

IN THE HIGH COURT OF ORISSA AT CUTTACK
WPC(OAC) No.3857 of 2017

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

.....

Rakesh Kumar Swain

....

Petitioner

-versus-

State of Odisha & Others

....

Opposite Parties

For Petitioner

:M/s. S. Mallik, Advocate

For Opp. Parties

:M/s. R.N. Mishra,
Addl. Government Advocate

PRESENT:

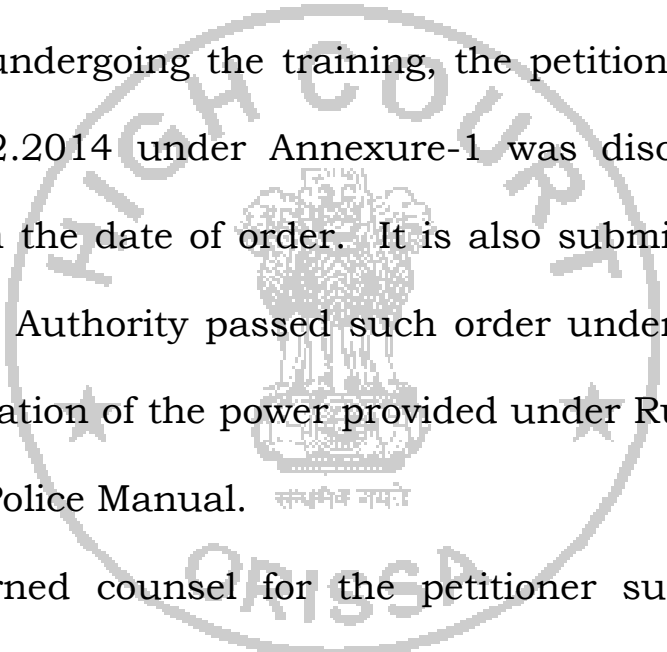
THE HONBLE JUSTICE BIRAJA PRASANNA SATAPATHY

Date of Hearing: 12.10.2022 and Date of Order: 31.10.2022

Biraja Prasanna Satapathy, J.

1. Heard Mr. Sidheswar Mallik, learned Counsel appearing for the petitioner and Mr. R.N. Mishra, learned Additional Government Advocate appearing for the State-Opp. Parties.

2. The present writ petition has been filed with a prayer to quash the order of punishment passed against the

Petitioner on 18.8.2017 under Annexure-18 and the confirmation of the same by the appellate authority vide his order dated 28.03.2018 under Annexure-20. Mr. Mallik, learned counsel appearing for the petitioner submitted that the petitioner entered into service as a Police Constable on 08.08.2012 and on such appointment, he was deputed to undergo the required training on 27.09.2013. It is submitted that while undergoing the training, the petitioner vide order dated 13.02.2014 under Annexure-1 was discharged from service from the date of order. It is also submitted that the Disciplinary Authority passed such order under Annexure-1 in contemplation of the power provided under Rule 825(C) of the Orissa Police Manual. 

3. Learned counsel for the petitioner submitted that against the order of punishment passed under Annexure-1, though the petitioner preferred an appeal, but the appellate authority when rejected the same vide his order dated 13.04.2014, the petitioner challenging both the orders approached the learned Tribunal in O.A. No.3215(C) of 2014.

4. It is submitted that learned Tribunal vide its order dated 23.09.2015 under Annexure-3 while quashing the order under Annexures-1 & 2 directed the opposite parties to

re-instate the petitioner in his service by allowing all service and financial benefits in his favour. But learned Tribunal observed that the petitioner is not entitled for any back wages for the period he was not in service. Learned Tribunal also observed that opposite parties are at liberty to proceed against the petitioner in accordance with law.

