Damodar Meher Vs State Of Odisha & Others

Court: Orissa High Court

Date of Decision: April 5, 2022

Acts Referred: Constitution of India, 1950 â€" Article 226, 227
Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 â€" Rule 15(4), 15(5), 15(6), 15(8), 15(9A)

Hon'ble Judges: Sashikanta Mishra, J

Bench: Single Bench

Advocate: S.N. Patnaik, U. Patnaik, C. Panda, K.C. Panigrahi, S. Mohapatra, H.K. Panigrahi

Final Decision: Allowed

Judgement

Sashikanta Mishra, J

1. In the present writ application, the petitioner challenges the order of punishment imposed on him vide order dated 16.08.2017 after being found

guilty of misconduct in a departmental proceeding held against him. It is claimed that the departmental proceeding was not conducted as per rules and

against the principles of natural justice.

2. The facts of the case are that the petitioner is an officer belonging to Odisha Welfare Service-II. While he was working as Assistant District

Welfare Officer, Dhenkanal, he was promoted to the rank of O.W.S.-II Group-B and posted as District Welfare Officer, Rayagada vide notification

dated 03.08.2011. By office order dated 15.12.2011, the petitioner was transferred from Rayagada and posted as Special Officer, DKDA, Parsali but

at that time the petitioner claims to have been on official duty at Bhubaneswar to attend a meeting at SC & ST, RTI, Bhubaneswar presided by

opposite party no.1. While at Bhubaneswar, the petitioner further claims to have fallen ill and therefore applied for leave from 19.12.2011, which was

sought to be extended from time to time. In the meantime, being aggrieved by his transfer as Special Officer, DKDA, Parsali, the petitioner

approached the Odisha Administrative Tribunal in O.A. No. 4573 (C) of 2011. Initially, the learned Tribunal, vide order dated 21.12.2011 directed the

parties to maintain status quo as on that date and thereafter on 23.03.2012, learned Tribunal directed the opposite party no.1 to take immediate steps to

post the petitioner in any district as DWO or in any equivalent post in any nearby district. By a memo dated 31.07.2012, the petitioner was

communicated with a set of charges in a departmental proceeding initiated against him for disobedience of Government orders and misconduct on the

allegation that though he was relieved from the office of the DWO, Rayagada w.e.f. 16.12.2011 (AN), he had not handed over the detailed charge to

his reliever nor had joined in his place of posting at Parsali nor applied for leave. It is alleged by the petitioner that the documents sought to be relied

upon as per the memo of evidence were never supplied to him. Nevertheless, he submitted his written statement of defence intimating the interim

orders passed by the learned Tribunal. Again, vide order dated 14.09.2012, he was served with additional charges to the effect that despite direction of

the learned Tribunal in its order dated 23.03.2012, he had not joined in his new place of posting by remaining unauthorizedly absent from his duty from

17.12.2011. The petitioner submitted a reply to the additional charges also. The written statement of defence submitted by him not being accepted, it

was decided to hold an enquiry by appointing the Director (OBC) as enquiring officer and DWO, Rayagada as marshalling officer. It is further alleged

that the enquiring officer did not examine any witness either on behalf of the department or the delinquent and submitted his report dated 17.05.2013

by holding the petitioner guilty of the charges only on perusal of relevant records produced by the DWO, Rayagada. A copy of the enquiry report

having been served upon the petitioner, he submitted his reply. Again, vide order dated 22.07.2014, he was served with a 2nd show cause notice

indicating the proposed penalties to be imposed on him. He submitted his representation against the same on 27.08.2014. However, without

considering his reply, the opposite party no.1 passed final order on 16.08.2017, enclosed as Annexure-14 to the writ petition, by imposing the following

penalties:

(i) withholding one increment with cumulative effect and

(ii) the unauthorized period of absence be treated as leave due and admissible.

The aforementioned order imposing penalty is impugned in the present writ application.

