A.F.R.

# ORISSA HIGH COURT: CUTTACK

**W.P.(C) No.13914 OF 2007**

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

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Jogendranath Gharai ... Petitioner

-Versus-

Chairman & Managing Director,
U.Co. Bank, Kolkata & others ... Opposite Parties

For Petitioner : M/s Rabindra Nath Prusty and C.R. Kar

For Opp. Parties : M/s. A.K.Rath, A.K.Panda and A.K.Nath

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*P R E S E N T:*

**THE HONOURABLE MR. JUSTICE A.S.NAIDU**
**AND**
**THE HONOURABLE MR. JUSTICE B.N. MAHAPATRA**

Date of Hearing – 18.12.2009 : Date of Judgment - 23.02.2010

***B.N.Mahapatra, J.*** This writ petition has been filed challenging the order dated 21.4.2007 (Annexure-9) passed by opposite party no.3-Deputy General Manager (appellate authority) whereby the order dated 13.7.2006 (Annexure-6) passed by opposite party No.4-Chief Officer (disciplinary authority) has been modified without any variation of the punishment of removal from service with superannuation benefits such as pension and/or provident fund and gratuity as were due otherwise under the Rules and Regulations prevailing at the relevant time and without disqualification for future employment.

2. Bereft of unnecessary details the facts and circumstances giving rise to the present writ application are that on 1.9.1989 the petitioner was given appointment as Peon-cum-Farash in the UCO Bank at Langaleswar Branch in the district of Balasore. Thereafter, the petitioner was given promotion to the post of Clerk from the post of Peon. While he was working as Clerk in the UCO Bank at Thakurpatna Branch in the district of Kendrapara, on 04.03.2005 a charge sheet was issued against him vide Annexure-3. In response to the said charge sheet, the petitioner submitted his reply dated 16.03.2005. Being not satisfied with the reply of the delinquent-petitioner, the disciplinary authority appointed Enquiry Officer and the Presenting Officer. The matter was enquired into by the Enquiry Officer and on completion of enquiry he submitted a report dated 17.03.2006 under Annexure-5. A copy of the enquiry report was supplied to the delinquent who filed his reply vide Annexure-7 denying all the charges except allegation No.2 which he claimed to be unintentional lapse. The disciplinary authority on the basis of said enquiry report passed the order dated 13.07.2006 inflicting punishment of removal from service as per Annexure-6. Against the said order of removal, the petitioner preferred an appeal under Annexure-8 before opposite party no.3 with a prayer to exonerate him from the charges and to reinstate him in service. The appellate authority while modifying the said order upheld the order of removal from service passed by the disciplinary authority against the petitioner. Hence, the writ application.

3. Mr R.N. Prusty, learned counsel appearing on behalf of the petitioner vehemently argued that the order of removal from service passed by the disciplinary authority and confirmed by the appellate authority is

illegal, arbitrary, mala fide and bad in the eye of law. The petitioner was given promotion to the post of Clerk from the post of Peon because of his honesty, sincerity, devotion and dedication to hard work. While working as Clerk in the UCO Bank at Thakurpatna Branch, the then Manager/Assistant Branch Manager of the said Branch entrusted more workload upon the petitioner by issuing Office Order dated 20.01.2005 vide Annexure-1. The petitioner received that order on protest and, as a token of respect to the said Office Order he went on discharging his duties allotted to him with sincerity. Both the disciplinary authority and the appellate authority have failed to appreciate the evidence in its proper perspective. The disciplinary authority as well as the appellate authority being the court of facts should have examined the evidence / records / documents relied upon by the petitioner. The reply / submission / argument (Annexure-7) of the petitioner filed before the disciplinary authority in response to the enquiry report that the findings arrived at by the Enquiry Officer are illegal and arbitrary has neither been considered by the disciplinary authority nor the appellate authority. The proceedings having not been conducted fairly, lawfully and without bias, all the allegations held to have been proved against the petitioner are far from truth. The order of punishment passed by the opposite parties is based on extraneous materials, personal whim and colourable exercise of powers. Neither any customer nor any public was produced by the management as witness to prove that the petitioner was in habit of coming to the Bank in drunken state and misbehaving with public. The disciplinary authority neither lodged any complaint before the higher authority and police nor requisitioned any doctor for examination of the petitioner to prove his intoxication. The