5. It is submitted that the order passed by the learned Tribunal on 23.09.2015 under Annexure-3 was challenged by the State-Opp. Parties before this Court in W.P.(C) No.17598 of 2016. It is submitted that this Court vide judgment dated 08.03.2017 while was inclined to set aside the order passed by the learned Tribunal held as follows :

“In the result, the disciplinary authority is directed to initiate fresh departmental proceeding in accordance with law and conclude the same within a period of three months from the date of receipt of a copy of the order. The continuance of the applicant-opp. party in service will dependent upon the out-come of the disciplinary proceeding.

6. Learned counsel for the petitioner submitted that even though the petitioner provided a copy of the order passed by this Court before Opp. Party No.4 by Registered Post on 25.03.2017 under Annexure-5, but the petitioner also filed Review Petition No.84 of 2017 seeking review of the order passed by this Court on 08.03.2017.

7. It is submitted that this Court vide order dated 11.05.2017 while disposing the review application held as follows.

“We, after hearing learned counsel for the parties and after perusal of the provision of law as contained in Rule 841(a) of the Orissa Police Manual, are of the opinion that since we have already directed the authority to conclude the departmental proceeding, as such the authority is directed to conclude the departmental proceeding within prescribed time and while complying the authority shall take note of the provision as contained in Rule 841(a) of the Orissa Police Manual.”

8. Learned counsel for the petitioner submitted that in terms of the order passed by this Court originally on 08.03.2017 under Annexure-4 and on 11.05.2017 under Annexure-6, a proceeding was initiated against the petitioner with service of charges vide Memorandum dated 29.05.2017 under Annexure-7. It is submitted that on receipt of the said charges, the petitioner submitted his written statement of defence on 12.06.2017 under Annexure-8. It is further submitted that after submission of the written statement of defence and on the appointment of the Enquiry Officer and Marshalling Officer vide order dated 19.06.2017 under Annexure-9, the petitioner was issued with the notice by the Enquiry Officer on 20.06.2017 under Annexure-10 to appear on the date of enquiry which is fixed to 28.06.2017.

9. It is submitted that on 28.06.2017, the prosecution examined five numbers of witnesses and the next date of enquiry was fixed to 05.07.2017.

10. It is submitted that on the next date, three more P.Ws were examined and while closing the proceeding from the side of the prosecution, the enquiry officer directed the petitioner to submit the names of his witnesses by 12.07.2017. It is submitted that since the order passed by the Enquiry Officer on 05.07.2017 was communicated to the petitioner by Registered Post and the petitioner received the same on 11.07.2017, the petitioner in terms of the said order could not submit the names of his witnesses, which was fixed to 12.07.2017. It is submitted that since the petitioner because of delayed receipt of the order dated 05.07.2017 was deprived from submitting the list of his witnesses, he moved an application before the Enquiry Officer on 14.07.2017 under Annexure-13 with a prayer to indicate as to whether in view of the order passed by this Court on 08.03.2017, the enquiry against the petitioner can continue as this Court in the said order had directed the authority to conclude the proceeding within a period of three months from the date of receipt of the order.

11. It is submitted that without considering such application as made under Annexure-13, the Enquiry Officer after conclusion of the enquiry submitted the report on 07.08.2017.

12. It is submitted that on receipt of the said enquiry report, the Disciplinary authority/Opp. Party No.4 issued the first show-cause with a request to the petitioner to submit his representation against the finding of the Enquiry Officer vide letter dated 28.07.2017 under Annexure-14.

13. Mr. Mallick, learned counsel appearing for the petitioner submitted that even though the petitioner submitted his reply to the first show-cause on 07.08.2017 by taking a specific stand that since this Court in its order dated 08.03.2017 had directed the Disciplinary Authority to conclude the proceeding within a period of three months, the petitioner vide Annexure-13 though requested the Enquiry Officer to indicate any further date of enquiry, if so permissible, but the Enquiry Officer without considering such request, as made in Annexure-13, not only proceeded with the enquiry, but also submitted the report on 08.07.2017 by holding the petitioner guilty of the charges.

