ORISSA HIGH COURT : CUTTACK

W.P.(C) No.28593 of 2022

In the matter of an Application under
Articles 226 and 227 of the Constitution of India, 1950

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Kansari Behera
Aged about 64 years
Son of Late Prahallad Behera,
resident of Village: Patrapada
P.O.: Dutipada, *Via*/P.S.: Khajuripada
District: Kandhamal. ... Petitioner.

-*VERSUS*-

1. State of Odisha,
represented through
Principal Secretary, Revenue &
Disaster Management Department
Odisha Secretariat
Unit-V, Bhubaneswar
District: Khordha.

2. Revenue Divisional Commissioner,
Southern Division
At/P.O.: Berhampur
District: Ganjam.

3. Collector & District Magistrate,
Kandhamal
At/P.O.: Phulbani
District: Kandhamal.

4. Tahasildar
Chakapad Tahasil,

At/P.O.: Chakapada
District: Kandhamal.

5. Principal Accountant General
(A & E), Odisha
AG Square, Bhubaneswar ... Opposite parties.

Counsel appeared for the parties:

For the Petitioners : M/s. Krishna Chandra Sahu,
Sudarshan Pradhan,
D.K. Mahalik,
Ajaya Kumar Samal,
Monalisa Tripathy, Advocates

For the Opposite parties : Mr. Arnav Behera,
Additional Standing Counsel

P R E S E N T:

HONOURABLE
MR. JUSTICE MURAHARI SRI RAMAN

Date of Hearing : 26.09.2024 :: Date of Judgment: 09.10.2024

JUDGMENT

Assailed in the writ petition is the Office Order No.1610-Con.VI-3/2021/BBE dated 05.04.2021 (Annexure-15) whereby and whereunder assuming jurisdiction in purported exercise of powers as if conferred by the Appellate Authority-*cum*-Revenue Divisional Commissioner (Southern Division), Berhampur, the Disciplinary Authority the Collector, Kandhamal sought to pass further orders by restricting payments during

the period from 30.09.2000 (date of suspension) to 30.09.2013 (date of reinstatement).

1.1. The petitioner craving to invoke extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India made the following prayer(s):

"In view of the facts and submissions mentioned above the petitioner prays for the following relief(s);

(i) The Hon'ble Court be pleased to admit and allow the writ petition.

(ii) The Hon'ble Court be pleased to quash/modify the impugned Order dated 05.04.2021 under Annexure-15 so far as relating to treatment of the periods of suspension from 30.09.2000 to 30.09.2013 in respect of the petitioner as abandoned and further consequential fixation of pay on notional basis by declaring the same as illegal and unjustified one.

(iii) The Hon'ble Court be further direct the opposite party No.3 i.e. Collector, Kandhamal to treat the periods of suspension of the petitioner from 30.09.2000 to 30.09.2013 as duty so also to grant/disburse the consequential actual differential arrear financial benefits including the consequential fixation of pay as due and admissible in favour of the petitioner instead of fixing on notional basis within a time bound period for the interest of justice.

(iv) The Hon'ble Court may be pleased to pass any Order(s)/direction(s) as deems fit and proper for the interest of justice.

And for this act of kindness, the petitioner shall as in duty bound ever pray."

Facts:

2. As adumbrated in the pleadings, the petitioner while working as Revenue Inspector under Chakapad Tahasil in the district of Kandhamal, a case bearing Berhampur Vigilance P.S. Case No.36 dated 04.11.1999 was instituted and the petitioner was placed under suspension *vide* Order dated 30.09.2000 in exercise of powers under Rule 12(2)(b) of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 ("OCS (CCA) Rules", for convenience).

2.1. After continuing for more than one year under suspension, a departmental proceeding was initiated against the petitioner *vide* Memo No.4312 dated 03.11.2000 by the Disciplinary Authority-*cum*-Collector & District Magistrate, Kandhamal.

2.2. As the allegations in the aforesaid vigilance case and the departmental proceeding were the identical, being emanating from same set of facts, the petitioner approached the learned Odisha Administrative Tribunal, Bhubaneswar by filing Original Application bearing O.A. No.1182 of 2001 wherein *vide* Order dated 14.08.2001 an interim Order was passed with a direction to the opposite parties not take any further action in the

departmental proceeding and the matter was kept pending. But while the interim Order was in force and main matter was pending adjudication, the Order of dismissal of the petitioner from service was passed *vide* Order No.3643, dated 12.09.2001 by inflicting punishment under Rule 13 of the OCS (CCA) Rules.

2.3. With the intervention of the learned Odisha Administrative Tribunal *vide* Order dated 07.12.2001, the said Original Application came to be disposed of with the following observation:

> *" Heard. The prayer in O.A. is that the imposition of penalties on the applicant be held up till the criminal case in the Court of Special Judge (Vigilance)-cum-Additional District and Sessions Judge, Berhampur, Ganjam is disposed of. By Order dated 14.08.2001 the Tribunal directed that further action on the enquiry report might wait 05.09.2001. No reply has been filed in the meantime and the said date has been extended from time to time.*
>
> *2. The prayer of the applicant had actually been allowed upto a certain time and the said time has been extended on subsequent 4 occasions. Since the prayer is simple and has almost been allowed, I now direct that the final disposal of the disciplinary proceeding shall be held up till disposal of the criminal case in the Court of the Special Judge (Vigilance)-cum-Additional District & Sessions Judge, Berhampur.*

3. *In the result, with the above direction, the O.A. is allowed."*

2.4. The criminal case being G.R. Case No.38 of 1999 (V)/ T.R. Case No.39 of 2021 (arising out of Berhampur Vigilance P.S. Case No.36 dated 03.11.1999 under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988) came to an end *vide* judgment dated 18.04.2011 delivered by the learned Special Judge (Vigilance), Berhampur, Ganjam with the following observation:

"***

8. *In this case, the acceptance of bribe has not been proved beyond reasonable doubt. Mere demand of bribe though proved will not carry any punishment nor a conviction can be based on that. Therefore, on the entire appreciation of the record, it is found that the prosecution is not able to prove the case against the accused beyond all reasonable doubt and as such the accused is found not guilty under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and is acquitted under Section 248(1) Cr.P.C. and set him at liberty. His bail bond is cancelled."*

2.5. Laying challenge against the said Order of acquittal, the Vigilance Authority approached this Court by filing CrlLP No.40 of 2012, which was dismissed *vide* Order dated 11.12.2018.