allegation that on 26.1.2005 the petitioner came to the Bank in a drunken state and misbehaved with Mr. B.K. Mohanty was false and frivolous. Therefore, allegation nos.1, 5 and 8 are not sustainable. Allegation nos.2 and 3 are not at all true since the petitioner was a sincere and hard working employee. The signatories of the complaint, on the basis of which allegation nos.4 and 6 were made, having denied of making any such complaint by way of filing an affidavit, the said allegations should not have been used against the petitioner. Since the petitioner did not become a party to the illegality and irregularity committed by M.W. 2 in the matter of extending irregular loan facilities to the loanees by taking bribe, he has been subjected to harassment and inconvenience in all spheres. Finding no other way, the petitioner had written a letter to the Chairman and Managing Director for redressal of his grievance. On receipt of the said letter, the Chairman conducted an enquiry against the then Manager, A.K. Samantray, Assistant Manager, Shri Birakishore Mohanty and Head Cashier, Shri Golak Behari Sahu by the UCO Bank Regional Vigilance Squad. The said squad found prima facie evidence against those persons. Thereafter, the Management reverted the Manager, A.K.Samantray from scale-II to scale-I, dismissed the Assistant Manager B.K. Mohanty from service and as G.B. Sahu, Head Clerk died, no action could be taken against him. Out of the five witnesses produced on behalf of the Bank, three witnesses are the prime witnesses and on the basis of their evidence all the charges are held to have been proved. Unfortunately, these three prime witnesses are G.B.Sahu, Head Clerk (M.W.1), A.K. Samantray, Manager (M.W.2), B.K. Mohanty, Asst. Manager (M.W.4) who as stated above have been punished in the meantime. The name of D.W.1-Chakradhar Pradhan who stated before the Enquiring

Officer that the petitioner had done commendable works in recovery of loans has been struck off from the enquiry register and in that place the name of one Narayan Das. D.W.1 had been taken in. This aspect has been ignored by the disciplinary authority as well as the appellate authority. In spite of making an application to the disciplinary authority under Annexure-11 dated 5.10.2005 for supply of the photo copy of certain letters/documents which were claimed to have relevance for the investigation, the same were not supplied to the petitioner. The completion of enquiry and also the disposal of appeal were not done within the stipulated time. Both the Manager and Assistant Manager hatched out a conspiracy to harm the petitioner and they could be able to do so. Learned counsel relying upon a decision of the apex Court in ***Managing Director, ECIL, Hyderabad v. Karunakar, AIR 1994 SC 1074***, submitted that the orders passed by the disciplinary authority and appellate authority vide Annexures-6 and 9 respectively should be quashed.

4. Mr A.K. Rath, learned counsel appearing on behalf of the opposite parties contended that there is no infirmity or illegality in the orders of the disciplinary authority as well as the appellate authority. Adequate hearing was given by the Enquiry Officer to the petitioner and after a vivid discussion on the materials available on record, the Enquiry Officer submitted his report on 17.3.2006 holding that all the charges framed against the petitioner have been proved. The disciplinary authority after affording opportunity of hearing to the petitioner agreed with the finding of the Enquiry Officer and by order dated 13.07.2006 inflicted punishment of removal from service with superannuation benefits. The appellate authority went through the entire proceeding, deposition of

witnesses, enquiry report and appeal memo and after affording opportunity of hearing to the petitioner concurred with the findings of the disciplinary authority except Charge no.4, but finally held that the penalty imposed on the petitioner by the disciplinary authority has to be commensurated with the gravity of the charges. Placing reliance on the decision of the apex Court in ***State of Andhra Pradesh and others v. S.Sree Rama Rao, AIR 1963 SC 1723***, and many other decisions of the apex Court, Mr. Rath contended that scanning of evidence is beyond the purview of the writ court unless the conclusion reached on such evidence is found to be perverse. It is not the duty of the High Court in exercise of its jurisdiction under Article 226 to scan the evidence and arrive at independent finding on the basis of such evidence. Relying on the decision of the apex Court in ***Union of India and others v. G. Ganayutham, AIR 1997 SC 3387***, it was submitted that unless the Court opines in its secondary role that the administrator was, on the material before him, irrational, according to Wednesbury or CCSU norms, the punishment cannot be quashed. Placing reliance on a decision of the apex Court in ***Chairman and Managing Director, United Bank and others v. P.C. Kakkar, AIR 2003 SC 1571,*** he submitted that a bank officer is required to exercise higher standard, honesty and integrity as he deals with the money of the depositors and the customers. The petitioner has not established the prejudice caused to him for non-observance of the principles of natural justice. The petitioner having participated in the enquiry without any demur or protest cannot turn round and say that the documents were not supplied to him since the result is not palatable to him. The petitioner asked for certain documents