14. It is submitted that without considering the said reply of the petitioner as submitted under Annexure-15, Opp.

Party No.4 issued the second show-cause by proposing the punishment of dismissal from service vide notice dated 11.08.2017 under Annexure-16. It is further submitted that the petitioner once again through submitted his reply to the said show cause under Annexure-17 taking the stand that the proceeding against the petitioner since was not completed within the time stipulated by this Court in its order dated 08.03.2017, the continuance of the same, beyond the said period, is not permissible. It is however, submitted that without considering the said reply submitted under Annexure-17, the Disciplinary Authority-Opp. Party No.4 passed the impugned order of punishment dated 18.09.2017 under Annexure-18 by dismissing the petitioner from his service w.e.f 13.02.2014.

15. It is submitted that against such order of punishment, though the petitioner preferred an appeal before Opp. Party No.3, but the said Opp. Party without proper appreciation of the grounds taken in the appeal, confirmed the order of punishment vide his order dated 28.03.2018 under Annexure-20.

16. Learned counsel for the petitioner submitted that since the Disciplinary Authority in terms of the order passed by this Court on 08.03.2017 never concluded the proceeding

within a period of three months, as directed, the continuance of the proceeding against the petitioner beyond the said period with the imposition of punishment under Annexure-18 and confirmation under Annexure-20, are illegal and liable for interference of this Court.

17. Mr. Mallik further submitted that even though basing on the order passed by this Court on 08.12.2017, a proceeding was initiated against the petitioner with service of charge memo on 29.05.2017 under Annexure-7, but the petitioner was not given due opportunity to defend himself by the Enquiry Officer as the petitioner was not allowed to examine his witnesses in terms of the order passed by the Enquiry Officer on 05.07.2017.

18. It is also submitted that since the petitioner received the order passed by the Enquiry Officer on 05.07.2017 only on 11.05.2017, he moved the application on 14.07.2017 under Annexure-13, with a request to the Enquiry Officer to intimate the further date of enquiry as the period stipulated by this Court for completion of the proceeding has already elapsed. But it is submitted that without considering the same in its proper prospective, not only the enquiry officer completed the enquiry by submitting the enquiry report, but also the Disciplinary Authority without considering the reply

submitted by the petitioner under Annexures-15 & 17 passed the order of punishment by dismissing the petitioners from his service with retrospective effect.

19. Mr. Mallik in support of his aforesaid submission relied on the decision of the Hon'ble Apex Court reported in (2009) 2 SCC 570, Roop Singh Negi Vs. Punjab National Bank Ltd. and Others. Hon'ble Apex Court in para 14 of the said judgment has held as follows :

“14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence.

Mr. Mallik also relied on another decision of the Hon'ble Apex Court reported in (2017) 2 SCC 308 Allahbad Bank Vs. Krishna Narayan Tiwari and others. Hon'ble Apex Court in Para 6 to 8 of the said judgment has held as follows.

6. *On behalf of the respondent it was on the other hand contended that the enquiry conducted against the respondent and the conclusion arrived at by the Enquiry Officer, Disciplinary Authority and the Appellate Authority suffered from fatal defects. Firstly, because the enquiry conducted by the Enquiry Officer was unfair and had resulted in gross miscarriage of justice on account of*

the failure of the Enquiry Officer to provide a reasonable opportunity to the respondent to lead evidence in his defense. In the second place the findings recorded by the Enquiry Officer and so also the Disciplinary Authority were unsupported by any evidence whatsoever and were perverse to say the least. In the third place, the orders were unsustainable also for the reason that the same did not disclose due and proper application of mind by the Disciplinary Authority and the Appellate Authority. The order passed by the Appellate Authority was, in particular, bad in law as the same did not examine the material on record independently and had simply relied upon the findings of the Disciplinary Authority without adverting to the points which the respondent had raised in support of his challenge. It was lastly submitted that the respondent has since superannuated and was a physical wreck having suffered a heart attack and a debilitating stroke which had confined him to bed. Any remand of the proceedings to the Appellate Authority to pass a fresh order or the Disciplinary Authority for re-examination and fresh determination of the respondent's guilt would not only be harsh but would tantamount to denial of justice to him. The High Court was in that view justified in taking a pragmatic view of the matter and in directing continuity of service to the respondent and release of all service and retiral benefits to him upto the date of his superannuation.