2.6. After finalisation of said vigilance case, the Collector, Kandhamal-opposite party No.3 being approached for withdrawal of Order of dismissal, he passed Order on 21.08.2013 with the following observation:

"***

Whereas the applicant filed O.A. No.1182/2001 challenging the continuance of Departmental Proceeding drawn up against him. Hon'ble Odisha Administrative Tribunal, Bhubaneswar in Order No.2 dated 14.08.2001 directed that let the interim Order to continue till 30.09.2001. But the said Order was received in the Office of the Collector, Kandhamal on 21.09.2001 and finally Order No.7 dated 07.12.2001 the Hon'ble Odisha Administrative Tribunal white disposing of the case, directive was issued to the effect that, the final disposal of the Disciplinary Proceeding shall be held up till disposal of the criminal case in the Court of the Special Judge (Vigilance)-cum-Additional District & Sessions Judge, Berhampur. By the time of copy of the Order dated 05.09.2001 was received, i.e., on 21.09.2001, the Departmental Proceeding bearing No 4312 dated 13.11.2000 initiated against the applicant had already been finalized and disposed of. Accordingly, the applicant was dismissed from service with immediate effect vide Order No. 3643, dated 12.09.2001.

Whereas, the applicant challenging the dismissal Order passed by the Disciplinary Authority vide Order No.3643 dated 12.09.2001 has filed a contempt petition vide C.P.(C) No.71/2002.

Whereas, the Ho'nble Odisha Administrative Tribunal, Cuttack vide Order No. 40, dated 30.01.2013 in C.P.

71(C)/2002 arising out of O.A. No. 1182/2001 filed by Sri Kansari Behera, Ex. Revenue Inspector has directed undersigned to first purge the contemptuous Order vide Order No. 3643/Estt., dated 12.09.2001 after which any apology by alleged contemnors may be considered.

Whereas, again Hon'ble Odisha Administrative Tribunal, Bhubaneswar vide Order No.41, dated 20.01.2013 served that 'the final Order in the Departmental Proceeding dismissing the applicant from service was passed while the stay Order was very much in force. The said stay Order was passed in open Court in presence of the learned Government Advocate. Therefore, even if the plea of the alleged contemnor that the Order was not communicated to him and for that he is not personally liable, is accepted, still the impugned Order of dismissal con be safely held to be non-existent in the eye of law'.

Whereas, the Government in Revenue and Disaster Management Department Odisha, in their Letter No 31273/RD&M, dated 16.08.2013 have allowed to implement the Order No.441 dated 20.03.2013 of the Hen'ble Odisha Administrative Tribunal passed in C.P.(C) No 71/2002 (arising in O.A. Case No 1182/2001).

Whervos, in the meantime the case was heard and the Hon'ble Tribunal vide Order No. 07 dated 29.07.2013 have allowed time as prayed for to file the full compliance.

Therefore, in compliance to the Order No.40 dated 30.01.2013 & No.41 dated 20.03.2013 of the Hon'ble Odisha Administrative Tribunal, Bhubaneswar passed in above Contempt Proceeding Case and as per instruction of Government in Revenue and Disaster Management Department communicated in Letter No.31273/RD&M, dated 10.08.2013, the Order of dismissal passed vide

District Office Order No.3643/Estt., dated 12.09.2001 is hereby withdrawn."

2.7. Accordingly, the petitioner was reinstated in service *vide* Office Order No.1764— BBE-Con.VI-2/13, dated 24.09.2013 passed by the Collector, Kandhamal with effect from the date of his actual resumption in duty. Text of said Office Order runs as follows:

"Sri Kansari Behera, Ex-Revenue Inspector, Bisipada R.I. Circle who was placed under suspension vide District Office Order No.3976 dated 30.09.2000 is reinstated into service with effect from the date he actually resumes his duties.

On reinstatement, he is posted as such to Kotagarh Tahasil.

Necessary Order for treatment of the period of his suspension will be issued at the time of passing final Orders in the Disciplinary Proceeding bearing No.4312, dated 03.11.2000."

2.8. Being aggrieved by such observation as to the period of suspension, the petitioner with constraint moved the learned Odisha Administrative Tribunal, Bhubaneswar in Original Application (O.A. No.1066 of 2014) with regard to treatment of the period of suspension for about 13 years, *i.e.*, from 30.09.2000 to 30.09.2013, which came to be disposed of on 13.10.2015 with the following observation:

"*

The case was heard. In the criminal proceeding the applicant was acquitted, whereas the departmental proceeding is still pending. The proceeding was initiated way back in the year 2000. In the meantime 15 years have already passed.

In pursuance of the Order dtd.24.09.2013 as at Annexure-7 of the Collector, Kandhamal, Phulbani, the Order of treatment of the period of his suspension would be issued at the time of passing final Orders in the Disciplinary Proceeding bearing No.4312, dated 03.11.2000. From this it is clear that there is way to withdraw this disciplinary proceeding.

At this stage when 15 years has elapsed, it is necessary that the enquiry relating to disciplinary proceeding be concluded at the earliest. Therefore, respondent No.2 is directed that this particular enquiry be completed within a period of four months from the date of receipt of a copy of this Order and subsequent thereto the treatment of the period regarding suspension be decided. In case the disciplinary proceeding is not completed within four months, then the same would be deemed to have been dropped. Further, it is directed that the financial as well as the consequential service benefits may be given to the applicant.

With these Orders the O.A. is disposed of."

2.9. Pursuant to the aforesaid direction of the learned Odisha Administrative Tribunal contained in Order dated 13.10.2015, the Disciplinary Authority-*cum*-Collector, Kandhamal passed the following Order dated 15.02.2016:

"***

Whereas, in the re-instatement Order the nature of period of suspension was not spelled out, Hon'ble Odisha Administrative Tribunal, Bhubaneswar in O.A. No.1066 of 2014 vide Order No.6 dated 13.10.2015 directed the respondent No.2 that

'Therefore the respondent No.2 is directed that this particular enquiry be completed within a period of four months from the date of receipt of a copy of this Order and subsequent thereto the treatment of the period regarding suspension be decided. In case the disciplinary proceeding is not completed within four months, then the same would be deemed to have been dropped. Further, it is directed that the financial as well as the consequential service benefits may be given to the applicant.'

After careful perusal of the charges framed against the D.O., enquiry report dated 30.06.2001 of I.O. wherein the I.O. suggested that the period of suspension to be treated as such and all other relevant documents incidental to the proceeding, the Disciplinary Authority and Collector, Kandhamal has been pleased to Order as follows:

'the period of suspension from 30.09.2000 to the date of reinstatement i.e. 30.09.2013 may be treated as such'."

