

**IN THE HIGH COURT OF JUDICATURE FOR ORISSA
AT CUTTACK**

D.B. Writ Petition (Civil) No.15510 of 2010

AFR Dolamani Bishi Petitioner

-Versus -

State of Odisha and others Opp. Parties

Advocate(s) who appeared in this case by virtual mode:-

For Petitioner	:	M/s. S. Mohanty, P.K. Harichandan, B. Biswal and Dr. B.K. Baghar, Advocates.
For Opp. Parties	:	Mr. A.R. Dash, Addl. Government Advocate

**HONOURABLE THE CHIEF JUSTICE MR. MOHAMMAD RAFIQ
AND
HONOURABLE DR. JUSTICE B.R. SARANGI**

J U D G M E N T

Date of hearing: 06.10.2020 :: Date of Judgment:09.10.2020

Per: Dr. B.R. Sarangi, J.

The petitioner, who was selected and appointed as Writer Constable, is seeking to quash the termination

orders dated 31.10.1994 at Annexure-9 and dated 31.05.1995 at Annexure-11 and the order dated 22.07.2010 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 2233(C) of 1995 in dismissing the said original application; and issue direction to the opposite parties to allow him to continue in the post with all back wages by extending financial and service benefits.

2. The factual matrix of the case, in hand, is that the petitioner, having passed H.S.C. Examination in the year 1989, registered his name in employment exchange on 01.02.1991. He joined as Writer Constable on 16.08.1993, after being duly selected by the selection committee consisting of three empowered members with S.P., Bolangir as Chairman, Principal, Police Training School, Nayagarh as a Member and D.S.P., Bolangir as the 2nd Member. The petitioner passed all the required tests of reading, writing, running, swimming, cycling etc., along with measurement of weight and height, with other 24

persons. The height of the petitioner was recorded as 168 cm, chest 81/90 and weight 65 kg. Consequently, he was allowed to join as Writer Constable in Reserve Office, Bolangir and was allotted No. RC/613. Though he was appointed as a temporary constable w.e.f. 16.08.1993, subject to verification of character and antecedent, in the scale of Rs.950-1500/- and was allotted Bolangir district brass number, he was directed to submit his joining report on 16.08.1993 and was posted to Headquarter O.R. Sl. No. 10. The appointment letter, being subject to verification of character and antecedents only, no other factors like height, weight etc. should be reopened at a subsequent stage as it was already tested and finalized by the three-member selection committee. The petitioner was deputed on 14.03.1994 for training at Hatibadi Police Training School, Sundargarh for a period of nine months. While the petitioner was continuing training for more than six months, on 19.09.1994, he was suddenly sent back by the Principal Training School Hatibadi due to alleged shortage of height by 1 cm. He returned from training and reported

his joining on 20.09.1994. At this point of time, a DO letter was issued on 31.10.1994 communicating the same to the petitioner, vide memo no. 869 dated 03.11.1994, discharging him from service w.e.f. 31.10.1994 on the basis of the message received from opposite parties no. 5 and 6. Thereafter, he submitted his grievance before the DIG of Police (Admn.), Odisha, Cuttack for condonation of his short height and to allow him to complete the training at PTS, Hatibari. The DIG of Police (Admn.), while considering his grievance petition, also personally measured the height of the petitioner and found as 167 cm, which was 1 cm less than the requisite standard. The matter was placed for consideration before the D.G. & I.G. of Police, Odisha, who decided to move the Government to condone the deficiency of 1 cm and directed to retain the applicant in service until further orders vide W.T. message dated 07.11.1994. Accordingly, he was allowed to continue in service since that date until further orders by letter dated 14.11.1994. Subsequently, in obedience to DIG of Police(Admn.) W.T. Message dated 26.05.1995, the

petitioner was discharged from service w.e.f. 31.05.1995 vide Bolangir DO No. 989 dated 31.05.1995. Challenging such action of the opposite parties, the petitioner approached the Odisha Administrative Tribunal, Cuttack Bench Cuttack by filing O.A. No. 2233(C) of 1995 seeking to quash the termination orders dated 31.10.1994 and 31.05.1995 with a prayer to reinstate him and allow to continue in service as before. But the tribunal by the order impugned dismissed such original application for the reasons mentioned therein. Hence this application.

