

ORISSA HIGH COURT: CUTTACK

WPC (OA) No. 125 of 2019

(An application under Article 226 and 227 of the Constitution of India)

Akshay Kumar Nayak Petitioner

-Versus-

State of Odisha & others Opp. Parties

Advocate(s) appeared in this case:-

For Petitioner : M/s. K.K. Swain, P.N. Mohanty, U. Chhotray, and P.K. Mohapatra, Advocates

For Opp. Parties : Mr. R.N. Acharya, Standing Counsel for S & ME Department.

CORAM

JUSTICE SASHIKANTA MISHRA

ORDER
17th March, 2022

SASHIKANTA MISHRA, J. The petitioner has filed the present writ petition seeking the following relief:

“Under the above circumstances, it is humbly prayed that the Original Application may be allowed and the impugned order dated 23.03.2018 passed by the

Director of Secondary Education, Odisha, Bhubaneswar and the order dated 07.06.2008 of the Inspector of Schools, Jeypore Circle, Jeypore under Annexures- 11 and 7 may be quashed/set aside and necessary direction may be made to the respondents to reinstate the applicant in his former post with all consequential benefits and thereafter he may be granted full pension and other retiral benefits within a time to be stipulated by this Hon'ble Tribunal as the applicant has already reached the age of superannuation with effect from 31.03.2016 or in the alternative, any other order/orders or direction/directions may be issued so as to give complete relief to the applicant."

2. The brief facts of the case are that the petitioner was appointed as a Classical Teacher on 18.11.1976 in Government High School, Dasamantapur, Koraput and after he joined as such on the said date he was transferred to different Government High Schools. While he was working in the Government High School Patraput in the district of Koraput, he took leave from 16.03.2002 for a period of 10 days by submitting necessary application before the Headmaster of that School and subsequently extended such leave by one month. In the meantime, the summer vacation holidays intervened, but thereafter when the petitioner wanted to resume his duties he was not allowed to do so on the ground that he was transferred to Government High School, Hatabarandi

in the district of Nabarangpur, which is at a distance of 200 kms away from Patraput. The petitioner was not formally relieved but the substituted teacher joined in his place in the month of June, 2002. He applied for advance pay and GPF and as also submitted leave application in order to enable him to join in his new place of posting. But, the petitioner was neither relieved from Patraput nor was allowed to join in his new place of posting. While he was on leave as aforesaid, he was again transferred to Government High School, Dolapur, but the said order was not communicated to him. While the matter stood thus, he received a show cause notice dated 12.08.2005 alleging that despite order of the authority he had not joined in his duties by remaining unauthorizedly absent since 23.01.2003 which is a misconduct and secondly, he had not handed over the charges of library books of Government High School, Patraput kept in a locked wooden almirah, the keys of which are with him. The petitioner was charged with misconduct, loss of Government property, disobedience of order of authority

and dereliction in performing the Government duties and was called upon to explain in writing within 30 days. The said show cause notice is annexed as Annexure-1 to the writ application. In response, the petitioner submitted a detailed explanation on 24.09.2005, annexed as Annexure-2 explaining each of the charges. However, nothing was communicated to him nor any enquiry was conducted. He submitted a representation on 11.03.2006 to the Inspector of Schools, Jeypore Circle and again on 15.11.2006. He also submitted a representation to the Director, Secondary Education, Odisha on 17.11.2007 receiving which, the Inspector of Schools, Jeypore Circle was called upon to submit a detailed report and to furnish a specific view for taking further action in the matter. However, without considering the case of the petitioner, the Inspector of Schools, Jeypore Circle vide order dated 07.06.2008 removed the petitioner from service in terms of Rule 72(1) & (2) of the Odisha Service Code.