2.10. The petitioner, thereafter, assailed the said Order before the Appellate Authority (Revenue Divisional Commissioner (Southern Division), Berhampur, Ganjam) by filing appeal petition dated 19.05.2016 through Tahasildar, K. Nuagaon, which was disposed of by the Appellate Authority in exercise of power under Rule 29 of the OCS (CCA) Rules, 1962 after the petitioner got

retired from service on attaining age of superannuation on 31.03.2018. The Order-in-Appeal of the Appellate Authority with the following observation was communicated to the petitioner *vide* Memo No.8706, dated 23.12.2019:

"The reason for his suspension in this case was his being in the Police Custody for more than 48 hours after arrest and initiating of criminal proceeding against him. Then the fact that when the Court has acquitted him, the very cause for suspension does not exist. It is to be noted that during the period of suspension he was paid subsistence allowance. Then he was reinstated in service in compliance to the Order of Hon'ble OAT vide Order dated 20.3.2013 passed in C.P.(C) No.71 of 2002 (arising out of OA No.1182/2001). The Prosecution was not able to prove the case against the accused beyond all reasonable doubt and as such, he was found not guilty under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 by the Hon'ble Court of the Special Judge (Vigilance), Berhampur and he was acquitted under Section 248(1) Cr.P.C. and set him at liberty. ***The acquittal passed by the Hon'ble Special Judge (Vigilance), Berhampur was challenged by the Government in G.A. Deptt., Cuttack before the Hon'ble High Court of Orissa vide CRLLP No.40 of 2012 which has been dismissed vide Order dated 11.12.2018. In these circumstances, his acquittal can be said to be without a blame and on merit.*** *The Collector, Kandhamal passed final Order vide Order No.286 dated 15.02.2016, with the penalty that the period of suspension from 30.09.2000 to the date of re-*

instatement i.e. on 30.09.2013 may be treated as such which was unwarranted and justified.

Hence, in exercise of the powers conferred under Section 29 of the OCS (CC&A) Rules, 1962, and with a thorough appreciation of the case materials at hand, the appeal is allowed. Considering the merit of the case, the Order of Collector-cum-Disciplinary Authority, Kandhamal passed in Order No.286 dated 15.02.2016 of the Disciplinary Proceeding Case is hereby set aside."

2.11. The Collector, Kandhamal at Phulbani solicited clarification from the Additional Secretary to Government of Odisha in Revenue and Disaster Management Department, Odisha, by Letter No.2383/BBE, dated 16.05.2020 with respect to "treatment of period of suspension from 30.09.2000 to the date of reinstatement, *i.e.,* 30.09.2013 (more than 13 years) of Sri Behera, Revenue Inspector". In response thereof, the Revenue and Disaster Management Department instructed the Disciplinary Authority "to pass specific orders for treatment of the suspension period basing on the finding of inquiry in the Disciplinary Proceeding keeping Rule 91 of the Odisha Service Code in view".

2.12. Accordingly, the Disciplinary Authority-opposite party No.3 passed the following Order on 05.04.2021:

"Office of the Collector,
Kandhamal, Phulbani.

No. 1610—Con V1-3/2021/BBE, dated 05.04.2021
Office Order

Whereas on consideration of the charges framed against Sri Kansari Dehera, Ex-RI, Tahasil Office, G. Udayagiri, retired as such at Tahasil Office, Chakapad, the following punishment had been awarded vide Order No. 286 dated 15.02.2016.

1. *The period of suspension from 30.09.2000 to the date of reinstatement i.e., 30.09.2013 treated as such.*

Whereas, against the said order the D.O. had preferred an appeal before the Hon'ble Revenue Divisional Commissioner (Southern Division), Berhampur. The Appellate Authority ordered that considering the merits of the case, the order of Collector-cum-Disciplinary Authority, Kandhamal passed in Order No.286, dated 15.02.2016 of the Disciplinary Proceeding case is hereby set aside.

Whereas, since the matter relates to service period of more than 13 years and has financial implications, Government in Revenue Department the Administrative had been moved for clarification vide District Office Letter No.2384 dated 16.05.2020. In response to the same Government in Revenue & Disaster Management Department, Odisha has intimated that the creation of the situation itself may be construed as violation in terms of Conduct Rules which needs consideration to take a stand on the intervening period. Hence, the Disciplinary Authority may pass specific order for treatment of the suspension period basing on the findings of inquiry in the Disciplinary Proceedings keeping Rule 91 of Odisha Service Code in view.

Whereas, the I.O.-cum-Revenue Officer, Sub Collector's Office, Phulbani has reported that the charges levelled against the D.O. are proved and the D.O. is found guilty. Clause (3)(b), 5 of Rule 91 of Odisha Service Code speaks that when a Government Servant, not having been exonerated of the charges fully, is reinstated in service he may be allowed subsistence allowance only for the period of suspension as admissible under Rule 90 and the period of suspension from duty shall not be treated as period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose.

Now, therefore, after careful perusal of the enquiry report of I.O., Letter No.35980/R&DM, dated 10.12.2020 of Government in Revenue & Disaster Management Department, Odisha and all other records/documents ancillary and incidental to the proceeding, the undersigned has been pleased to pass Orders as follows;

1. *The punishment awarded to Sri Behera vide District Office Order No.286 dated 15.02.2016 is hereby recalled.*

2. *That the claim of pay minus subsistence allowance for the period under suspension is abandoned.*

3. *The fixation of pay of Sri Behera and settlement of all his claims relating to arrear pay as per pay fixation from time to time is to be calculated except mentioned at point No.2 above and pay should be fixed notionally.*

4. *The abandonment of the claim to the above extent would not be treated as punishment as will not have any effect on the service in any manner."*

2.13. Dissatisfied thereby, the petitioner has knocked the doors of this Court for protection by way of filing the instant writ petition with prayer to invoke extraordinary jurisdiction under Article 226/227 of the Constitution of India.

Hearing:

3. Pleadings are completed and exchanged among the counsel for respective parties, and on consent of counsel for both sides, this matter is taken up for final hearing at the stage of admission.

3.1. Accordingly, heard Sri Krishna Chandra Sahu, learned Advocate for the petitioner and Sri Arnav Behera, learned Additional Standing Counsel appearing for the opposite parties and the matter stood reserved for preparation and pronouncement of judgment.

Rival contentions and submissions:

4. Sri Krishna Chandra Sahu, learned counsel appearing for the petitioner submitted that the tenor of the order of the Appellate Authority setting aside the Order dated 15.02.2016 of the Disciplinary Authority can very well be couched. Having the order of the Disciplinary Authority being nullified in the appeal, in absence of any further direction, the Disciplinary Authority has no authority to confer upon himself the jurisdiction and assume powers

to pass fresh/further orders in furtherance of the Appellate Order.

4.1. The Disciplinary Authority, thus, transgressed his authority by passing further order *inter alia* directing to abandon the claim of pay minus subsistence allowance for the period of suspension inasmuch as there is categorical observation of the Appellate Authority that "the Collector, Kandhamal passed final order *vide* Order No.286, dated 15.02.2016, with the penalty that the period of suspension from 30.09.2000 to the date of reinstatement, *i.e.,* on 30.09.2013 may be treated as such which was unwarranted and unjustified". It is vehemently contended that such obnoxious observation and direction of the Collector, Kandhamal, acting as *quasi* judicial Authority, is questionable as he sought to sit over the decision of the Appellate Authority taking shelter of advisory received from the Revenue and Disaster Management Department *vide* Letter dated 10.12.2020 (Annexure-14), which is not only wholly impermissible in law but also not above reproach.