3. Mr. S. Mohanty, learned counsel for the petitioner contended that once the petitioner found suitable in respect of the height by the selection committee, the same should not have been re-measured subsequently by any authority as it has got no legal sanction. It is further contended that the order passed by the tribunal suffers from gross error of law apparent on the face of record leading to miscarriage of justice and as such, suffers from violation of principle of natural justice,

and the finding as has been arrived at is perverse and based on no admissible materials resulting in manifest injuries to the petitioner i.e. termination of service, and the same has not decided the question of discrimination between the petitioner vis-à-vis similarly situated persons in condoning the height if any, and also not taken into consideration the hardship rule applicable to the petitioner. To substantiate his case, he relied upon a judgment of this Court in ***Sabyasachi Lenka v. State of Odisha***, 2019 (I) ILR-CUT-752.

4. Mr. A.R. Dash, learned Addl. Government Advocate appearing for the State opposite parties though admitted the facts but contended that while the petitioner was undergoing training he was found short of height by 0.8 cm during re-measurement by the Principal, PTA Hatibari and 1.5 cm by Principal Training College, Angul. But subsequently, the D.I.G. of Police (Admn.), when took the re-measurement, found the height of the petitioner as 167 cm, which is 1 cm less than the requisite standard,

i.e., 168 cm. Thereby, request was made to the Government to condone such shortage of height of 1 cm so that the petitioner can retain in service. But the same having not been acceded to, the petitioner was discharged from service. It is contended that since there is physical deficiency of 1 cm, the action taken by the authority is well justified and the same having been confirmed by the tribunal vide order impugned, does not call for interference by this Court.

5. This Court heard Mr. S. Mohanty, learned counsel appearing for the petitioner and Mr. A.R. Dash, learned Addl. Government Advocate appearing for State opposite parties by virtual mode. Pleadings having been exchanged, with the consent of learned counsel for the parties, the matter is being disposed of finally at the stage of admission.

6. The facts narrated above are undisputed. The discharge of the petitioner from service is only because of deficiency of height by 1 cm. The tribunal, while passing

the order impugned, has also taken into consider the said aspect and stated that since height of the petitioner on re-measurement has been found to be 167 cm and required height is 168 cm, thereby there is deficiency of 1 cm and accordingly the action taken by the authority is well justified. But the tribunal has not taken into consideration the fact that the selection has been conducted by the selection committee constituted by three members and they have examined all the candidates participated in the process of selection. The petitioner, along with others, on satisfying the requirement having been selected and appointed, pursuant to which he joined the service and undergone training, subsequent re-measurement, is not permissible in law. Needless to mention here, the petitioner was selected not only on the basis of educational qualification but also on consideration of various other criteria necessary for the post. The petitioner has also satisfied the physical test for appointment to the post of Writer Constable and submitted required documents for the said purpose. Once the selection committee by

applying its mind and taking recourse to the process of selection found the petitioner eligible and accordingly selected him and given appointment, subsequently that should not have been lightly interfered with by any authority. As such, by getting appointment and continuing in service and by undergoing training a right has been accrued in favour of the petitioner. Therefore, the same should not have been dislodged in a capricious manner by the authority concerned, as has been attempted to be done in the instant case. Meaning thereby, if the petitioner, for some reason or other, does not satisfy any of the requirements of the selection process, in that case the authority should have given opportunity of hearing to the petitioner. Rather, on the basis of the representation filed by the petitioner, the case of the petitioner was considered by the DG & IG of Police, Odisha and recommended to the Government for relaxation and the Government while passing the order has not given any opportunity of hearing to the petitioner. Thereby, there is non-compliance of principle of natural justice.