3. A counter affidavit has been filed by opposite party no.1 disputing the averments of the writ petition. On facts, it is stated that consequent upon

joining of his substitute, Sri Santosh Kumar Mishra as DWO, Rayagada, the petitioner was relieved by the Collector, Rayagada w.e.f. 16.12.2011

(AN) and directed to handover the detailed charges to his successor immediately, but the petitioner did not sign the OGFR and rather, left the office

without obtaining permission of the higher authorities. As a result, on 17.12.2011, the office chamber of DWO, Rayagada was found locked and it was

not possible to open the office as its key was with the petitioner. Further, despite being relieved from his duty as aforesaid, the petitioner neither joined

in his new place as Special Officer, DKDA, Parsali nor applied for leave in spite of instructions issued by the Department vide letter dated 01.02.2012

along with newspaper publication vide notice dated 01.02.2012. Therefore, a disciplinary proceeding was initiated against him for disobedience of

orders of the higher authorities and for remaining absent in his place of posting unauthorizedly and causing dislocation of official work. It is further

stated that since the learned Tribunal vide order dated 23.03.2012 in O.A. No. 4573 (C) of 2011 had directed the opposite party no.1 to post the

petitioner as DWO or in any equivalent post in any nearby district, despite his unauthorized absence, he was posted as Special Officer, ITDA,

Phulbani vide office order dated 25.04.2012. However, he did not join in the said place of posting nor submitted any leave application, for which

additional charges were framed vide memorandum dated 14.09.2012. It is admitted that the enquiry report was finalized by the enquiring officer after

perusal of records produced by ADWO (Hqrs.), Rayagada on behalf of DWO, Rayagada in presence of the petitioner.

On the legal grounds urged by the petitioner, it is stated that the initiation of departmental proceeding and the final order passed in imposing penalty

was with due approval of the Government as also the Odisha Public Service Commission. It is further stated that the petitioner was given ample

opportunity to defend himself by issuing notices to him on different dates but he attended the enquiry only once. The disciplinary authority after going

through the enquiry report and the representations made by the petitioner decided to impose the punishment on him.

4. Heard Mr. S.N. Patnaik, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Addl. Standing Counsel for the State.

5. In assailing the impugned order of imposition of penalty (Annexure-14) Mr. S.N. Patnaik has made a three-fold argument: -

(i) FramingÃ, ofÃ, charges,Ã, appointmentÃ, of enquiring officer, first show cause notice and 2nd show cause notice were not issued by the

competent authority, but by the Secretary to the Department.

(ii) There were gross procedural irregularities in conduct of the enquiry causing serious prejudice to the petitioner; and

(iii) The petitionerÃ¢â‚¬â„¢s representation has not been properly considered by the enquiring officer or the opposite party no.1.

6. Elaborating his arguments, Mr. Patnaik, contends on point no.(i) as above that communication of the memorandum of charges, appointment of

enquiring officer, first show cause notice and 2nd show cause notice by the Commissioner-cum-Secretary to the Department is illegal as Government

is the competent authority to do so.

As regards point no. (ii), it is argued by Mr. Patnaik that the enquiry was conducted in a manner contrary to the provisions under Rule-15(6) of the

OCS (CCA) Rules, 1962, which mandates that the enquiring authority shall consider documentary evidence and also oral evidence as may be relevant

or material in regard to the charges and in such event, the Government servant (delinquent) shall be entitled to cross-examine the witnesses so

examined. In the case at hand, not a single witness was examined by the enquiring officer. Secondly, the memo of evidence attached to the

memorandum dated 31.07.2012 reveals that the department sought to prove all the three charges on the basis of different office orders and letters

issued by different authorities. Similarly, three additional charges were sought to be proved on the basis of some office orders and letters. Mr. Patnaik

forcefully contends that it was necessary to examine the authors of such documents so that the documents would have been formally proved and the

petitioner could have had an opportunity to cross-examine them. However, the enquiring officer simply finalized the enquiry by himself perusing the

documents. It is also argued by Mr. Patnaik that when DWO, Rayagada was appointed as the marshalling officer by the Government, the ADWO

(Hqrs), Rayagada could not have been allowed to act on his behalf.

With regard to point no.(iii), it is argued by Mr. Patnaik that as per Rule-15(9-A), the disciplinary authority is duty bound to give specific views charge-

wise on the findings of the enquiring officer. In any event, the punishment imposed on the petitioner is highly disproportionate to the charges of

misconduct proved against him.

In support of his contentions as narrated above, Mr. Patnaik has relied upon the following decisions:

Union of India and others vs. Prakash Kumar Tandon, reported in (2009) 1 SCC (L & S) 394; Roop Singh Negi vs. Punjab National Bank and

others, reported in (2009) 2 SCC 570 and Ministry of Finance and others vs. S.B. Ramesh, reported in (1998) SCC (L & S) 865.