4.2. It is submitted that the punishment as imposed in the Order No.286, dated 15.02.2016, that "the period of suspension from 30.09.2000 to the date of reinstatement, *i.e.,* 30.09.2013 may be treated as such" (Annexure-10) has been set aside *vide* communication dated 23.12.2019 by the Appellate Authority by

observing that "considering the merit of the case, the order of Collector-*cum*-Disciplinary Authority, Kandhamal passed in Order No.286, dated 15.02.2016 of the disciplinary proceeding case is hereby set aside" (Annexure-12). Despite such clear observation, as if the Appellate Authority has issued further direction to the Disciplinary Authority to consider imposition of order of punishment afresh, further Order ought not to have been passed on 05.04.2021 (Annexure-15) by holding abandonment of payment, which would tantamount to imposition of penalty. It is vehemently contested that the decision of the Disciplinary Authority, which is a sanctuary of errors cannot be allowed to gain the benefit of sanctuary of protection and acceptance and therefore, the impugned Office Order dated 05.04.2021 does deserve quashment.

5. Sri Arnav Behera, learned Additional Standing Counsel appearing for the opposite parties referring to the counter affidavit filed by opposite party No.3 submitted that fresh Order dated 15.02.2016 passed by the Disciplinary Authority after the Appellate Authority set aside the punishment imposed in the disciplinary proceeding on the ground that the petitioner got acquitted in the criminal case cannot be faulted with.

5.1. He pressed into service the following replies given in counter affidavit at paragraphs-8, 10 and 11:

"8. That the averments made in para-6 of the writ application, the deponent humbly submits that, in Order No.7 dated 07.12.2001 the Hon'ble Odisha Administrative Tribunal, Bhubaneswar while disposing off the case, issued directive to the effect that, the final disposal of the disciplinary proceeding shall be held up till disposal of the criminal case in the court of the Special Judge (Vigilance)-cum-Additional District & Sessions Judge, Berhampur. By the time of copy of the Order dated 05.09.2001 was received i.e. on 21.09.2001, the Departmental Proceeding bearing No.4312, dated 13.11.2000 initiated against the applicant had already been finalised and disposed off and accordingly the applicant had already been dismissed from service with effect from 12.9.2001 but did not disclose the same to the Hon'ble Tribunal.

10. That the averments made in paragraph-9 of the writ application, the deponent humbly submits that, after careful perusal of the charges framed against the D.O., enquiry report dtd.30.06.2001 of I.O. wherein he suggested that the period of suspension to be treated as such and all other relevant documents incidental to the proceedings and having regard to Order No.06 dated 13.10.2015 passed by the Hon'ble Odisha Administrative Tribunal in O.A. No.1066/2014, the Disciplinary Authority and Collector, Kandhamal decided the period of suspension treating as such vide district office Order No.286, dated 15.02.2016.

11. That, the averments made in paragraphs 10 to 13 of the writ application, the deponent humbly submits that, the Appellate Authority-cum-RDC (SD),

Berhampur had set aside the Orders passed by Collector cum Disciplinary Authority against the petitioner. Since the matter relates to regularisation of service period of more than 13 years and has financial implications, Govt. in Revenue Department, the Administrative authority had been moved for clarification. In response to the same Government in R&DM Department, Odisha has intimated that the creation of the situation itself may be construed as violation in terms of Conduct Rules which needs consideration to take a stand on the intervening period. Hence, the Disciplinary Authority may pass specific Order for treatment of the suspension period basing on the findings of enquiry in the Disciplinary Proceeding keeping Rule 91 of Odisha Service Code in view. The I.O.-cum-Revenue Officer, Sub-Collector's Office, Phulbani has reported that the charges levelled against the DO are proved and the DO is found guilty. Clause (3)(b), 5 of Rule 91 of Odisha Service Code speaks that when a Government servant, not having been exonerated of the charges fully, is reinstated in service he may be allowed subsistence allowance only for the period of suspension as admissible under Rule-90 and the period of absence from duty shall not be treated as period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specific purpose.

After careful perusal of the enquiry report of I.O., letter No.35980/R & DM dated 10.12.2020 of Govt. in R & DM Department, Odisha and all other records/documents ancillary and incidental to the proceeding the Disciplinary Authority-cum-Collector, Kandhamal was pleased to pass Orders as follows:

1. *The punishment awarded to Sri Behera and District Office Order No.286 dated 15.02.2016 is hereby recalled.*

2. *That the claim of pay minus subsistence allowance for the period under suspension is abandoned.*

3. *The fixation of pay of Sri Behera and settlement of all his claims relating to arrear pay as per pay fixation from time to time is to be calculated except mentioned at point No.2 above and pay should be fixed notionally.*

4. *The abandonment of the claim to the above extent would not be treated as punishment as will not have any effect on the service in any manner."*

5.2. With the aforesaid backdrop, the learned Additional Standing Counsel wound up his argument by making a statement that when the Appellate Authority has merely set aside the order of the Disciplinary Authority without any instruction as to further action to be taken, there arose justified reason for the Collector, Kandhamal to approach the Government for advice, and on receipt of appropriate response, he could pass the Order dated 03.04.2021 in consonance with Rule 91 of the Odisha Service Code.

Discussion, analysis and conclusion:

6. The issue hovers round whether further order can be passed by the Disciplinary Authority after the Appellate Authority sets aside the order of punishment without spelling out further course of action.

6.1. Rule 12 of the OCS (CCA) Rules, in sub-rule (1) provides as follows:

"The Disciplinary Authority, while passing the final order of punishment or of release in the Disciplinary Proceedings against the Government servant, ***shall give directions about the treatment of the period of suspension, which is passed not as a measure of substantive punishment but as suspension pending inquiry,*** *and indicate whether the suspension would be a punishment or not."*

6.2. Glance at Order No.3976—Con.-III-6/2K, dated 30.09.2000 of the Collector, Kandhamal (Annexure-2) with respect to suspension reveals the fact that,

"Whereas ***a disciplinary proceeding*** *against Sri Kansari Behera, Ex. Revenue Inspector, Paburia of G. Udayagiri, Tehsil, now working as such in Khondmals Tehsil under Bisipada R.I. Circle* ***is contemplated****, now, therefore, the Collector, Kandamal, Phulbani and Disciplinary Authority,* ***in exercise of power conferred under clause (b) of sub-rule (2) of Rule 12 of the CCS (CCA) Rules, 1962,*** *hereby places Sri Kansari Behera, Revenue Inspector under* ***suspension*** *with immediate effect. ***"*

6.3. From the aforesaid it appears that while the disciplinary proceeding against the petitioner was under contemplation he was placed under suspension on 30.09.2000. Accordingly, the Disciplinary Proceeding No.4312, dated 03.11.2000 being instituted, the petitioner was called upon to submit explanation and *vide* Letter No.3643/Estt, dated 12.09.2001, the Collector, Kandhamal afforded opportunity to the petitioner to have his say against the proposition made for inflicting the penalty of 'dismissal from service', which was subject matter of challenge before the Odisha Administrative Tribunal in O.A. No.1182 of 2001. As interim measure in the said case, *vide* Order dated 07.12.2001, the disciplinary proceeding was directed to be held up till disposal of the criminal case by the Special Judge (Vigilance)-*cum*-Additional District and Sessions Judge, Berhampur. Despite such interim order being pronounced in the presence of the counsel for the Government, the Disciplinary Authority proceeded to passed order of dismissal.

