

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC(OAC) No.1802 of 2009

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

.....

Bansidhar Muduli

....

Petitioner

-versus-

State of Odisha & Others

....

Opposite Parties

For Petitioner : M/s.P.K.Ray, K.C.Dash &
M.K.Sahoo.

For Opp. Parties : Standing Counsel
Mr. N.K.Praharaj.

PRESENT:

THE HONBLE JUSTICE BIRAJA PRASANNA SATAPATHY

संस्थानिक न्यायो

Date of Hearing:20.04.2022 and Date of Judgment:09.05.2022

Biraja Prasanna Satapathy, J.

1. This matter is taken up through Hybrid Mode.
2. Heard Mr. P.K.Ray, learned counsel for the Petitioner and Mr. N.K. Praharaj, learned counsel for the State- Opposite Parties.
3. The Petitioner is aggrieved by the order dated 13.09.2007 passed by the Disciplinary Authority under Annexure-12, and also the order passed by the Appellate Authority on 15.12.2008 under Annexure-14.

3. It is submitted by Mr. Ray, learned counsel for the Petitioner that the Petitioner was initially placed under suspension w.e.f. 03.06.2003 vide order dated 04.06.2003. While continuing under suspension a proceeding was initiated against the Petitioner and others, vide Memorandum dated 18.01.2005 under Rules 15 & 17 of OCS (CCA) Rules, 1962.

4. It is submitted that even though the proceeding was initiated on 18.01.2005, but the charge memo was never provided to the Petitioner and the Petitioner on coming to know that such proceeding has been initiated against him moved the Deputy Secretary to Government Agriculture Department on 24.03.2006 vide Annexure-1 with a request to provide him the charge memo.

5. It is also submitted that in spite of such request made under Annexure-1, when the Petitioner was issued with the notice by the Enquiry Officer to attend the Enquiry, the Petitioner once again moved the Deputy Director of Agriculture, Koraput Branch, Jypore on 22.08.2006 under Annexure-2 with a request to provide him the charge memo and to proceed with the enquiry thereafter.

6. It is also submitted that on receipt of Annexure-2, the Petitioner was provided with the charge memo on 22.08.2006 and the said fact is also apparent in the communication of the Deputy Director of Agriculture under Annexure-3.

7. It is also submitted that on being provided with the charge memo on 22.08.2006, the Petitioner vide his letter

dated 25.08.2006 under Annexure-4 prayed for supply of the relevant documents as reflected in the charge memo in order to enable him to file the written statement of defence.

8. It is submitted that vide letter dated 7.9.2006 under Annexure-5, the said Deputy Director of Agriculture though instructed the Addl. District Agriculture Officer, Motu at Kalimela to allow the Petitioner to peruse the relevant records and to take the extract thereof on requisition, but the documents were never provided to the Petitioner.

9. It is also submitted that vide letter dated 20.11.2006 under Annexure-6, the self-same Deputy Director of Agriculture once again requested the Addl. District Agriculture Officer, Motu at Kalimela to look into the matter personally and to take expeditious step to obtain the seized records from the police station at Kalimela and to allow the Petitioner to take extract of the said records immediately. But it is submitted that in spite of all such communications issued under Annexures-5 & 6, the Petitioner was never provided with the document and accordingly he was deprived from submitting his written statement of defence as against the charge memo dated 18.01.2005.

10. It is submitted that even though non-supply of the documents on the face of Annexure-5 to 7 is apparent, but when vide order dated 21.07.2006 of the Addl. Secretary to Government Agriculture Department, the person who had initiated the charges against the Petitioner was appointed as the Enquiry Officer to inquire into the charges, the Petitioner vide letter dated 13.09.2006 under Annexure-8 moved the Government with a prayer to change the said

Enquiry Officer. But it is submitted that the Petitioner was neither provided to the document nor his prayer to change the Enquiry Officer was considered by the Opposite Party No.1. Instead of complying the provision contained under Rule-15 of OCS (CCA) Rules, 1962, the Enquiry Officer proceeded with the enquiry and submitted the enquiry report on 18.11.2006 by holding the Petitioner liable on account of all the charges and opined that the further continuance of the Petitioner in Government Service shall not be trustworthy and helpful to the Government.

