for the Petitioner thus challenged the impugned order for being contrary to the established principle. It is in the above background, taking this Court to Annexure-7, the enquiry report and Annexure-8, the show cause notice issued by the Disciplinary Authority, Mr. Rath, learned counsel for the Petitioner contended that there is

gross-violation of the Rules governing the field and in the circumstance, particularly for non-compliance of the provisions of the Rules, the punishment order is vitiated. With the above ground of challenge, learned counsel for the Petitioner also brings to the notice of this Court the judgment of the Odisha Administrative Tribunal, Bhubaneswar involving one of the Delinquents involved in the same enquiry referring to Paragraphs-8 to 10 of the judgment dated 5.5.2018 involving O.A. No.1179/2008 submitted that the Tribunal in disposal of similar proceeding for the reasons therein not only quashed the impugned order of the like nature but also directed the Respondents therein to draw and dispose of the retiral benefits in favour of the Applicant which was held up by the authorities on account of the impugned order within a period of three months. It is stated that there is no challenge to such order any further. It is in the above legal background, learned counsel for the Petitioner prayed this Court for setting aside the impugned order at Annexure-8 & 14 also granting similar benefit to the petitioner.

11. Per contra, Mr.P.C.Das, learned Additional Standing Counsel for the State referring to the pleadings as well as disclosures contended that keeping in view the Disciplinary Authority's disagreement with the order of the Inquiring Officer, a report was called for from the Engineer-in-Chief, Water Resources, and thus contended that the show cause notice in Annexure-8 even though nowhere disclosed the observation of the Disciplinary Authority dependent on such exercise, however

the show cause at Annexure-8 was based on such a report existing with the Disciplinary Authority and thus contended that there is no defect in the ultimate conclusion of the disciplinary proceeding, vide Annexure-14 requiring to be interfered with. Mr.Das, however, did not dispute the statutory provision under the O.C.S.(C.C. & A.) Amendment Rules, 2000 prescribing the manner of disposal of the disciplinary proceeding in such contingency. In reference to the order of the Tribunal Passed in O.A. No.1179/2008, learned counsel for the Petitioner submitted that in the said case the show cause and order of penalty since discussed in the view of the Engineer-in-Chief, it stands on a different footing. Mr.Das, learned Additional Standing Counsel in the circumstance, contended that the decision, if any, involving *Mukunda Dev Upadhyaya vrs. State of Orissa & ors.* has no relevancy to the case at hand.

12. Considering the rival contentions of the Parties and keeping in mind the grounds of challenge to the show cause notice at Annexure-8 as well as the enquiry report at Annexure-7, the Enquiring Officer finally reached the following conclusion:-

“I, therefore, conclude that as enquiry was conducted lately after Super Cyclone, the surface of the road was partly damaged in different places. The apprehension of damage due to submergence of road due to Super Cyclone’99 is rather correct than the execution of substandard work. Hence officer alleged may be exempted from the charges framed against them. This is submitted for the perusal of Govt. to decide the further action as deem fit.”

Reading the aforesaid, there should remain no doubt that the plea of the Delinquent therein that the suffering involved is an outcome of the Super Cyclone taking place in the entire area at the relevant point of time, the apprehension of damage as raised by the Delinquent was well understood in the enquiry and the Enquiring Officer thus rightly directed exemption of the Delinquent including the Petitioner from the charges framed against them. It is taking into consideration here the show cause notice at Annexure-8, this Court finds, Annexure-8 reads as follows :-

“Whereas disciplinary proceeding under Rule-15 of the O.C.S.(C.C.& A) Rules, 1962 has been initiated against the above officers for commissions and omissions made by them vide this Department Memorandum No.25467, dated 18.7.2002;

Whereas, the Executive Engineer, Salandi Canal Division, Bhadrak was appointed as Inquiring Officer to enquire into the charges leveled against the aforesaid officers vide Department of Water Resources order No.41315 dated 20.11.2002;

Whereas, the Inquiring Officer after completion of enquiry has furnished the record of enquiry to this Department vide his letter No.18, dated 27.9.2003;

Whereas, government after careful consideration of the enquiry report and gravity of the charges have proposed to recover an amount of Rs.12,57,800/- from each of the officers;

And now they are directed to submit their representations as they may wish to make against the proposed punishment of Government within a period of 15(fifteen) days from the date of receipt of this show cause notice, failing which the matter shall be decided in accordance with existing rules.”