6.4. The criminal case being G.R. Case No.38 of 1999 (V)/ T.R. Case No.39 of 2001 culminated in order of acquittal on 18.04.2011 invoking Section 248(1) of the Code of Criminal Procedure, 1973 *vide* judgment of the learned Special Judge (Vigilance)-*cum*-Additional District and Sessions Judge, Berhampur finding the petitioner "not

guilty" under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. Further proceeding before this Court by the Government of Odisha against such order of acquittal resulted in dismissal of Leave Petition bearing CrlLP No.40 of 2012 *vide* Order dated 11.12.2018.

6.5. Notwithstanding acquittal of the petitioner in the criminal case, by Order dated 24.09.2013, the Collector, Kandhamal though directed reinstatement in service, reserved consideration of "treatment of the period of his suspension" "at the time of passing final order in the Disciplinary Proceeding bearing No.4312, dated 03.11.2000". The Odisha Administrative Tribunal taking note of such fact in O.A. No.1066 of 2014, in Order dated 13.10.2015 clarified that,

"At this stage when 15 years has elapsed, it is necessary that the enquiry relating to disciplinary proceeding be concluded at the earliest. Therefore, respondent No.2 is directed that this particular enquiry be completed within a period of four months from the date of receipt of a copy of this order and subsequent thereto the treatment of the period of suspension be decided."

6.6. The Disciplinary Authority passed final Order on 15.02.2016 (Annexure-10) by accepting the suggestion of the Inquiring Officer in the Inquiry Report dated 30.06.2001 that the period of suspension to be treated as such, held "the period of suspension from 30.09.2000

to the date of reinstatement, *i.e.*, 30.09.2013 may be treated as such".

6.7. The petitioner having carried the matter in appeal, the Appellate Authority, appreciating the position with regard to criminal case held,

> *"The acquittal passed by the Hon'ble Special Judge (Vigilance), Berhampur was challenged by the Government in G.A. Deptt., Cuttack before the Hon'ble High Court of Orissa vide CRLLP No.40 of 2012 which has been dismissed vide Order dated 11.12.2018. In these circumstances,* ***his acquittal can be said to be without a blame and on merit. The Collector, Kandhamal passed final Order vide Order No.286 dated 15.02.2016, with the penalty that the period of suspension from 30.09.2000 to the date of re-instatement i.e. on 30.09.2013 may be treated as such which was unwarranted and justified.***
>
> *Hence, in exercise of the powers conferred under Rule 29 of the OCS (CCA) Rules, 1962, and with a thorough appreciation of the case materials at hand, the appeal is allowed. Considering the merit of the case, the order of Collector-cum-Disciplinary Authority, Kandhamal passed in Order No.286, dated 15.02.2016 of the Disciplinary Proceeding Case is hereby set aside."*

6.8. Perusal of aforesaid Appellate Order transpires that the Appellate Authority has not only taken into consideration the fact of acquittal of the petitioner in the criminal case, but also weighed the merit of the matter

based on material on record while invoking power under Rule 29 of the OCS (CCA) Rules.

6.9. Rule 29 of the OCS (CCA) Rules spells out as follows:

> *"29. Consideration of Appeals.—*
>
> *(1) In the case of an appeal against an order imposing any of the penalties specified in Rule 13[1], the appellate authority shall consider—*
>
> *(a) whether the procedure prescribed in these rules has been complied with and, if not, whether such non-compliance has resulted in violation of any provisions of the Constitution or in failure of justice;*
>
> *(b) **whether the findings are justified**; and*
>
> *(c) whether the penalty imposed is excessive, adequate or inadequate;*
>
> *and, after consultation with the commission if such consultation is necessary in the case, pass orders—*
>
> *(i) **setting aside,** reducing, confirming or enhancing the penalty; or*
>
> *(ii) remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case:*

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1 Rule 13 of the OCS (CCA) Rules, lays down as follows:
"13. Nature of penalties.—
The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a Government servant, namely:
***
(v) Suspension;
***"

Provided that—

(i) the appellate authority shall not impose any enhanced penalty which neither such authority nor the authority which made the order appealed against is competent in the case to impose;

(ii) no order imposing an enhanced penalty shall be passed unless the appellant is given an opportunity of making any representation which he may wish to make against such enhanced penalty; and

(iii) if the enhanced penalty which the Appellate Authority proposes to impose is one of the penalties specified in clauses (vi) to (ix) of Rule 13 an inquiry under Rule 15 has not already been held in the case, the Appellate Authority shall, subject to the provisions of Rule 18, itself hold such inquiry or direct that such inquiry be held and, thereafter, on consideration of the proceedings of such inquiry and after giving the appellant an opportunity of making any representation which he may wish to make against such penalty, pass such orders as it may deem fit.

(2) In the case of an appeal against any order specified in Rule 23[2] the Appellate Authority shall consider all

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[2] Rule 23 of the OCS (CCA) Rules stands as follows:
"23. Appeal against other orders.—
(1) A Government servant may appeal against an order which—
(a) denies or varies to his disadvantage his pay, allowances, pension or other conditions of service as regulated by any rules or by agreement, or
(b) interprets to his disadvantage the provision of any such rules or agreement,

the circumstances of the case and pass such orders as it deems just and equitable.

(3) Copies of orders passed by the appellate authority shall be supplied to the appellant free of cost."

6.10. The Appellate Authority is, thus, empowered under Rule 29 of the OCS (CCA) Rules to examine whether the findings of the Disciplinary Authority are justified and "set aside" the order imposing penalty, *i.e.,* treating the period of suspension from 30.09.2000 to the date of reinstatement, *i.e.,* 30.09.2013 "as such".

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to the Governor if the order is passed by the authority which made the rules or agreement, as the case may be, or by any authority to which such authority is subordinate, and
to the authority which made rules or agreement, if the order is passed by any other authority.