11. It is submitted that on receipt of the said enquiry report, the Petitioner was issued with the first show cause on 28.11.2006 under Annexure-9 with a request to make his representation against the finding of the Enquiry Officer.

12. Mr. Ray, learned counsel for the Petitioner submitted that on receipt of Annexure-9, the Petitioner though made his representation under Annexure-10 on 12.02.2007, but in the said representation the Petitioner specifically pleaded about the non-supply of the documents basing on which the charges were framed against the Petitioner and the inability of the Petitioner in submitting his written statement of defence in absence of non-supply of those documents. But it is submitted that without considering the representation submitted under Annexure-10 to the 1st show-cause and the representation submitted by the Petitioner to the second show cause under Annexure-11, the Opposite Party No.1 passed the impugned order of punishment on 13.09.2007 under Annexure-12 by

dismissing the Petitioner from Government service with immediate effect.

13. It is further submitted that challenging the order of punishment passed under Annexure-12, the Petitioner though moved an appeal before the Hon'ble Governor of Odisha under Annexure-13, but the said Appellate Authority without proper appreciation of the grounds taken in the memo of appeal and the admitted non-compliance of the provision under Rule-15 of the OCS (CCA) Rules, 1962, upheld the order of punishment passed on 13.09.2007 under Annexure-12 by rejecting the appeal vide office order dated 15.12.2008 under Annexure-14.

14. It is accordingly submitted by Mr. Ray, learned counsel for the Petitioner that since the Petitioner at no point of time was provided with the documents basing on which the charges were framed and enquired into against the Petitioner, the impugned order of punishment passed under Annexure-12 and upholding of the same by the Appellate Authority under Annexure-14 are illegal and the same are hit by the principle of natural justice as well as non-compliance of the provision of Rule 15 of the OCS (CCA) Rules, 1962.

15. Mr. Ray, learned counsel for the Petitioner in support of his aforesaid stand also relied on the decision of the Hon'ble Apex Court reported in **2015 (8) Supreme 609**. The Hon'ble Apex Court in Para-18 and 19 of the said judgment held as follows:-

“18.The said judgment in Vitarelli's case was referred to by this Court in R.D. Shetty vs. International Airport Authority, 1979 (3) SCC 489, the relevant extract of which is quoted hereinunder:

"10.....It is a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in *Viteralli v. Saton* where the learned Judge said: 'An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.' This Court accepted the rule as valid and applicable in India in *A.S. Ahluwalia v. Punjab* and in subsequent decision given in *Sukhdev v. Bhagatram, Mathew, J.*, quoted the above-referred observations of Mr Justice Frankfurter with approval. It may be noted that this rule, though supportable also as an emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pp. 540-41 in Prof Wade's "Administrative Law", 4th Edn. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise....."

19. Further, the learned Single Judge has examined the opinion sought for from the C.V.O. by the disciplinary authority on the penalty to be imposed upon the appellant, the C.V.O. has suggested the major penalty of removal, the same is inconsistent with the norms applicable in the Bank's disciplinary proceedings. The learned Single Judge examined the action of the disciplinary authority in relation to the Branch Manager Hallydayganj Branch that facilitating the second loan to the loanee, Mr. Tapan Kumar Sangma, closely known to the said Manager, the same allegation has been treated as a minor lapse, but in the context of the appellant they have imposed major penalty, which is a clear case of discrimination. The appellant's admission with regard to writing the loan applications of Abdul Kuddus Mondal and Hasanuzzaman to enable them to avail contract finance from the Hallydayganj Branch, the contention urged on behalf of the appellant is examined and held that the said applicants had availed loans to the extent of Rs. 10,000/- and Rs. 15,000/- respectively from the Phulbari Branch of the S.B.I., projecting that minimal loss and both the loans were cleared of, assuming that the disciplinary proceedings were just and fair, learned senior counsel for the appellant argued that the minor punishment proposed by the disciplinary authority of pay reduction should have been considered reasonable in the context of the charges.