3. The petitioner preferred an appeal before the Commissioner-cum-Secretary, School and Mass Education Department on 05.08.2008. During pendency of the appeal the petitioner approached the Odisha Administrative Tribunal in O.A. No. 2173(C) of 2014, which was disposed of vide order dated 13.04.2017 directing the opposite party no.1 to consider and dispose of the appeal of the petitioner within a period of three months. Despite such directions, the opposite party no.1 delegated the power to Director of Secondary Education Odisha to take a decision, who, vide order dated 23.03.2018 rejected the appeal on the ground that the petitioner is deemed to have resigned from his service as he remained unauthorizedly absent. The said order has been enclosed as Annexure-11 to the writ application. It is the further case of the petitioner that the action of the authorities in removing him from service is contrary to the statutory provisions, i.e., Rule 72(2) of the Odisha Service Code, which mandates that an enquiry as per OCS (CCA) Rules, 1962 should be conducted before

taking any action.

4. Counter affidavit has been filed by the District Education Officer, Koraput (opposite party no.3) disputing the averments of the writ petition. It is stated that since the petitioner continuously disobeyed the order of the higher authorities, a disciplinary proceeding was initiated by the Inspector of Schools by order dated 12.08.2005. The submission of reply to the show cause notice is however admitted in the counter. It is further stated that despite initiation of the disciplinary proceeding, the petitioner was given another opportunity to join in his duty vide letter dated 23.11.2006 enclosed as Annexure E/3 to the counter, but he did not respond and therefore, finding no other way out, he was removed from service. The petitioner's contention regarding competence of the Director, Secondary Education to hear the appeal is sought to be repelled by stating that he is the immediate higher authority of the petitioner.

5. A rejoinder has been filed to the counter affidavit

explaining the circumstances in which the petitioner could not join in his new place of posting. It is further specifically pleaded that though a disciplinary proceeding was sought to be initiated, but the same was never conducted as per the provisions of OCS (CCA) Rules, 1962 and on the contrary, he was removed from service in terms of Rule 72(2) of the Odisha Service Code. Since no disciplinary proceeding was held as per the OCS (CCA) Rules, 1962 the same amounts to clear violation of the statutory mandate under Rule 72(2) and therefore, the order of removal of the petitioner from service and the rejection of his appeal are not sustainable in the eye of law.

6. Heard Mr. K.K.Swain, learned counsel for the petitioner and Mr. R.N. Acharya, learned Standing Counsel appearing for the School and Mass Education Department.

7. Mr. Swain has made a two-fold argument, firstly, that it is not a case of unauthorized absence for

continuous period of five years since the petitioner was never relieved from his parent High School nor he was allowed to join in his new place of posting. Secondly, the action of the authority in straightway removing him from service is entirely contrary to Rule 72(1) & (2) of the Odisha Service Code, inasmuch as the same mandates that action can be taken only after following the procedure under Rule 15 of the OCS (CCA) Rules, 1962. Mr. Swain, therefore, contends that as the mandatory statutory requirement was not fulfilled, the order is rendered a nullity and therefore, deserves to be set aside. However, in the meantime, the petitioner attained the age of superannuation on 31.03.2016. It is argued by Mr. Swain that therefore, order may be passed directing the authorities to treat the entire period from his date of joining i.e., 18.11.1976 as qualifying service for the purpose of pension and other retirement benefits. In support of his contention Mr. Swain has relied upon a decision of this Court in the case of **Karunakar Behera vs. State of Orissa and others.**, reported in 2017(I) ILR-

CUT-906.

8. Per contra Mr. R.N. Acharya has contended that it is a clear case of unauthorized absence and disobedience of the orders of the higher authority by the petitioner which amounts to misconduct. Despite being granted repeated opportunities, the petitioner did not avail of the same and chose to remain absent from duties continuously for more than five years. Therefore, according to Mr. Acharya, he was rightly removed from service in view of the law laid down by the apex Court in the case of **Syndicate Bank vs. General Secretary, Syndicate Bank Staff Association and another** reported in AIR 2000 SC 2198 and the case of **Aligarh Muslim University and another vs. Mansoor Ali Khan**, reported in AIR 2000 SC 2783.

9. Having heard the rival contentions as above, this Court finds that the basic facts of the case are not seriously disputed inasmuch as the petitioner having availed leave initially for a period of ten days w.e.f.