7. We have given our anxious consideration to the submissions at the bar. It is true that a writ court is very slow in interfering with the findings of facts recorded by a Departmental Authority on the basis of evidence available on record. But it is equally true that in a case where the Disciplinary Authority records a finding that is unsupported by any evidence whatsoever or a finding which no reasonable person could have arrived at, the writ court would be justified if not duty bound to examine the matter and grant relief in appropriate cases. The writ court will certainly interfere with disciplinary enquiry or the resultant orders passed by the competent authority on that basis if the enquiry itself was vitiated on account of violation of principles of natural justice, as is alleged to be the position in the present case. Non-application of mind by the Enquiry Officer or the Disciplinary Authority, non-recording of reasons in support of the conclusion arrived at by them are also grounds on which the writ courts are justified in interfering with the orders of punishment. The High Court has, in the case at hand, found all these infirmities in the order passed by the Disciplinary Authority and the Appellate Authority. The respondent's case that the enquiry was conducted without giving a fair and reasonable opportunity for leading evidence in defense has not been effectively rebutted by the appellant. More importantly the Disciplinary Authority does not appear to have properly appreciated the evidence nor recorded

reasons in support of his conclusion. To add insult to injury the Appellate Authority instead of recording its own reasons and independently appreciating the material on record, simply reproduced the findings of the Disciplinary Authority. All told the Enquiry Officer, the Disciplinary Authority and the Appellate Authority have faltered in the discharge of their duties resulting in miscarriage of justice. The High Court was in that view right in interfering with the orders passed by the Disciplinary Authority and the Appellate Authority.

8. There is no quarrel with the proposition that in cases where the High Court finds the enquiry to be deficient either procedurally or otherwise the proper course always is to remand the matter back to the concerned authority to redo the same afresh. That course could have been followed even in the present case. The matter could be remanded back to the Disciplinary Authority or to the Enquiry Officer for a proper enquiry and a fresh report and order. But that course may not have been the only course open in a given situation. There may be situations where because of a long time lag or such other supervening circumstances the writ court considers it unfair, harsh or otherwise unnecessary to direct a fresh enquiry or fresh order by the competent authority. That is precisely what the High Court has done in the case at hand.

Mr. Mallik also relied on another decision of the Hon'ble Apex Court reported in (2014) 12 SCC 106 State Bank of Patiala Vs. Ramniwas. Hon'ble Apex Court in the said judgment in Para 31 has held as follows:

31. In the case at hand, the said stage is over. The Full Bench on the earlier occasion had already rendered a verdict that the serious prejudice had been caused and, accordingly, had directed for reinstatement. The said direction, if understood and appreciated on the principles stated in *B. Karunakar (supra)*, is a direction for reinstatement for the purpose of holding a fresh enquiry from the stage of furnishing the report and no more. In the case at hand, the direction for reinstatement was stayed by this Court. The Bank proceeded to comply with the order of the High Court from the stage of reply of enquiry. The High Court by the impugned order had directed payment of back wages to the delinquent officer from the date of dismissal till passing of the appropriate order in the disciplinary proceeding/superannuation of the petitioner therein whichever is earlier. The Bank has passed an order of dismissal on 22.11.2001 with effect from 23.4.1985. The said order, as we perceive, is not in