7. On the other hand, Mr. H.K. Panigrahi, learned Addl. Standing Counsel has argued that none of the grounds raised by the petitioner to challenge

the order of punishment are valid or tenable in the eye of law. With regard to point no. (i), it is argued by Mr. Panigrahi that a reference to the DP file

would reveal that the Government order was obtained at every stage and only because such fact was not reflected in the communications made by

the Commissioner-cum-Secretary of the Department, the same cannot render the communications illegal. On point no.(ii), it is argued that though no

witness was examined to formally to prove the documents, yet the same by itself cannot vitiate the entire proceeding unless the petitioner can prove to

the satisfaction of the Court that he was seriously prejudiced thereby. According to Mr. Panigrahi, the enquiry was conducted strictly as per rules by

affording full opportunity to the delinquent to defend himself and even assuming there were some irregularities of procedure at some stage or the

other, the same by itself cannot nullify the entire proceeding unless it is proved that it had prejudiced the petitioner. Moreover, the documents

considered by the enquiring officer are all official correspondences and known to the petitioner. As regards non-recording of reasons by the

disciplinary authority for accepting the findings of the enquiring officer, it is argued by Mr. Panigrahi that detailed reasons are required to be recorded

only when the disciplinary authority decides to differ from findings of the enquiry.

In support of his contentions, Mr. Panigrahi has relied upon the decisions of the Apex Court in the case of State of Karnataka and another vs. N.

Gangaraj, reported in (2020) 3 SCC 423 and Om Prakash vs. State of Punjab & Others, reported in (2011) 14 SCC 682.

8. As regards the contentions urged under point no. (i) that the departmental proceeding was not conducted by the competent authority and so also the

order of punishment, in course of argument, considering the stand taken by the petitioner in this regard, this Court had directed the learned Addl.

Standing Counsel to produce the original departmental proceeding file relating to the petitioner. A perusal of the file clearly reveals that at every stage

of the proceeding beginning from the decision to conduct the disciplinary proceeding, communication of the charges, appointment of enquiring

officer/marshalling officer, first show cause notice, second show cause notice and the order of punishment have all been issued with due approval of

the Government, i.e., the Minister of the concerned Department. It may be noted here that perusal of the file also reveals that originally the proposed

penalty was approved by the Commissioner-cum-Secretary and forwarded to the OPSC for concurrence but vide letter dated 27.03.2015, the OPSC

sought for clarification as Government Order had not been obtained. Accordingly, the file was again processed and approval of the HonÃ¢â‚¬â„¢ble

Minister was taken and thereafter again sent to the OPSC. Thus, concurrence was received, whereupon the final order was passed in the disciplinary

proceeding. Therefore, the contention advanced by Mr. Patnaik is found to be factually incorrect and hence, not acceptable.

9. On point no.(ii), the first argument made by Mr. Patnaik is that the disciplinary authority having appointed the DWO, Rayagada as the marshalling

officer in the departmental proceeding, the ADWO (Hqrs), Rayagada could not have been permitted to represent him and the same having been done

in the instant case, vitiates the entire proceeding. To the above, Mr. Panigrahi has argued that at best this is an irregularity, which does not go to the

root of the matter and in any case, the petitioner cannot be said to have been prejudiced thereby.

10. A perusal of the enquiry report, enclosed as Annexure-10/1 to the writ petition, reveals that on 13.04.2013 the ADWO, Hqrs, Rayagada produced

the relevant records on behalf of the DWO, Rayagada, who was the marshalling officer and also filed hazira. Reference to the original DP file

produced by learned State Counsel would reveal that the Director (OBC) was appointed as the enquiring officer and DWO, Rayagada as the

marshalling officer on orders of the Government passed on 15.01.2013. Rule 15(4) of OCS (CCA) Rules, 1962 provides that on receipt of the written

statement of defence or if no such statement is received within the time specified, the disciplinary authority may itself enquire into such of the charges

as are not admitted or, if it considers it necessary so to do, appoint a board of enquiry or an enquiring officer for the purpose. Sub-Rule(5) provides

that the disciplinary authority may nominate any person to present the case in support of the charges before the enquiring authority. As already stated,

the DWO, Rayagada was nominated by the disciplinary authority to act as the marshalling officer in the enquiry. The DP file does not reveal any such

nomination being subsequently issued in favour of the ADWO, Hqrs, Rayagada to act as the marshalling officer or to produce the relevant records on

behalf of the marshalling officer. Thus, by allowing a person not authorized/nominated by the disciplinary authority to produce the relevant records on

behalf of the marshalling officer, the enquiring officer has in effect, acted in violation of the orders of the disciplinary authority. Nothing is forthcoming

from the record as to why the DWO, Rayagada did not produce the relevant records despite being nominated as the marshalling officer by the

disciplinary authority. Though it is argued by learned State counsel that this is a mere irregularity without going to the root of the matter, this Court is

of the view that the provisions under Rule-15 being enacted to lay down the procedure for imposing penalties on the delinquent Government servant,

have to be construed strictly. So if Sub-Rule (5) provides for nomination of a person to present the case in support of the charges (marshalling officer)

no other person can be allowed to perform such role. This Court is therefore constrained to hold that the procedure adopted by the enquiring officer as

narrated above is contrary to Rules.