(2) An appeal against an order—
- *(a) stopping a Government servant at the efficiency bar in time-scale on the ground of his unfitness to cross the bar;*
- *(b) reverting to a lower service, grade or post, a Government servant officiating in a higher service, grade or post, otherwise than as a penalty;*
- *(c) reducing or withholding the pension or denying the maximum pension admissible under the rules; and*
- *(d) determining the pay and allowances for the period of suspension to be paid to a Government servant on his reinstatement or determining whether or not such period shall be treated as a period spent on duty for any purpose, shall lie—*
  - *(i) in the case of an order made in respect of a Government servant on whom the penalty of dismissal from service can be imposed only by the Governor, to the Governor; and*
  - *(ii) in the case of an order made in respect of any other Government servant, to the authority to whom an appeal against an order imposing upon him the penalty of dismissal from service would lie.*

EXPLANATION.—
In this rule—
- *(i) the expression of "GOVERNMENT SERVANT" includes a person who has ceased to be in Government service;*
- *(ii) the expression "PENSION" includes additional pension, gratuity and any other retirement benefit."*

6.11. In view of provisions contained in Rule 30[3] of the OCS (CCA) Rules, in absence of any further direction, there is no scope left to the Disciplinary Authority to pass any consequential further orders.

6.12. As the Appellate Authority in his Order made it clear that "The Collector, Kandhamal passed final order *vide* Order No.286, dated 15.02.2016, with the penalty that the period of suspension from 30.09.2000 to the date of reinstatement, *i.e.,* on 30.09.2013 may be treated as such which was unwarranted and unjustified", there was no occasion for the Disciplinary Authority to seek for advisory from the Revenue and Disaster Management Department. Nothing is placed on record to show that the Appellate Order in Annexure-12 has ever been challenged and/or varied by any other competent court of law. In such view of the matter, the Collector, Kandhamal was bound by the *quasi* judicial order-in-appeal, and in defiance thereof he was not competent to pass fresh orders by adhering to directive of the Revenue and Disaster Management Department on the administrative side. Such a course, in flagrant violation of provision of Rule 30 of OCS (CCA) Rules, 1962, is impermissible.

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[3] Rule 30 of the OCS (CCA) Rules, provides as follows:
"Implementation of orders in appeal.—
The Authority which made the order appealed against shall give effect to the orders passed by the Appellate Authority."

6.13. It is noteworthy that the criminal case ended in acquittal and attained finality on dismissal of CrlLP by this Court and the order passed in disciplinary proceeding also got set aside on consideration of merit of matter on the basis of materials available on record. These factors are indicative of fact that nothing survives against the petitioner and the allegations levelled against the petitioner could not be substantiated by the opposite parties. Therefore, it is obligatory on the part of the Disciplinary Authority to comply with the Order dated 13.10.2015 of the Odisha Administrative Tribunal, Bhubaneswar passed in O.A. 1066 of 2014. In the said Order dated 13.10.2015, it has been stipulated that,

> *"Therefore, the respondent No.2 is directed that this particular enquiry be completed within a period of four months from the date of receipt of a copy of this order and subsequent thereto the treatment of the period regarding suspension be decided. In case the disciplinary proceeding is not completed within four months, then the same would be deemed to have been dropped. Further, it is directed that the financial as well as consequential service benefits may be given to the applicant."*

6.14. However, ultimately the disciplinary proceeding attained finality by virtue of order of the Appellate Authority which nullified the effect of punishment imposed by the Disciplinary Authority. Taking a holistic view of material on record including the finality being attained to the criminal case as also the disciplinary proceeding, there

remains no scope for the opposite parties not to extend the service and financial benefits as the petitioner has been deprived of for no fault of his own.

6.15. The Hon'ble Supreme Court of India has exposited the position of the employee, when the order of termination from service is set aside, in *Anantdeep Singh Vrs. The High Court of Punjab and Haryana, (2024) 9 SCR 135 = 2024 INSC 673*, wherein it has been observed as follows:

> *"21.* ***Once the termination Order is set aside and judgment of the High Court dismissing the writ petition challenging the said termination Order has also been set aside, the natural consequence is that the employee should be taken back in service and thereafter proceeded with as per the directions. Once the termination Order is set aside then the employee is deemed to be in service.*** *We find no justification in the inaction of the High Court and also the State in not taking back the appellant into service after the Order dated 20.04.2022. No decision was taken either by the High Court or by the State of taking back the appellant into service and no decision was made regarding the back wages from the date the termination Order had been passed till the date of reinstatement which should be the date of the judgment of this Court. In any case, the appellant was entitled to salary from the date of judgment dated 20.04.2022 till fresh termination Order was passed on 02.04.2024.* ***The appellant would thus be entitled to full salary for the above period to be calculated with all***

benefits admissible treating the appellant to be in continuous service.

22. Insofar as the period from 18.12.2009 i.e., after the termination Order of 17.12.2009 was passed till 19.04.2022 the date prior to the judgment and Order of this Court, we are of the view that ends of justice would be served by directing that the appellant would be entitled to 50 per cent. of the back wages treating him to be in service continuously. Such back wages to be calculated with all benefits admissible under law to the appellant as if he was in service."

6.16. In the wake of the above situation, the Order dated 03.04.2021 (Annexure-15), being *non est* in the eye of law the petitioner is entitled to service and pecuniary benefits as is available in law had he not been suspended since 30.09.2000.

7. Law is no more *res integra* that disciplinary matters are *quasi* judicial proceedings. In the case of *Mohd. Yunus Khan Vrs. State of Uttar Pradesh, (2010) 10 SCC 539* the Supreme Court has held that holding disciplinary proceeding against a Government employee and imposing punishment on his being found guilty of misconduct under the statutory rule is in the nature of *quasi* judicial proceeding. Also in the case of *Roop Sing Negi Vrs. Punjab National Bank, (2009) 2 SCC 570* the Supreme Court of India has observed that indisputably a disciplinary proceeding is a *quasi* judicial proceeding and the enquiry officer performs a *quasi* judicial

function. This Court at this juncture wishes to have regard to certain decisions of Courts eliciting the purport of appellate orders:

7.1. In *Nirmal Chandra Panigrahi Vrs. State of Odisha, 2021 SCC OnLine Ori 807* this Court observed as follows:

> *"23. In Westminster Corpn. Vrs. L.&N. Ry., (1905) AC 426 it was held that it is a condition of any statutory power that it must be exercised reasonably, and without negligence.*
>
> *24. In Cf. Karnapura Development Co. Vrs. Kamakshya Narain, 1956 SCR 325, the Apex Court held that it is a condition of any statutory power that it must be exercised bona fide.*
>
> *25. In Commissioner of Police, Bombay Vrs. Gordhandas Bhanji, AIR 1952 SC 16, the Apex Court observed as follows:*
>
> > *"10. *** Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order. ****
> >
> > *28. *** An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor it*

*be evaded, performance of it can be compelled. ****"

26. *In Sirsi Municipality Vrs. Cecelia Kom Francis Tellis, (1973) 1 SCC 409 = AIR 1973 SC 855, the Apex Court observed that,*

"the ratio is that the rules or the regulations are binding on the authorities".