The learned Single Judge, after considering the opinion/report DEX-4, held that the enquiry officer did not base his conclusion on any incriminatory materials and in fact the report DEX-4 was totally ignored which would have established the innocence of the delinquent and further held that the enquiry officer conducted the enquiry sans furnishing the copies of crucial documents and furnishing the list of witnesses. It appears to be a case of denial of fair opportunity to the delinquent in gross violation of the procedural requirements of the Service Rules. That finding is based on factual, undisputed facts and in conformity with the law, therefore, in our opinion, the learned Single Judge has rightly held that the enquiry conducted against the appellant was unfair and the findings recorded on the charges are perverse in law. While recording such a finding the learned Single Judge has also proceeded to hold that the enquiry was found to be vitiated for the reason that the then Branch Manager Mr. Pradeep Kumar Das of Hallydayganj Branch was never examined in the enquiry and without his evidence, conclusion on culpability of the delinquent on the loans disbursed by the Branch Manager of Hallydayganj to the loanee could not have been reasonably reached by anyone, including the enquiry officer and imposing major penalty on the basis of the C.V.O. without there being any legal evidence on record, the enquiry was not properly conducted due to non-furnishing the list of witnesses and copies of the documents, therefore, the exercise of power on the basis of the C.V.O.'s opinion for removal of the appellant from service entail serious consequences. Therefore, placing reliance on K.P. Narayanan Kutty (supra), the learned Single Judge held that the action taken in accepting the C.V.O.'s view and passing order of removal is arbitrary, unreasonable and gross violation of Article 14 of the Constitution of India. Having said so, the learned Single Judge has set aside the order of removal and granted reinstatement of the appellant with 25% back wages in the absence of any proof to show that he was gainfully employed from the date of order of removal till the date of the decision rendered by the learned Single Judge and the Division Bench of the High Court, therefore, the same is contrary to the law laid down by this Court in the case of Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D. ED.) & Ors., (2013) 10 SCC 324, para 38 is quoted hereinunder:

"38. The propositions which can be culled out from the aforementioned judgments are:

- i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.
- ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.
- iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the

existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv) The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the Court or Tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in *Hindustan Tin Works Private Limited vs. Employees of Hindustan Tin Works Private Limited*, (1979) 2 SCC 80.

vii) The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal*, (2007) 2 SCC 433 that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

16. Mr. Ray also relied on the decision of this Court reported in **1985 (I) OLR 438**. In Para 8 & 9 of the said decision, this Court held as follows:-

"8. The law on this aspect is well settled. In *State of Madhya Pradesh v. Chintaman Sadshiva Vaishampayar* AIR 1961 S. C. 1623, the complaint was : firstly that Chintaman was not supplied with a copy of the application on the strength of which the preliminary enquiry was started against him and secondly, the statements of Rajab Ali and Noor Bhai were not supplied to him. The Constitution Bench of the Supreme Court observed :

"...Failure to supply the said copies to the respondent made it almost impossible for the respondent to submit the said two witnesses to an effective cross-examination; and that in substance deprived the respondent of a reasonable opportunity to meet the charge..."

On the denial of the copy of the application on the strength of which the preliminary enquiry was commenced, their Lordships observed :

"...Like the prior statements of Rajab Ali and Noor Bhai this document has been improperly characterised as secret and withheld from the respondent. If he had been given the documents which he had called for, the respondent would have been able to cross-examine the witnesses adequately, and in their absence he suffered from a handicap which in the result denied him a reasonable opportunity which is guaranteed to him under Article 311(2)."