7. The soul of natural justice is *'fair play in action'*

In **HK (An Infant) in re**, 1967 1 All ER 226 (DC), Lord Parker, CJ, preferred to describe natural justice as *'a duty to act fairly'*.

In **Fairmount Investments Ltd. v. Secy of State for Environment**, 1976 2 All ER 865 (HL), Lord Russel of Killowen somewhat picturesquely described natural justice as *'a fair crack of the whip'*

In **R. v. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ**, 1977 3 All ER 452 (DC & CA), preferred the homely phrase *'common fairness'* in defining natural justice.

8. **A.K. Kraipak and others v. Union of India, AIR 1970 SC 150= (1969) 2 SCC 262**, is a landmark in the growth of this doctrine. Speaking for the Constitution Bench, Hegde, J. observed thus:

"If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates

administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far reaching effect than a decision in a quasi-judicial enquiry”.

In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597 = (1978) 1 SCC 248, law has done further blooming of this concept. This decision has established beyond doubt that even in an administrative proceeding involving civil consequences doctrine of natural justice must be held to be applicable.

9. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the meaning of ‘natural justice’ came for consideration before the apex Court and the apex Court observed as follows:-

“The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, “natural justice” has been used in a way “which implies the existence of moral principles of self evident and urarguable truth”. “Natural justice” by Paul Jackson, 2nd

Ed., page-1. In course of time, judges nurtured in the traditions of British jurisprudence, often invoked it in conjunction with a reference to “equity and good conscience”. Legal experts of earlier generations did not draw any distinction between “natural justice” and “natural law”. “Natural justice” was considered as “that part of natural law which relates to the administration of justice.”

10. In **Basudeo Tiwary v Sido Kanhu University** and others (1998) 8 SCC 194, the apex Court held that natural justice is an antithesis of arbitrariness. It, therefore, follows that audi alteram partem, which is facet of natural justice is a requirement of Art.14.

11. In **Nagarjuna Construction Company Limited v. Government of Andhra Pradesh**, (2008) 16 SCC 276, the apex Court held as follows:

“The rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice. Thus, whenever a man’s rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice. It is important to note in this context the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be

read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principles of natural justice, but in that event, the validity of that rule may fall for consideration.”

12. The apex Court in ***Uma Nath Panday and others v State of U.P.*** and others, AIR 2009 SC 2375, held that natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

13. Natural justice, another name of which is common sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that *“fundamental quality of fairness which being adopted, justice not only be done but also appears to be done”*.

14. The Government of Odisha issued instructions in the shape of “Hardship Rule”, vide notification no.

16359 dated 30.12.1955, stating that in exercise of the powers conferred by the proviso to Article 309 of the Constitution, the Governor of Odisha hereby makes the following rules:-

“When the Government of Orissa is satisfied the operation of any rule regulating the conditions of service of State Government servants or any class of such Government servants causes undue hardship in any particular case, it may dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner.”

15. When a selection committee selected the petitioner by following prescribed procedures and accordingly order of appointment was issued, any other authority cannot sit as an appellate authority over the selection made by the selection committee by following due procedure. Thereby, the authorities, while discharging the petitioner from service, have not applied their mind. More so, similar benefit has been extended to similarly situated persons by condoning the height. Thereby, the tribunal has not considered these aspects in proper perspective.

16. In **Sabyasachi Lenka** mentioned supra, similar question had come up for consideration by this Court where one of us (Dr.B.R.Sarangi,J), sitting singly, while answering issue no.(ii)-whether re-measurement of height of petitioners therein, which was made by the opposite parties, is legally permissible even after recruitment process was over, final select list was published and appointment was made, in paragraphs 14 to 17 of the judgment observed as follows:-