accord with the principle laid down by the Constitution Bench decision in B. Karunakar (supra), for it has been stated there that in case of non-furnishing of an enquiry report the court can deal with it and pass as appropriate order or set aside the punishment and direct reinstatement for continuance of the departmental proceedings from that stage. In the case at hand, on the earlier round the punishment was set aside and direction for reinstatement was passed. Thus, on the face of the said order it is absolutely inexplicable and unacceptable that the Bank in 2001 can pass an order with effect from 23.4.1985 which would amount to annulment of the judgment of the earlier Full Bench. As has been held by the High Court in the impugned judgment that when on the date of non-furnishing of the enquiry report the delinquent officer was admittedly not under suspension, but was in service and, therefore, he would continue in service till he is dismissed from service in accordance with law or superannuated in conformity with the Regulations. How far the said direction is justified or not or how that should be construed, we shall deal with while addressing the other points but as far as the order of removal being made retrospectively operational, there can be no trace of doubt that it cannot be made retrospective.”

Learned counsel for the petitioner also relied on another decision of the Hon'ble Apex Court reported in (2010) 2 SCC 772 State of Uttar Pradesh Vs. Saroj Kumar Sinha. Hon'ble Apex Court in Para 27 & 28 of the said judgment has held as follows :

27. *A bare perusal of the aforesaid sub-Rule shows that when the respondent had failed to submit the explanation to the charge sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the Government servant despite notice of the date fixed failed to appear that the enquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the enquiry officer to record the statement of witnesses mentioned in the charge sheet. Since the Government servant is absent, he would clearly lose the benefit of cross examination of the witnesses. But nonetheless in order to establish the charges the department is required to produce the necessary evidence before the enquiry officer. This is so as to avoid the charge that the enquiry officer has acted as a prosecutor as well as a judge.*

28. *Enquiry officer acting in a quasi judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.*

20. Making all such submissions and relying on the decisions as cited (supra), learned counsel appearing for the petitioner submitted that since the Disciplinary proceeding was not concluded within the time stipulated by this court in its order dated 08.03.2017 and that too without giving reasonable opportunity of hearing to the petitioner during the conduct of the enquiry, the order of dismissal passed against the petitioner, that too with retrospective effect, is illegal and liable to be set aside by this Court.

21. Mr. R.N. Mishra, learned Additional Government Advocate on the other hand submitted that though this Court in its order dated 08.03.2017 directed the Disciplinary Authority to initiate a proceeding and conclude the same within a period of three months, but seeking review of the said order, the petitioner filed Review Petition No.84 of 2017 and the said review petition was disposed of only vide order dated 11.05.2017.

22. It is also submitted that after disposal of the review petition vide order dated 11.05.2017, the proceeding against the petitioner was initiated on 29.05.2017 under Annexure-7. Therefore, even if accepting the submission made by the learned counsel for the petitioner, the date of commencement of the proceeding should start from 11.05.2017 and not from 08.03.2017. Learned counsel for the State-Opp. Parties also submitted that even though vide order dated 05.07.2017, the petitioner was directed to submit the list of his witnesses by 12.07.2017, but the petitioner never availed the said benefit nor submitted his written statement as directed vide the said order. Instead the petitioner made an application under Annexure-13 by raising an objection regarding continuance of proceeding beyond period of three months w.e.f 08.03.2017. Accordingly, it is submitted that since the proceeding in terms of the order passed by this Court on 08.03.2017 and 11.05.2017 was completed with passing an order of punishment on 18.07.2017, no illegality can be found with the impugned order. It is also submitted that since the petitioner was originally discharged from his service vide order dated 13.02.2014 under Annexure-1, Opp. Party No.1 rightly passed the impugned order by holding the petitioner to have been dismissed from service w.e.f

13.02.2014 under Annexure-18. Mr. Mishra, learned Additional Government Advocate also submitted that since pursuant to the order passed by this Court on 08.03.2017 & 11.05.2017, the petitioner was given all opportunities of hearing during conduct of the enquiry, no illegality can be found with the impugned order passed under Annexure-18 and confirmed vide order under Annexure-20.