vide letter dated 5.10.2006 under Annexure-11 at the final stage of enquiry. The enquiry was over on 27.10.2006. Thus no prejudice has been caused to the petitioner. The orders passed by the disciplinary authority and the appellate authority is commensurate with the gravity of charges. It is neither shocking nor defiant of logic and, therefore, the writ application is liable to be dismissed.

5. While the petitioner was functioning as a Clerk in the Bank at Thakurpatna Branch, as many as six charges have been levelled against the petitioner-delinquent on the basis of nine allegations.

Domestic enquiry was conducted in respect of all those charges. The petitioner all along denied the allegations on the basis of which charges were framed except allegation No.2 which he claimed to be unintentional lapse and there was no attempt on his part to cause any damage to the property of the Bank. The Enquiry Officer submitted his report holding that all the six charges are proved. However, according to the Enquiry Officer, the allegation no.7 has not been proved. The disciplinary authority agreeing with the finding of the Enquiry Officer has inflicted the penalty of removal from service. In appeal, the appellate authority although modified the order of the disciplinary authority deleting charge No.4 corresponding to allegation No.6, maintained the penalty imposed by the disciplinary authority.

6. There is no dispute that on receiving the copy of the enquiry report the petitioner filed his reply dated 30.4.2006 under Annexure-7. Perusal of Annexure-7 and the order of the disciplinary authority reveals that the delinquent challenged the findings of the Enquiry Officer in respect of each and every allegation in its reply (Annexure-7) relying on

both oral and documentary evidence, which has not been taken into consideration in its entirety by the disciplinary authority, while passing final order of punishment. No specific finding against each allegation/charge has been recorded by the disciplinary authority with reference to the reply/submission made by the petitioner on the basis of oral and documentary evidence. Reply to the enquiry report is a vital piece of material. Non-consideration of the same vitiates the proceeding. Merely saying that the reply of the delinquent and submission/argument of defence representative were considered is not enough. Giving opportunity to the delinquent to file his reply to the enquiry report is not an empty formality. A casual approach to the reply of the delinquent is not at all permissible. The right of the delinquent to receive the report of the Enquiry Officer and to avail a fair opportunity to meet, explain and controvert it and consideration of his representation by the disciplinary authority has been highlighted by the apex Court in the case of ***Managing Director, ECIL (supra).*** The apex Court in the said case held as under:-

> "The reason why the right to receive the report of the Inquiry Officer is considered an essential part of the reasonable opportunity at the fist stage and also a principle of natural justice is that the findings recorded by the Inquiry Officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the

> documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is the negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the Inquiry Officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the Inquiry Officer along with the evidence on record. In the circumstances, the findings of the Inquiry Officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the Inquiry Officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the Inquiry Officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusion. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employees should have an opportunity to reply to the Inquiry Officer's findings. The disciplinary authority is then require to consider the evidence, the report of the Inquiry Officer and the representation of the employee against it."

In the case at hand, in reply to the enquiry report, the delinquent brought to the notice of the disciplinary authority as to how the findings of the Enquiry Officer were wrong indicating the reasons therein on the basis of evidence recorded by the Enquiry Officer. Non-consideration

of the reply to the enquiry report by the disciplinary authority amounts to miscarriage of justice. The disciplinary authority having been required to pass the final order of punishment is obliged under the law to examine the case of the delinquent minutely by reading between lines with reference to the reply of the delinquent. In the instant case, neither the disciplinary authority nor the appellate authority has considered the defence taken by the delinquent in Annexure-7 and also in the appeal memo in Annexure-8 in its entirety. As it appears, the disciplinary authority has been simply influenced by the evidence of the employer and has not taken into consideration the various evidence led and submission advanced on behalf of the petitioner in respect of each and every allegation/charge. The abrupt conclusion arrived at by the opp. parties shows not only non-application of mind of the said authorities but also their casual approach in dealing with career of an employee who has served the employer for pretty long period. Therefore, the decision taken is wholly arbitrary and capricious.