Their Lordships then drawing attention to the observations of Vankatarama Aiyar, J. in *Union of India v. T. R. Varma*, AIR 1957 S.C. 882, observed :

"...Stating it broadly and without intending it to be exhaustive it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them."

and added "It is hardly necessary to emphasise that the right to cross-examine the witnesses who give evidence against him is a very valuable right, and if it appears that effective exercise of this right has been prevented by the enquiry officer by not giving to the officer relevant documents to which he is entitled, that inevitably would be that the enquiry had not been held in accordance with rules of natural justice..."

In the *State of Punjab v. Bhagat Ram*; AIR 1974 S. C. 2335, the Supreme Court observed that it was unjust and unfair to deny the Government servant copies of statements of witnesses examined during investigation and produced at the enquiry in support of the charges levelled against the Government servant. A synopsis did not satisfy the requirements of giving the Government servant a reasonable opportunity of showing cause against the action proposed to be taken.

Though the Government servant was given an opportunity to cross-examine the witnesses unless the statements were given to him, he would not be able to have an effective and useful cross-examination.

9. The question is so elementary that it is unnecessary to multiply authorities. What is essential is just and fair play. Failure to supply copies of the complaint petition of Giri and statements of witnesses recorded during the preliminary enquiry denied the petitioner just and fair play in action. Gross violation of the constitutional guarantee renders the decision a nullity. The order in appeal upholding a void decision and the further order on the memorial are also infected.

Mr. Sinha, the learned counsel for the petitioner, has drawn our attention to the case of Board of Trustees of the port of Bombay v. Dilip Kumar Raghavendra nath Nadkarni and others; AIR 1983 S. C. 109, and submitted that when the petitioner neither trained in law nor possessing proficiency in the art of cross-examination was faced with grave allegations in the nature of criminal charge who was to cross-examine a large number of witnesses and was pitted against the experienced and trained person like his disciplinary authority, the denial of assistance of a lawyer deprived him of adequate opportunity. Their Lordships in Bhagat Ram's case reviewed some of the earlier decisions of the Supreme Court including AIR 1972 S. C. 2178 and observed :

"... In our view we have reached a stage in our onward march to fair play in action that where in an inquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated."

Their Lordships further observed :

"... Justice must not only be done but must seem to be done is not an euphemism for Courts alone, it applies with equal vigour and rigour to all those who must be responsible for fair play in action. And a quasi-judicial tribunal cannot view the matter with equanimity on inequality of representation....."

This is one aspect while considering the request for assistance of a lawyer. Another aspect would be the nature of the enquiry, the allegations and the nature and volume of evidence. All these must be borne in mind while considering the request for assistance of a lawyer. Where the documents are voluminous, the number of witnesses is large or witnesses are experts or specialised in the line, the delinquent would be at a disadvantage. He would be overwhelmed and perplexed and would be inadequate in his attainments to cross examine an expert or specialist. Anybody and everybody cannot be a good cross examiner, then cross examination would cease to be an art. It would not be appropriate to quote Gobrial Masonary in the context :

"It is not every man, who has the ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness on the other side. He may be tongue-tied or nervous confused or wanting in intelligence. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task?"

Not all delinquents are able and clever. The ability of the delinquent having regard to the circumstances is the relevant consideration. The request of the petitioner was turned down solely on the ground that a lawyer was not to be allowed in a disciplinary proceeding. As an absolute proposition it is unsound. As we have indicated, it would depend on the fact and

circumstances of the case and whenever a request is made, the disciplinary authority is obligated to consider what should be fair play in action. Where the disciplinary authority the Superintendent of Police a person well versed in law and investigation is the enquiring authority and also acts as the presenting-cum-marshalling officer, examining the witnesses presented in support of the charges in chief and cross-examining the witnesses presented by the delinquent in defence, dental of a lawyer to the petitioner, an assistant Sub-Inspector, was unreasonable”.