“14. In consonance with the rules mentioned above, the State Selection Board, Odisha Police, Cuttack, having determined the number of constables required for the Force, issued advertisement under Annexure-1 to fill up 1370 number of posts of constable by way of direct recruitment by constituting a Selection Board as per Rule-6 taking into eligibility criteria under Rule-7. As per Rule-8, the recruitment centres for constables shall be decided by the Board and the Unit Level Selection Board shall conduct the recruitment test under the direction and supervision of the Board. As per Sub-rule(4) of Rule-11 the Unit Level Selection Board shall start the recruitment process by conducting the physical measurement. Then, the candidates only qualifying the physical measurement shall proceed to the next stage, i.e. physical fitness test and thereafter the Board may

decide to further tests, i.e. written test and physical efficiency test. Rule-12 provides that physical measurement for all categories has to be done and Rule-13 provides written test. As per the decision of the Unit Level Selection Board, in the present case, after physical measurement was done, physical efficiency test, i.e., physical fitness test was conducted as per Rule-15. The petitioners, having been found suitable, were called for written test. After completion of recruitment test, the Board drawn up a composite merit list of the successful candidates of all categories and the said merit list was prepared in descending order on the basis of aggregate marks in accordance with the vacancies. The merit list so prepared by the Board was placed before the Director-General and Inspector General of Police for approval and after receiving approval it was called select list. As the petitioners' name were found place in the select list, they were issued with provisional appointment order and directed to report for training. While undergoing training, the petitioners were again called for physical measurement test, so far height is concerned, which is not permissible either under the advertisement or under the Rules mentioned above. The order impugned indicates that only after conducting physical measurement, so far height is concerned, the petitioners name have been removed from the second revised select list and eliminated from the appointment as constables in OISF. As such, there is no provision for drawing any second revised select list nor making second physical measurement, so far as height is concerned, after the select list was finalized either under the Rules, 2014 or in the advertisement under Annexure-1. Therefore, the entire action taken by the authority

under Annexures-5, 6 and 7 dated 28.04.2016 in removing the names of the petitioners from the second revised merit list and eliminating from the appointment as constables in OISF cannot sustain in the eye of law.

15. In **Rakhi Ray v. High Court of Delhi**, (2010) 2 SCC 637 : AIR 2010 SC 932, it has been held by the apex Court that the process of selection begins with the issuance of advertisement and ends with the filling up of notified vacancies.

16. In **Andhra Pradesh Public Service Commission, Hyderabad v. B. Sarat Chandra**, (1990) 2 SCC 669 the apex Court held that the process consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of success candidates for appointment.

17. The statement of the Supreme Court appears to be much wider than the true legal position because the selection process, in its accurate sense, is not initiated by the issuance of advertisement. In its true sense the process begins when the stage of evaluation of the merits of the candidates is reached. Generally, the task of selection is assigned to a selection committee. The function of such a committee is to select those amongst the eligible candidates on the basis of merit adjudged by adopting fairly laid down criteria and finally preparing a panel or select list of the successful or selected candidates.”

17. In view of such position, this Court is of the considered view that discharge/termination of the petitioner from service vide order dated 31.10.1994 at Annexure-9 and order dated 31.05.1995 at Annexure-11 and consequential confirmation made by Odisha Administrative Tribunal, Cuttack Bench, Cuttack, vide order dated 22.07.2010 passed in O.A. No.2233(C) of 1995 at Annexure-1 cannot sustain in the eye of law and the same are hereby quashed. The opposite parties are directed to reinstate the petitioner in service by condoning the height of 1 cm and allow him to resume training for left out period and continue in service as before. As the petitioner has not rendered any service during the interregnum period, viz., from the date of discharge from service, i.e., 31.10.1994 and from the date of passing of this order, as he was reverted from the training itself, this Court is not inclined to grant any financial benefits to him by applying the principle of no work no pay.

18. The writ petition is thus allowed. However, there shall be no order as to costs.

As lock-down period is continuing for COVID-19, learned counsel for the parties may utilize the soft copy of this judgment available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed vide Court's Notice No.4587 dated 25.03.2020.

(DR. B.R. SARANGI)
JUDGE

(MOHAMMAD RAFIQ)
CHIEF JUSTICE

*G.D.Samal, APS/
A.K. Rana, Sr.Steno.*