Coming to the 2nd argument put forth under point no.(ii), it is the case of the petitioner that though several documents were mentioned in the memo of

evidence as being the basis for proving the charges, the same were not formally proved by the authors thereof. In this context, Sri Patnaik, would

argue that unless the author of the document is examined, it would not be possible for the delinquent to properly defend himself for want of opportunity

to cross-examine him. It is further submitted that had the author of the document in question been examined, the delinquent could have cross-

examined him on the contents and various aspects thereof. In response, Mr. Panigrahi submits that when the documents themselves are not disputed,

being part of the official records, the formal proof thereof was rightly dispensed with by the enquiring officer.

Reference to the enquiry report does not reveal that the enquiring officer had passed any order specifically dispensing with the examination of the

authors of the documents mentioned in the memo of evidence. Nevertheless, the documents have apparently been considered and findings given

basing thereon. The memo of evidence shows that the specific charges were sought to be proved on the basis of certain documents of Ã¢â‚¬Å“office of

the Collector RayagadaÃ¢â‚¬ and Ã¢â‚¬Å“office of the P.A., ITDA, PhulbaniÃ¢â‚¬. Therefore, either the Collector himself or anyone acquainted with the

documents in question should have been examined to formally prove them and to be cross-examined by the delinquent in relation thereto. Similarly,

either the P.A., ITDA, Phulbani himself or any other person acquainted with the documents in question should have been examined.

Mr. Patnaik has referred to Sub-Rule-(8) of Rule-15 in this context which reads as follows:

Ã¢â‚¬Å“15. Procedure for imposing penalties Ã¢â‚¬

xxÃ, Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, xx Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, xx

8. The record of enquiry shall include:

i) The charges framed against the Government servant and the statement of allegations furnished to him under sub-rule (2)

ii) His written statement of defence, if any;

iii) The oral evidence taken in the course of the inquiry;

iv) The documentary evidence considered in the course of the inquiry;

v) The orders, if any, made by the disciplinary authority and the inquiring authority in regard to the inquiry;

vi) A report setting out the findings on each charge and the reasons therefore; and

vii) The recommendations of the inquiring authority, if any, regarding the punishment to be inflicted.

Clause(ii), (v) and (vii) contain the expression Ã¢â‚¬Å“if anyÃ¢â‚¬, suggesting that the said aspects are not mandatory, but the other clauses do not contain

such expression, which suggests that the same are mandatory and have to be followed. Thus, relying on clause (iii) of sub-Rule(8) of Rule-15, it is

argued by Mr. Patnaik that oral evidence is a must in the inquiry.

Upon a reading of the provision referred to by Mr. Patnaik and the entire scheme laid under Rule-15, this Court is unable to accept the contentions

advanced by Mr. Patnaik that in all cases oral evidence has to be mandatorily adduced, rather, this Court finds it not unreasonable to hold that oral

evidence, if and when necessary, has to be adduced. For instance, if the proceeding is drawn up entirely on the basis of admitted and undisputed

documents there may not be any necessity of adducing oral evidence to prove the charge. However, in the case at hand, there is nothing on record to

suggest that the documents indicated in the memo of evidence were admitted by the petitioner. A reading of the representation submitted by the

petitioner against the findings of the enquiry officer clearly suggest that he had a plea to raise and an explanation to make with regard to the charges.

To such extent therefore, this Court is willing to accept that in the absence of the author of the documents, the petitioner was deprived of his valuable

right of cross-examination with reference to the points raised by him in his defence. It is well settled that in a domestic enquiry fairness in the

procedure is a part of the principles of natural justice as held by the apex Court in the case of State of Uttar Pradesh vs. Om Prakash Gupta, reported

in (1969) 3 SCC 775.

In the case of Roop Singh Negi (supra), relied upon by Mr. Patnaik, the apex Court held as follows:

Ã¢â‚¬Å“14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled

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.Ã¢â‚¬â€‹

Similarly, it is well-settled that suspicion or presumption cannot take the place of proof even in a domestic enquiry, as held by the apex Court in the

case of Central Bank of India Ltd. v. Prakash Chand Jain (1969) 1 SCR 735.