7. We are conscious that scanning of evidence is beyond the purview of this Court while exercising its writ jurisdiction. There is no quarrel over the legal propositions settled by the apex Court in various decisions relied upon by Mr. Rath. But, the writ court is not precluded to interfere with the decision where the departmental authorities have conducted the proceeding against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or

by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion or on similar grounds. (See *The State of Andhra Pradesh & Ors. v. S.Sree Rama Rao, AIR 1963 SC 1723*).

8. Even though this Court while exercising its writ jurisdiction cannot re-appreciate evidence, but where the evidence and relevant materials have not been taken into consideration at all, the Court cannot shut its eyes and put its judicial seal on the orders of the disciplinary authority and the appellate authority by which the livelihood of a delinquent has been wrongly and arbitrarily taken away.

The apex Court in ***Mathura Prasad V. Union of India & Ors., (2007) 1 SCC 437***, held that when an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedures laid down under the sub-rules are required to be strictly followed. A judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in a manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact for sufficient reasons may attract the principles of judicial review.

9. In the instant case, non-consideration of the reply to the enquiry report (Annexure-7) in its entirety and in respect of all the points raised by the opp. parties amounts to non-application of mind and vitiates the entire proceeding.

10. Another glaring irregularity found in the proceeding is that on 27.7.2005, the petitioner produced the list of defence witnesses including the name of one Chakradhar Pradhan, Daftary, at Tharkurpatna Branch. On the same day, Chakradhar Pradhan was examined as D.W.1 and his name was entered in the enquiry register. According to the petitioner, D.W.1 has categorically stated that the petitioner had done a commendable job for recovery of the loan and he only recommended for grant of loan in favour of the persons from whom he recovered the overdue installments and loan amount. But, surprisingly the name of Chakradhar Pradhan (D.W. 1) has been struck off from the enquiry register and, in his place, the name of one Narayan Das has been taken as D.W.1. The Management with *mala fide* intention has ignored D.W.1. In reply to the said averments, the opposite parties in their counter submitted that the name of Chakradhar Pradhan was inadvertently omitted as D.W.1. The deposition of Chakradhar Pradhan was considered by the Enquiry Officer who in his deposition has categorically stated that the petitioner used to interfere while sanctioning and disbursing the loan. Omission of the name of Chakradhar Pradhan is a typographical error, which could not change the nature of the entire proceeding.

However, perusal of the evidence of Chakradhar Pradhan D.W.1 reveals that he has categorically stated that every day the delinquent used to come in time and after completing his daily work, he was invariably leaving office at 6/7 P.M. He does not have any knowledge whether the delinquent had ever taken alcohol. The delinquent recommended for grant loan in respect of the persons from whom he could recover the loan. He did not usually recommend any

name for advancement of loan. The evidence of DW-1 has not been taken into consideration by the opp. parties. Be that as it may, non-consideration of the evidence of witness Chakradhar Pradhan-D.W.1 by omitting his name from the list of defence witnesses, and his evidence which goes in favour of the delinquent, is a serious lapse in the disciplinary proceeding. The manner in which the disciplinary proceeding has been conduced puts a question mark about the fair trial.

Law is well settled that action of State instrumentality or public authority having public element must be just, fair and reasonable in public interest and in consonance with constitutional conscience and socio-economic justice. (See *Life Insurance Corporation of India & Anr. Vs. Consumer Education and Research Centre & Ors [1995] 5 SCC 482)*

11. In the instant case, we are not appreciating the evidence, but we are considering the effect of non-consideration of the relevant materials in a disciplinary proceeding. It is the settled law that non-consideration of relevant materials and consideration of irrelevant materials vitiate the proceeding.

The apex Court in ***State of U.P. & Ors. Vs. Renusagar Power Co. & Ors., (1988) 4 SCC 59,*** held that exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the execise of power will be regarded as manifestly erroneous.

