

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 20881 OF 2019

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

State of Odisha
and others

..... Petitioners

-Versus-

Karunakar Biswal
and another

..... Opp. Parties

For Petitioners : Mr. M.K. Khuntia,
Addl. Government Advocate.

For Opp. Parties : M/s. L.K. Mohanty and
B.K. Jena, Advocates
[O.P. No.1)

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HON'BLE MISS JUSTICE SAVITRI RATHO**

Date of hearing & judgment: 13.05.2022

DR. B.R. SARANGI, J. The State of Odisha and its functionaries have filed this writ petition assailing the order dated 27.02.2019 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 229 (C) of 2020, by which the orders passed by the authorities, vide

Annexures-2 and 3 to the Original Application, have been quashed and the present petitioners have been directed to take back opposite party no.1 into service by entitling him the service benefits from the date of his appointment, with the observation that he will not be entitled to any financial benefits for the period during which he had not performed any duty.

2. The factual matrix of the case, in brief, is that opposite party no.1, who was the applicant before the Orissa Administrative Tribunal, after being selected through a process of selection, was appointed as a Sepoy in 5th Battalion, Baripada vide order dated 10.02.2009. Subsequently, he was deputed to OASP 3rd Battalion, Koraput for undergoing advance training course. During the training period, he applied for 10 days C.L. w.e.f. 16.05.2013 to 25.06.2013 on the ground of his father's death. But subsequently it came to light that the reason shown in the said C.L. application, i.e., his father's death was false and accordingly he was removed from government service w.e.f. 07.06.2013, as per the

instruction of SAP Headquarters, Orissa, Cuttack, communicated on 30.05.2013 read with PMR 668-A, as per order issued by Commandant, OSAP, 5th Battalion, Baripada vide Annexure-2 to the Original Application. In the said order dated 07.06.2013, it was further alleged that earlier opposite party no.1 had availed paternity leave for 15 days from 10.09.2012 to 25.9.2012, but, instead of joining on duty on 26.9.2012, he over-stayed till 23.03.2013 on the plea of death of his grandmother. Even though such allegations were made, neither any show cause notice was issued by the disciplinary authority nor any disciplinary proceeding was initiated against him and without giving him any opportunity of being heard, he was imposed with a major penalty. Thereafter, he preferred appeal before the DG & IG of Police, which was not considered in proper perspective and the same was rejected vide order dated 07.09.2013. Therefore, challenging the order of removal from service as well as the order of rejection of his appeal, the petitioner approached the tribunal by filing O.A. No. 229 (C) of 2014 contending therein that the order of removal

from service was in clear violation of principle of natural justice and the order of rejection of his representation was also arbitrary, unreasonable, discriminatory and contrary to the settled principles of law. After due adjudication, the tribunal, vide order dated 27.02.2019, quashed the impugned orders of removal and rejection of his appeal under Annexures-2 and 3 to the Original Application and directed the present petitioners to take back opposite party no.1 into service. However, the tribunal observed that opposite party no.1 will be entitled to service benefits in accordance with the date of his appointment, but he will not be entitled to any financial benefits for the period during which he had not performed any duty on the basis of Annexures-2 and 3 to the O.A.. As such, the time limit was fixed by the tribunal to complete the entire exercise within a period of two months. This writ petition has been filed by the State functionaries, who were the opposite parties before the tribunal, alleging that the tribunal has committed error apparent on the face of the record, so as to warrant interference by this Court by quashing the impugned order.

3. Mr. M.K. Khuntia, learned Additional Government Advocate appearing for the State-petitioners, vehemently contended that the tribunal has committed gross error apparent on the face of the record granting relief in favour of opposite party no.1. According to him, on a bare reading of PMR 668-A, it would be clear that formalities required under Rule 828 are not required for removing the probationer under PMR 668. By conduct opposite party no.1 had proved himself to be unfit for appointment as Sepoy in the Battalion, which is a disciplined force. He further contended that opposite party no.1 was on probation and bound to adhere to the police ethos and discipline. More so, it is contended that Rule-14 (3) of the Method of Recruitment and Conditions of Service of Sepoys/Constables in Battalions Rules, 2011 provides that the person appointed shall be on probation for a period of two years or till successful completion of basic course of training. Opposite party no.1 had not completed basic course of training and he was on probation at the time of discharge under PMR 668.

Thereby, the tribunal has committed grave error for not taking into consideration such provision and passed the impugned order which cannot sustain in the eye of law.

4. Mr. L.K. Mohanty, learned counsel appearing for opposite party no.1 vehemently contended that opposite party no.1 was removed from service w.e.f. 07.06.2013 in terms of PMR 668-A, as he had availed the leave. But such removal from service has caused immense hardship to him. The reasons for grant of leave may be a different question altogether, but the removal having not been done in compliance to the provisions of law, he had a valid and justifiable reason to approach the tribunal. The tribunal, after due adjudication, set aside the orders of removal as well as rejection of his appeal vide Annexures-2 and 3 to the original application. Thereby, the tribunal is well justified in passing the order, which does not warrant any interference by this Court.