16.03.2002, extended the same for a period of one month but thereafter did not join in his duties. It is also seen that a disciplinary proceeding was initiated against him vide order dated 12.08.2005 (Annexure-1), in response to which, the petitioner had also submitted his explanation on 24.05.2008 (Annexure-2) yet the proceeding was not taken forward to its logical conclusion by holding an enquiry in the manner prescribed under the Rules. Be that as it may, fact remains that the authorities have invoked the provision under Rule 72 (1) and (2) of the Odisha Service Code to remove the petitioner from service, which reads as follows:

'72. Removal of Government servant after remaining leave for a continuous period exceeding five years.

(1) No Government servant shall be granted leave of any kind for a continuous period exceeding five years.

(2) Where a Government servant does not resume duty after remaining on leave for a continuous period of five years, or where a government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, he shall unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962.

(Emphasis supplied)

Mr. Acharya has relied upon the decision of the apex Court in the case of **Syndicate Bank** (supra) and **Aligarh Muslim University** (supra) to contend that no enquiry is necessary in such a case as it would amount to a useless formality.

10. A reading of the aforementioned case laws reveals that in the said cases there was no Rule akin to Rule 72(2) quoted hereinabove and therefore, the ratio was laid down in general terms. However, in so far as the Odisha Service Code is concerned there is a clear cut statutory provision that even in a case of a Government Servant remaining absent from duty exceeding five years, he shall be removed from service but only after following the procedure laid down in the OCS (CCA) Rules, 1962. Law is well established that when the statute requires a thing to be done in a particular manner, the same is to be done in that manner or not at all. This salutary principle was laid down long back by the Privy Council in the case of **Nazir Ahmed v. King Emperor** reported in AIR 1936 PC 253 and thereafter followed in numerous decisions of

the apex Court and the High Courts of the country. Needless to mention, the said principle still holds good. Therefore, notwithstanding the fact that the petitioner can be *prima-facie* held guilty of disobeying the orders of the authority by remaining continuously absent for more than five years, yet he cannot simply be removed without taking recourse to the prescribed statutory process. As has already stated hereinbefore, a disciplinary proceeding was sought to be initiated against the petitioner but the same was never continued nor reached its logical end.

11. In the case of **Karunakar Behera** (supra) relied upon by Mr. Swain, this Court in a case involving similar facts to the present case, interpreted the provision under Rule -72 of the Odisha Code as also relied upon the decision of the Apex Court in the case of **Deokinandan Prasad vs. The State of Bihar**, reported in AIR 1971 SC 1409 and the decision of this Court in the case of **Kishori Dash vs. State of Orissa and others** reported in (2008) 105 CLT 309 to hold that in the absence of any proceeding under the OCS(CCA) Rules, 1962, a Primary

School Teacher even if he remains absent for more than five years, can neither be removed nor his pensionary benefits be denied.

12. This Court is in respectful agreement with the ratio laid down in **Karunakar Behera** (*supra*) and holds that the action of the authorities in removing the petitioner from service in gross violation of the provision under Rule 72(2) of the Odisha Service Code cannot be sustained in law. Consequently, the rejection of the appeal filed by the petitioner also cannot be sustained in law. It is further observed that the petitioner has attained the age of superannuation in the meantime and therefore, the question of reinstatement in service does not arise. There is also no dispute that the petitioner has not rendered any service to the Government after 16.03.2002 till the date of his superannuation i.e., 31.03.2016, after deducting the period of casual leave sanctioned in his favour. Therefore, the petitioner cannot be held entitled to any financial benefits for the said period but must notionally be held to be in employment

only for the purpose of determining the qualifying service for calculation of pension and other retiral benefits as admissible.

13. In the result, the writ petition succeeds and is therefore allowed. The impugned orders under Annexures- 8 and 11 are hereby set aside. Further, the petitioner's pension and other retiral benefits shall be calculated accordingly and necessary orders be passed to such effect within a period of two months from the date of communication of this order or on production of certified copy thereof by the petitioner, whichever is earlier.

Sd/-

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 17th March, 2021/ A.K. Rana

True Copy

Sr. Steno