In revision, High Court can justifiably interfere with an order where its material evidence has been overlooked either by the trial court

or the appeal court. [*See Baidyanath Das Vs. Ghana Das & Ors., 1989 (3) CRIMES 492 (Orissa)*]

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12. It is further noticed that the petitioner made an application dated 5.10.2005 under Annexure-11 to supply him the documents, which were relevant to be produced as defence exhibits to exonerate him from the charges levelled against him. According to the petitioner, the said documents were written to the higher authorities appreciating the performance of the petitioner in the matter of recovery of loan, which could show his sincerity. Non-supply of the aforesaid documents to the petitioner was illegal, arbitrary and mala fide and violative of principles of natural justice.

In reply to the said averments, opposite parties in paragraph 18 of the counter affidavit stated that so far as supply of documents is concerned, some documents as requisitioned by the petitioner were not at all relevant and not at all related to the case of the petitioner. The petitioner neither raised any objection nor protested before the Enquiry Officer nor the disciplinary authority nor the appellate authority. He having participated in the enquiry without any demur or protest cannot turn round and say that the documents were not supplied to him since the result is not palatable to him. The further contention of opp. parties is that at the final stage of enquiry the petitioner asked for certain documents vide his letter dated 5.10.2006 (Annexure-11). The enquiry was over on 27.10.2006. During enquiry in the previous occasion, the petitioner did not raise any point nor asked for any document either on 18.10.2006 and 24.10.2006 respectively.

Perusal of Annexure-11 reveals that the same was dated 5.10.2005 and was received by the opposite parties on the even date. The said annexure further contains that the Manager, Thakurpatna Branch refused to give him the same even after the instruction of the Enquiry Officer. The stand of the opposite parties that the petitioner asked for certain documents at the final stage of the enquiry, i.e., 05.10.06 is not factually correct as because the petitioner made an application under Annexure-11 on 5.10.2005 and the enquiry report is dated 8.3.2006 and order of the disciplinary authority is dated 13.7.2006. In such scenario, it cannot be said that the petitioner asked for certain documents at the final stage of enquiry as contended by the opposite parties. Further, the contention of the opposite parties that some of the documents asked for by the petitioner were not relevant nor related to the case shows that there are some documents, which were relevant and related to the case.

In this admitted position, non-supply of documents as asked for under Annexure-11 amounts to violation of natural justice, which certainly has caused prejudice to the petitioner.

13. Further, there are certain aspects which have been highlighted before us relating to departmental action taken against the prime witness, namely, A.K.Samantray, Manager, B.K. Mohanty, Asst. Manager and G.B. Sahu, Head Cashier, which according to the petitioner, throw considerable light on the weakness of departmental case. These aspects have been elaborated in the written statement, which according to the petitioner, are the subsequent events. Since those are not specifically averred in the writ petition, we are not going to

delve into those aspects. The relevancy and effect of those aspects can be considered when the matter is taken up pursuant to the present order.

14. In the above fact situation, we have no hesitation to hold that the disciplinary proceeding has not been conducted in a fair manner complying with the principles of natural justice and requirement of law. We, therefore, set aside the order of punishment (Annexure-6) and appellate order (Annexure-9) and remit the matter to the disciplinary authority to re-start the proceeding from the stage of furnishing the reply under Annexure-7. We further direct that before the proceeding restarts, the petitioner shall be reinstated in service in terms of the decision of the apex Court in ***Managing Director, ECIL (supra)*** and supplied with the documents as required by him under Annexure-11. The petitioner shall be afforded an opportunity to furnish his further reply, if any. While passing final order, the disciplinary authority is directed to consider the reply of the petitioner in detail made under Annexure-7, further reply if any, and evidence of D.W.1-Chakradhar Pradhan. The disciplinary authority shall also take into consideration the relevancy and effect of the aspects indicated in paragraph-13 above. It is made clear that we have expressed no opinion on the merits of the case. The entire exercise shall be completed within a period of six months from the date of receipt of this order.

The writ petition is disposed of accordingly.

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B.N.Mahapatra, J.

***A.S.Naidu,J.*** I agree.

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A.S.Naidu,J.

*Orissa High Court, Cuttack*
*Dated 23rd February,2010/pcp/sss/bose*