11. Coming to the facts of the case, it can be safely inferred that in the absence of formal proof of the documents and examination of the persons

authoring the same, the petitioner was seriously prejudiced. While this Court reminds itself that it is not sitting in appeal over the findings of the

enquiring officer, yet if the same are based on merely ipse dixit or surmises and conjectures and the inferences drawn are not supported by any

evidence, it would be justified for the writ Court to interfere. The following observations made in Roop Singh Negi (supra) are highly relevant.

Ã¢â‚¬Å“23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have

severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was

no reason as to why the order of discharge passed by the criminal court on the basis of selfsame evidence should not have been taken into consideration. The

materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The

provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the enquiry officer

was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the enquiry officer apparently

were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof.Ã¢â‚¬â€‹

12. As it appears, the enquiring officer has evidently perused the documents from the side of the department and has drawn inference basing thereon

by rejecting the written statement of defence submitted by the petitioner at the threshold by observing that he has Ã¢â‚¬Å“cunningly denied all the charges

levelled against himÃ¢â‚¬â€‹. The enquiry officer has also observed as under:

Ã¢â‚¬Å“As a responsible Government servant, Sri Meher should be duty bound and such an officer cannot deliver proper justice to the poor

and downtrodden working in the districtÃ¢â‚¬â€‹

Obviously, the enquiring officer was not alive to the specific role assigned to him, i.e., of giving his findings on each of the charges based on evidence.

Instead of confining himself to such role assigned to him, he proceeded to deliver moral diktats, as evident from a bare perusal of aforequoted

observation. Again, at another stage, the enquiring officer has observed as under:

Ã¢â‚¬Å“The written statement of Sri Meher only speaks of his illness, suffering from suffocation due to high blood pressure and gastric problem, for which he has

availed long leave. He may be referred to State Medical Board. If the Medical Board considered not fit for holding the post, he may be declared medically

unsuitable/unit.Ã¢â‚¬â€‹

The above observations are not only uncalled for but also are a clear attempt to exceed the brief entrusted to the enquiring officer. In the process, the

enquiring officer has failed to consider even the possibility of the petitioner being prevented from joining in his new place of posting because of his

ailments. Evidently, the enquiring officer was attempting to be more loyal than the King himself! Instead of giving his findings on the charges

impartially he chose to go a step ahead by offering unsolicited advice to the Government. Thus, considered as a whole, the manner of conduct of the

inquiry is a gross violation of the principles of natural justice besides being contrary to the rules as referred to hereinbefore and therefore, cannot be

sustained in the eye of law.

This Court also finds that the charges have purportedly been proved merely on perusal of the documents produced on behalf of the department. The

explanation offered by the delinquent has been summarily brushed aside. The findings of the enquiring officer appear to be mechanical apparently to

somehow hold the petitioner guilty than to render proper reasons for his findings on each of the charges.

13. The final point canvassed by Mr. Patnaik is that as per Rule-15(9-A) the disciplinary authority not being the enquiring officer has to give specific

opinion charge-wise from the findings in the enquiry report. A perusal of the original disciplinary proceeding file does not reveal anywhere that the

disciplinary authority had recorded its findings on each of the charges levelled against the petitioner. Mr. Panigrahi argued that as the disciplinary

authority did not have any reason to disagree with the findings of the enquiry officer, it was not obligatory on its part to record its any finding on each

charge.

As it appears, sub-rule (9-A) of Rule-15 was inserted on 16.10.2015. The use of word Ã¢â‚¬Å“shallÃ¢â‚¬ in the said provision clearly shows the mandatory

nature thereof. The legislature in its wisdom thought it prudent to insert such provision evidently to ensure proper application of mind and just

consideration of the facts of the case by the disciplinary authority so as to discard the possibility of mechanical acceptance of the findings of the

enquiring officer. The statutory requirement as above cannot be dispensed with more so when the same is mandatory in nature as discussed above.

14. For the forgoing reasons therefore, this Court has no hesitation in holding that the disciplinary proceeding was held in gross violation of the

principles of natural justice, and in a manner contrary to the statutory rules of procedure and the findings of guilt on each of the charges are

mechanical without any acceptable evidence being adduced in support thereof.

15. Resultantly, the inquiry report dated 17.05.2013 vide Annexure-10/1 and the order of punishment dated 16.08.2017 as at Annexure-14 are hereby

quashed.

16. The writ petition is therefore allowed. No order as to costs.

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