23. Heard learned counsel for the parties and perused the materials available on record.

24. This Court after going through the same finds that pursuant to the order passed by this Court on 08.03.2017 and 11.05.2017, the proceeding against the petitioner was initiated on 29.05.2017 under Annexure-7. This Court further finds that after considering the written statement of defence submitted by the petitioner under Annexure-8 series on 12.06.2017, Opp. Party No.4 appointed the Enquiry Officer as well as Marshalling Officer vide his order dated 19.06.2017 under Annexure-9 and the Enquiry Officer on the very next date issued the notice to the petitioner fixing the date of enquiry to 28.06.2017. It is also found that on the next date of enquiry conducted on 05.07.2017, the petitioner though was very much present before the Enquiry Officer, but he was issued with the said order by Registered Post by

the Enquiry Officer, which the petitioner alleged to have received on 11.07.2017.

25. Taking into account the stand taken in the writ petition, this Court also called for the file dealing with the Disciplinary Proceeding initiated against the petitioner. This Court finds from the file that the order dated 05.07.2017 was sent by Registered Post on 07.07.2017 and the application dated 14.07.2017 under Annexure-13 was received by the Enquiry Officer on 17.07.2017.

26. In view of such position available on record, this Court is of the opinion that the Enquiry Officer after receipt of Annexure-13 should have intimated the petitioner about the further date of enquiry by fixing another date. But this Court finds that the enquiry officer instead of considering the said prayer as made in Annexure-13, proceeded with the enquiry by submitting the report on 07.08.2017. This Court is of the view that since the order passed by this Court on 08.03.2017 was reviewed by the petitioner himself by filing Review Petition No.84 of 2017 and the said Review petition was disposed of on 11.05.2017, the stand taken by the petitioner that the period of three months so fixed by this Court will commence from 08.05.2017 cannot be accepted. This Court finds that the Disciplinary Authority has followed

the time stipulation fixed by this Court in its order dated 08.03.2017 and 11.05.2017. However, it is found that since the petitioner received the order dated 05.07.2017 only on 11.07.2017, the petitioner was deprived from leading his evidence by submitting the list of witnesses in support of his stand as taken in Annexure-8. Therefore, taking into account the entirety of the matter and the materials available on record, this Court is of the opinion that prior to taking a lawful decision on Annexure-13, the Enquiry Officer should not have completed the enquiry by submitting the enquiry report on 07.08.2017. This Court also finds that Opp. Party No.4 as well as opp. Party No.3 also did not consider the stand taken by the petitioner in his reply under Annexurs-15 & 17 as well as memo of appeal filed under Annexure-19 regarding denial of opportunity to the petitioner to lead his evidence before the Enquiry Officer.

27. Since this Court finds that the petitioner has not been given reasonable opportunity of hearing by allowing him to examine his witnesses in terms of order dated 05.07.2017, this Court placing reliance on the decisions cited supra is inclined to quash the order of punishment passed under Annexure-18 and confirmed under Annexure-20. This Court while quashing both the orders directs Opp. Party No.4 to

start the proceeding afresh from the stage of examination of defence witnesses by the petitioner. This Court while holding so, directs the petitioner to submit his list of witnesses before the Enquiry Officer with a copy to opp. Party no.4 within a period of fifteen(15) days from the date of receipt of this order. It is further observed that on such receipt of the list of witnesses, Opp. Party No. 4 shall direct the Enquiry Officer to allow the petitioner to examine the witnesses and to proceed thereafter. This Court directs Opp. Party No.4 to take step for appointment of a fresh Enquiry Officer, if the Enquiry Officer who was appointed earlier is not available at present to complete the enquiry.

28. Be that as it may, opp. Party no.4 is directed to complete the proceeding in every respect within a period of three months from the date of receipt of the list of witnesses by the petitioner in terms of the order of this Court.

29. The Writ Petition is disposed of with the aforesaid observation and direction.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 31st of October, 2022/sangita