This Court ultimately in the said reported decision held as follows in Para-12:-

“Having regard to the facts and circumstances and the constitutional infirmities, we are of the opinion that it would be unjust and unfair to refuse the relief. We would accordingly quash Annexure-10. With the foundation crashing, the orders passed in appeal and by the Government also fall to the ground. The writ application is accordingly allowed with costs. Hearing fee is assessed at Rs. 200/- The petitioner shall be deemed to be continuing in service uninterrupted by the order of dismissal, Annexure-10, and shall be entitled to all consequential benefits”.

17. Mr. Ray, in view of the admitted non-supply of the documents and consequential non-compliance of the provision of Rule-15 of OCS (CCA) Rules, 1962 and the decisions as cited (*supra*) prayed for interference of this Court with the impugned order of punishment passed under Annexure-12 and the upholding of the same under Annexure-14.

18. Mr. Praharaj, learned counsel for the State-Opposite Parties based his argument relying on the stand taken in the counter affidavit. But when a specific query was put to Mr. Praharaj as to whether the Petitioner at any point of time was provided with the documents basing on which the charges were framed against him, Mr. Praharaj failed to give any reply. But relying on the stand taken in the counter Mr. Praharaj submitted that because of the finding of the Enquiry Officer where the Petitioner was held liable for the charges, the Disciplinary Authority rightly proceeded

with the enquiry by following all procedure as envisaged under Rule-15 and passed the order of punishment under Annexure-12. The Appellate Authority also by concurring with the order of the Disciplinary Authority, rejected the appeal vide order under Annexure-14.

19. Mr. Praharaj accordingly prayed that no interference is called for by this Court.

20. Mr. Ray as a counter to the submission made by the learned State Counsel submitted that on receipt of the counter affidavit, the Petitioner filed a rejoinder affidavit and in the said affidavit it was once again submitted that the Petitioner was never provided with the documents and in absence of such document, the Petitioner could not file his written statement of defence. In view of such action of the Opposite Parties in not providing him the documents, the Petitioner was not only handicapped to defend himself, but also the same amounts to non-compliance of the principle of natural justice. In the reply filed by the State-Opposite Parties to the rejoinder, though it was admitted in Para-5 that some documents / records could not be provided to the Petitioner as those were in the custody of the Officer-In-charge, Kalimela Police Station. But in view of the nature of charges framed against the Petitioner and the finding of the Enquiry Officer by holding the Petitioner guilty of charges no illegality has been committed by the Disciplinary Authority in imposing the order of punishment by removing the Petitioner from his service.

21. Heard learned counsel for the Parties at length.

22. Perused the materials available on record. After going through the same, this Court finds that the Petitioner in spite of several request was never provided with the documents basing on which the charges were framed against him in the proceeding dated 18.01.2005. The non-supply of the documents to the Petitioner is also apparent on the face of the communications issued by the Opposite Parties under Annexures-5 to 7. The Enquiry Officer in his report dated 18.11.2006 also admits that the Presenting Officer could not produce the original documents seized by the Police Station, Kalimela.

23. It is also indicated in the said report that the Officer-In-Charge, Kalimela Police Station expressed his inability to provide the seized records vide his letter No.1883 dated 23.09.2006.

24. In view of such admitted irregularity on the part of the Opposite Parties in not providing the Petitioner with the documents and the decisions as cited (supra), the order of punishment passed under Annexure-12 and the upholding of the same by the Appellate Authority vide order dated 15.12.2008 under Annexure-14 cannot sustain legal scrutiny and accordingly both the orders are liable to be set aside and hereby quashed. This Court while quashing both the orders held that the Petitioner shall be deemed to be continue in service uninterruptedly and he shall be entitled to all consequential service and financial benefits.

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

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 9th of May, 2022/Subrat