27. *The issue of writ of mandamus is a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directing to any person, Corporation, requiring him or them to do some particular thing specified in it which appertains to his or their office and is in the nature of a public duty.*

28. *In Comptroller and Auditor-General of India Vrs. K.S. Jagannathan, (1986) 2 SCC 679 = (1986) 2 SCC 679 = AIR 1987 SC 537, the Apex Court observed:*

'20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring

*such direction or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.' ***"*

7.2. In *Shree Sidhbali Steels Limited Vrs. State of Uttar Pradesh, (2011) 3 SCC 193*, it has been observed that by virtue of Sections 14 and 21 of the General Clauses Act, when a power is conferred on an authority to do a particular act, such power can be exercised from time to time and carries with it the power to withdraw, modify, amend or cancel the notifications earlier issued, to be exercised in the like manner and subject to like conditions, if any, attached with the exercise of the power. It has been observed as under:

"38. Section 21 is based on the principle that power to create includes the power to destroy and also the power to alter what is created. Section 21, amongst other things, specifically deals with power to add to,

amend, vary or rescind the notifications. The power to rescind a notification is inherent in the power to issue the notification without any limitations or conditions. Section 21 embodies a rule of construction. The nature and extent of its application must be governed by the relevant statute which confers the power to issue the notification etc. However, there is no manner of doubt that the exercise of power to make subordinate legislation includes the power to rescind the same. This is made clear by Section 21. On that analogy an administrative decision is revocable while a judicial decision is not revocable except in special circumstances. Exercise of power of a subordinate legislation will be prospective and cannot be retrospective unless the statute authorises such an exercise expressly or by necessary implication.

39. *The principle laid down in Section 21 is of general application. The power to rescind mentioned in Section 21 is without limitations or conditions. It is not a power so limited as to be exercised only once. The power can be exercised from time to time having regard to the exigency of time. When by a Central Act power is given to the State Government to give some relief by way of concession and/or rebate to newly-established industrial units by a notification, the same provision and such exercise of power cannot be faulted on the ground of promissory estoppel.*

40. *It would be profitable to remember that the purpose of the General Clauses Act is to place in one single statute different provisions as regards interpretations of words and legal principles which*

would otherwise have to be specified separately in many different Acts and Regulations. Whatever the General Clauses Act says whether as regards the meaning of words or as regards legal principles, has to be read into every statute to which it applies."

7.3. In *State of Odisha Vrs. Pratima Mohanty, (2021) 9 SCR 335* it is stated as follows:

*"8. At this stage, the decision of the Karnataka High Court in the case of K. Raju vs. Bangalore Development Authority in Writ Petition No.11102 of 2008 decided on 15.12.2010 [*reported at, *2010 SCC OnLine Kar 4322 = ILR 2011 Kar 120] dealing with a somewhat similar situation with respect to the allotment of plots in discretionary quota is required to be referred to. In that case also it was a case of allotment of the plots illegally and arbitrarily in the discretionary quota. Speaking from the Bench Justice S. Abdul Nazeer, J. as he then was has observed and held as under:*

'It is well established that a public body invested with statutory powers has to take care not to exceed or abuse its powers. It must act within the limits of authority committed to it.'

'31. BDA is the custodian of public properties. It is not as free as an individual in selecting the recipients for its largess. For allotment of the properties, a transparent, and objective criteria/procedure has to be evolved based on reason, fair play and non-arbitrariness. In such action, public interest has to be the prime guiding consideration. In Ramana Dayaram

Shetty Vrs. The International Airport Authority of India, AIR 1979 SC 1628, the Apex Court has held that it must therefore be taken to be the law that even in the matter of grant of largesses including award of jobs, contracts, quotas, licences, the Government must act in fair and just manner and any arbitrary distribution of wealth would violate the law of land. In Common Cause, A Registered Society Vrs. Union of India, (1996) 6 SCC 530, the Apex Court has held as under:

The Government today in a welfare State provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases in contracts, quotas and licences etc., Government distributes largesses in various forms. A Minister who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people In Onkar Lal Bajaj and Ors. Vrs. Union of India, (2003) 2 SCC 673, the Apex Court has summarised the cardinal principles of governance, which is as follows:

35. *The expression 'public interest' or 'probity in governance' cannot be put in a straitjacket. 'Public interest' takes into its fold several factors. There cannot be any hard-and-fast rule*

to determine what is public interest. The circumstances in each case would determine whether Government action was taken in public interest or was taken to uphold probity in governance.

36. The role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base a transparency but must create an impression that the decision making was motivated on the consideration of probity. The Government has to rise above the nexus of vested interests and nepotism and eschew window dressing. The act of governance has to be withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions. Therefore, the principles of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate.'

8.1 It is further observed after referring to the decision of this Court in the case of Common Cause, A Registered Society (supra) that if a public servant abuses his office whether by his act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action

may be maintained against such public servant. It is further observed that no public servant can arrogate to himself powers in a manner which is arbitrary. In this regard we wish to recall the observations of this Court as under:

'The concept of public accountability and performance of functions takes in its ambit, proper and timely action in accordance with law. Public duty and public obligation both are essentials of good administration whether by the State or its instrumentalities.' [See Delhi Airtech Services (P) Ltd. Vs. State of U.P., (2011) 9 SCC 354]

'The higher the public office held by a person the greater is the demand for rectitude on his part.' [See Charanjit Lamba Vs. Army Southern Command, (2010) 11 SCC 314]

'The holder of every public office holds a trust for public good and therefore his actions should all be above board.' [See Padma Vs. Hiralal Motilal Desarda, (2002) 7 SCC 564]

'Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good.' [See

Shrilekha Vidyarthi (Kumari) Vs. State of U.P., (1991) 1 SCC 212]

*'Public authorities should realise that in an era of transparency, previous practices of unwarranted secrecy have no longer a place. Accountability and prevention of corruption is possible only through transparency.' [See ICAI Vs. Shaunak H. Satya, (2011) 8 SCC 781] ***"*

7.4. In *Orissa Metaliks Pvt. Ltd. Vrs. State of Odisha, AIR 2021 Ori 85* the following is the observation:

"There is also merit in the contention, based on the judgment of this Court in Rashmi Cement Ltd. Vrs. State of Odisha, 113 (2012) CLT 177, which in turn followed the judgment of the Supreme Court in Commissioner of Police Vrs. Gordhan Das Bhanji, AIR 1952 SC 16 that a quasi-judicial authority vested with the power for cancellation of a license, could not have acted under the 'dictation' of another authority. Also the impugned action of suspension of the issuance of transit passes ought to have been preceded by an enquiry, that prima facie discloses wrong doing by Petitioner No.1 in the form of violation of the terms of the license. The suspension of a licence even before the inquiry reveals prima facie violation of the terms of the license would obviously be vulnerable to invalidation on the ground of it being arbitrary and irrational."