Reading the whole show cause notice, this Court finds, even though an allegation is made that the Disciplinary Authority by issuing the show cause notice has relied on the report of the Engineer-in-Chief but there is absolutely no such disclosure with regard to issuance of show cause notice, vide Annexure-8. It is at this stage of the matter, this Court after examining Annexure-14 found that Annexure-14, the penalty order of the Disciplinary Authority, has however a disclosure of giving such punishment keeping in mind the view of the Engineer-in-Chief and on the recommendation of the O.P.S.C. This Court thus finds, the so-called view of the Engineer-in-Chief did not come into existence at least till issuing the show cause notice, vide Annexure-8. In the above background, this Court takes into account here the provision at Rules (i)(a), (b) & (c) of the Orissa Civil Service (Classification, Control and Appeal) Amendment Rules, 2000, which read as follows :-

“(i)(a) If the inquiring officer is not the disciplinary authority, the disciplinary authority shall furnish to the delinquent Government servant a copy of the report of the inquiring officer and give him notice by registered post or otherwise calling upon him to submit within a period of fifteen days such representation as he may wish to make against finding of the Inquiring Authority;

(b) On receipt of the representation referred to in Sub-clause (a) the disciplinary authority having

regard to the findings on the charges, is of the opinion that any of the penalties specified in Clauses (vi) to (ix) of Rule 13 should be imposed, he shall furnish to the delinquent Government servant a statement of its findings along with brief reasons for disagreement, if any, with the findings of the inquiring officer and give him a notice by Registered post or otherwise stating the penalty proposed to be imposed on him and calling upon him to submit within a specified time such representation as he may wish to make against the proposed penalty...

(c) On receipt of the advice from the Commission the disciplinary authority shall consider the representation, if any, made by the Government Servant and the advice given by the Commission and shall pass appropriate orders in the case."

13. Before advertng to three stages requirement needs to be undertaken by the Disciplinary Authority in the factual scenario of the matter, this Court here observes that for the clear recommendation for exemption by the Enquiring Officer, there might not be requirement of following the Clause-(i)(a) taken note of herein above but in the event the Disciplinary Authority was to differ from the view of the Enquiring Officer and proposes to impose punishment in clear disagreement with the recommendation of the Enquiring Officer compliance of Clause-(i)(b) is a must. As per the above provision, while issuing show cause notice, the Disciplinary Authority shall furnish to the Delinquent-Government Servant a statement of its finding along with the brief reasons of disagreement, if any, with the findings of the Enquiring Officer and give him a notice by Registered Post or otherwise stating the penalty proposed to impose on him

and calling upon him to submit within a specified time such representation, as he may wish to make against the proposed penalty. There is no such observation in connection with issuance of the show cause notice, vide Annexure-8. As a consequence, looking to the challenge of the Petitioner to the punishment order at Annexure-14, this Court finds, in issuing notice under Annexure-8, mandatory statutory provision have not been followed. Further, in violation of Clause-(i)(b) of the aforesaid Rules, the views of the Engineer-in-Chief which is the foundation of the punishment order, even did not form part of the show cause notice and the punishment imposed also appears to be based on extraneous material and without even involving the Petitioner through the second stage. This Court while declaring the show cause notice at Annexure-8 as bad, is also of the considered view that the foundation in issuing the punishment order at Annexure-14 is also lost and as such the order of punishment is unsustainable in law.

14. Moreover, taking into consideration the judgment of the Tribunal relied on by the learned counsel for the Petitioner and claiming parity, looking to the benefit granted by the Tribunal in similarly situated case, this Court finds, in disposal of O.A. No.1179/2008, the Tribunal, vide Paragraphs-9 & 10 has come to observe as follows :-

“9. Normally in such circumstances, the matter would have been remitted to the Disciplinary Authority to take corrective measures from the appropriate stage. But in this case since the applicant has retired since long and the matter has

been delayed, there may not be any need to further delve into the issue to avoid delay.

10. In view of the above discussion, the O.A. is allowed. The impugned order at Annexure-6 is liable to be quashed and is quashed. Accordingly, respondents are directed to draw and disburse all retiral benefits in favour of the applicant, held up on account of the impugned order, within a period of three months from the date of receipt of copy of this order. With these orders, the O.A. is disposed of.”

15. In brief, the Tribunal while interfering with the impugned order considering the fact that the Delinquent had already retired since long and there has been sufficient delay in the meanwhile, while interfering with the impugned order therein, setting aside the same directed the Competent Authority for drawing and disbursing of retiral benefits in favour of the applicant therein. The present case also involves one of such Delinquents and it also involves the same enquiry and the loss of time in the meantime. In such view of the matter, this Court finds it difficult to have a different view than the view taken by the Tribunal in the earlier case involving some of the Co-Delinquents. As a consequence, this Court while setting aside the order at Annexure-8 as well as the order at Annexure-14 further directs the Disciplinary Authority to treat the Petitioner to be continuing in service in the post he was holding at the time of initiation of disciplinary proceeding and to calculate all consequential benefits including arrear dues and release the arrear dues held up on account of the impugned order by completing the entire exercise within a period of three months keeping in view the

suffering of the Petitioner on account of laches of the Disciplinary Authority. Looking to the great loss of time in the meantime in illegally withholding the dues of the Petitioner, this Court while directing for release of the entire arrear dues also awards interest @ 5% per annum, which is also required to be calculated within the aforesaid period of three months and release the same in favour of the Petitioner.

16. The Writ Petition thus succeeds. There shall be no order as to costs.

Orissa High Court, Cuttack.
The 29th June, 2022/U.K. Sahoo, Secretary