5. This Court heard Mr. M.K. Khuntia, learned Additional Government Advocate for the State-petitioners and Mr. L.K. Mohanty, learned counsel appearing for

opposite party no.1 by hybrid mode, and perused the records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. For just and proper adjudication of the case, PMR 668-A is quoted below:-

“Removal or reversion of officers appointed direct or promoted on probation: The following rules shall govern first appointments and on promotion of police and ministerial officers as detailed in Appendix -41.

(a) All officers shall, in the first instance, be appointed or promoted on probation, where the period of probation is not otherwise provide for the rules, it shall be period of two years in the case of executive officers and one year in the case of ministerial officers. The authority empowered to make such appointment or promotion may, at any time. During such probationary period and without the formalities laid down in Rule 828,remove an executive officer directly appointed or revert such an officer promoted who has not fulfilled the conditions of his appointment or who has shown himself unfit for such appointment or promotion. No appeal shall lie in such cases.’

There is no dispute that opposite party no.1 was granted 15 days paternity leave with effect from 10.09.2012 to 25.09.2012 as per prevailing circular. But instead of

joining, he overstayed till 22.03.2013 without any intimation. Subsequently, he joined on 23.03.2013, after a long gap of 179 days, on the plea of death of his grandmother, but did not produce any document to justify such plea. On being asked, opposite party no.1 also did not intimate about the death of his grandmother nor responded in the matter, which proves his gross indisciplined conduct. But fact remains, according to PMR 668-A, the period of unauthorized absence, after lapse of paternity leave, was treated as no pay retrospectively after his removal from service. The D.G. & I.G. of police has rightly considered the grievance of opposite party no.1 and passed a judicious order upholding the orders of the appointing authority in accordance with existing rules. Once the leave was allowed, but for some reason or other opposite party no.1 overstayed and subsequently the petitioners allowed opposite party no.1 to continue in service and no action was taken for his over-stay period at the relevant point of time. Subsequently, when he took leave on the plea of death of his grandmother, but actually such thing had

not happened, on such falsity of taking leave, he was removed from service vide order dated 07.06.2013. Such order was passed after more than four years of the leave already availed by opposite party no.1 and while passing such order, it appears that the authorities had not complied the principle of natural justice by giving opportunity of hearing to opposite party no.1. More so, such action of the authorities in removing opposite party no.1 from service is beyond the ambit and power vested on the appointing authority in terms of PMR 668-A. Consequentially, such exercise of power can be construed to be illegal one.

7. Even assuming opposite party no.1 was a probationer, does it empower the petitioners to remove him from service in terms of PMR 668-A, without taking recourse to the procedures prescribed under Article 311 of the Constitution of India or in the present case Appendix 49 of PMR? This matter has been examined by the apex Court in the cases of **Gujarat Steel Tubes Ltd. v. Mazdoor Sabha**, (1980) 2 SCC 593, **Anoop Jaiswal v.**

Gov. of India, (1984) 2 SCC 369 and **Dipti Prakash Banarjee v. Satendra Nath Bose National Centre for Basic Science**, (1999) 3 SCC 60.

8. The principles, as emerged from such judgments, are as follows:-

“(i) If a probationer is terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

(ii) The circumstances preceding or attendant on the order of termination have to be examined in each case.

(iii) If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment.

(iv) An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.

(v) If there be a full-scale departmental enquiry, charge sheet is issued, enquiry officer is appointed and then termination order is passed, it will attract the operation of Article 311 of the Constitution.

(vi) From of termination order is not conclusive/decisive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct.

(vii) It is open to the Court before which termination order is challenged to go behind the form and ascertain the true character of the order. The Court can apply the doctrine of lifting the veil.

(viii) If findings were arrived at in an enquiry as to misconduct, behind the back of officer or without a regular enquiry, the simple order of termination is to be treated as “founded”.

(ix) The factor which impelled the employer to take the action of termination is also important to determine the real nature of the action.”

9. In the light of the law laid down by the apex Court, the tribunal considered the case of opposite party no.1 and passed order by holding that opposite party no.1, who was a constable, was not within the probation period, for which the authorities could not have taken recourse to the provisions contained in PMR 668-A to remove him from the post of Sepoy. The said order was passed upon instruction of SAP Hdqrs., Odisha, Cuttack, communicated, vide letter dated 30.05.2013 read with PMR 668-A without issuing any show cause to opposite party no.1. Since opposite party No.1 had completed more than four years of service by the time the impugned order was passed, it was not open to the petitioners to take any action on opposite party no.1, other than through a departmental proceeding and the procedure prescribed in Appendix 49 of PMR. Therefore, non-adherence to the procedure as envisaged under law by conducting a

departmental proceeding or by adhering to Appendix 49 of PMR, the order of removal cannot be sustained.

10. As a consequence thereof, the tribunal is well justified in passing the order impugned by quashing the order dated 07.06.2013 removing opposite party no.1 and the order dated 07.09.2013 rejecting the appeal/representation preferred by opposite party no.1 under Annexures-2 and 3 to the Original Application, since the same were violative of the principle of natural justice and, as such, were not sustainable in the eye of law.

11. In view of the above, the writ petition merits no consideration and the same is hereby dismissed by upholding the order of the tribunal. There shall be no order as to costs.

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DR. B.R. SARANGI,
JUDGE

SAVITRI RATHO, J. I agree.

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SAVITRI RATHO,
JUDGE

Orissa High Court, Cuttack
The 13th May, 2022, Arun/GDS