7.5. In *State of Uttar Pradesh Vrs. Maharaja Dharmander Prasad Singh, (1989) 1 SCR 176* it has been observed as:

"It is true that in exercise of powers of revoking or cancelling the permission is akin to and partakes of a

quasi-judicial complexion and that in exercising of the former power the authority must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party and decide the matter consistent with the principles of natural justice. The authority cannot permit its decision to be influenced by the dictation of others as this would amount to abdication and surrender of its discretion. It would then not be the Authority's discretion that is exercised, but someone else's. If an authority 'hands over its discretion to another body it acts ultra vires'. Such an interference by a person or body extraneous to the power would plainly be contrary to the nature of the power conferred upon the authority. De Smith sums up the position thus:

'The relevant principles formulated by the courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be

*grouped in two main categories: failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive.' ****"

7.6. In *Union of India Vrs. Kamlakshi Finance Corporation Ltd., AIR 1992 SC 711* the Supreme Court had directed the department to adhere to the judicial discipline and give effect to the orders of higher appellate authorities which are binding on them. The relevant observations of made therein are required to be noted which read thus:

> *"6. *** The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assesse caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department— in itself an objectionable phrase— and is the subject-matter of an appeal can furnish no*

ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.

***

8. **** The observations of the High Court should be kept in mind in future and utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them."*

7.7. In the case of *Tirupati Balaji Developers Private Ltd. Vrs. State of Bihar, (2004) 5 SCC 1*, the Supreme Court held thus:

"The very conferral of appellate jurisdiction carries with it certain consequences. Conferral of a principal substantive jurisdiction carries with it, as a necessary concomitant of that power, the power to exercise such other incidental and ancillary powers without which the conferral of the principal power shall be rendered redundant. As held by Their Lordships of the Privy Council in Nagendra Nath Dey Vrs. Suresh Chandra Dey, AIR 1932 PC 165 (Sir Dinshah Mulla speaking for the Bench of five), an appeal is an application by a party to an appellate court asking it to set aside or revise a decision of a subordinate court. The appeal does not cease to be an appeal though irregular or incompetent. Placing on record his opinion, Subramania Ayyar, J. as a member of the Full Bench (of five Judges) in Chappan Vrs. Moidin Kutti (1899) 22 ILR

Mad 68 (at page 80) stated, inter alia, that appeal is 'the removal of a cause or a suit from an inferior to a superior judge or court for re-examination or review'. According to Wharton's Law Lexicon such removal of a cause or suit is for the purpose of testing the soundness of the decision of the inferior court. In consonance with this particular meaning of appeal, 'appellate jurisdiction' means 'the power of a superior court to review the decision of an inferior court.' 'Here the two things which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior court and the power on the part of the former to review decisions of the latter. This has been well put by Story:

*'The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial Tribunals an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted and acted upon by some other court, whose judgment or proceedings are to be revised, (Section 1761, Commentaries on the Constitution of the United States). ***"*

7.8. In *Orissa Forest Corporation Ltd. Vrs. Assistant Collector, 1982 SCC OnLine Ori 209* this Court made the following observation:

"*4. We do not think this should be the attitude of the Union Government. The demand is under the Statute and the statutory appellate authority, on the set of facts which are common both to the period when relief was granted and the period for which the impugned demand has been made, has already determined that no levy is exigible.* ***As long as the***

appellate order stands, it must be duly respected and only when the revisional authority vacates the order and holds that the decision of the appellate authority is wrong and the demand was justified, no demand should be raised. *It has been indicated on more than one occasions by the Supreme Court with reference to directions of the Appellate Tribunal under the Income Tax Act that such directions are binding and decisions rendered by appellate authorities should be respected by the subordinate revenue authorities and no attempt should be made to wriggle out of the binding decisions of higher authorities as long as they remain in force. The same principle should be applied to the present set of facts and we are, therefore, inclined to take the view that the demand under Annexure-4 should be set aside but we would make it clear that in the event of the appellate orders being vacated, under the Statute the liability would revive and notwithstanding our quashing Annexure-4 the statutory authority would be entitled to raise a demand in terms of the decision which may be ultimately sustained under the Statute."*

7.9. With such conspectus of legal perspective of sanctity attached to the Appellate Orders, it can be said in the present context that so long as the order in Appellate Authority in Annexure-12 stands, the Order dated 05.04.2021 passed by the Disciplinary Authority (Annexure-15) based on clarification issued by the Revenue and Disaster Management Department (Annexure-14) cannot be sustained.

8. This Court was drawn attention to Rule 91 of the Odisha Service Code by the learned Additional Standing Counsel to justify the Order passed by the Disciplinary Authority in restricting the payment made during the period of suspension.

8.1. Rule 91 of the Odisha Service Code stands as follows:

> *"91. Authority competent to order the reinstatement shall consider and make a specific order:*
>
> *(1) When a Government servant who has been dismissed, removed, compulsorily retired or suspended is reinstated or would have been reinstated but for his retirement on superannuation while under suspension the authority competent to order the reinstatement shall consider and make a specific order:*
>
> *(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duly or for the period of suspension ending with the date of his retirement on superannuation, as the case may be, and*
>
> *(b) whether or not the said period shall be treated as a period spend on duty.*
>
> *(2) Where such competent authority holds that the Government servant has been fully exonerated or in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay to which he would have been entitled had he not been dismissed, removed, compulsorily*

retired or suspended, as the case may be, together with any allowances of which he was in receipt to his dismissal, removal or suspension.

(3) (a) In the case of dismissal, removal and compulsory retirement when a Government servant who is not completely exonerated of the charges, is reinstated in service, it shall be open to the competent authority to decide not to allow any pay or allowances to him.

(b) In the case of suspension when a Government servant, not having been exonerated of the charges fully, is reinstated in service, he may be allowed subsistence, allowance only for the period of suspension as admissible under Rule 90.

(4) In a case falling under Clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under Clause (3) the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant so desires, such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant.

Note.—

A permanent post vacated by the dismissal, removal or compulsory retirement of a Government servant

should not be filled substantively until the expiry of the period of one year from the date of such dismissal, removal or compulsory retirement, as the case may be, where, on the expiry of the period of one year, the permanent post filled and the original incumbent of the post is reinstated thereafter, he should be accommodated against any post which may be substantively vacant in the grade to which his previous substantive post belonged. If there is no such vacant post, he should be accommodated against a supernumerary post which should be created in this grade, with proper sanction and with the stipulation that it would be terminated on the occurrence of the first substantive vacancy in that grade."

8.2. Bare reading of said provision manifests *inter alia* that when the Government servant, who has been dismissed is reinstated or would have been reinstated but for his retirement on superannuation while under suspension the Authority competent to order the reinstatement shall consider and make a specific order with respect to payment and allowances for the period of his absence from duty or for the period of suspension ending with the date of his retirement on superannuation and as to treatment of the period of suspension as on duty or otherwise.

8.3. The case at hand factually does not fit into clause (1) of Rule 91 of the said Code. Record reveals the fact, which remained undisputed, that the petitioner was placed

under suspension *vide* Order dated 30.09.2000 (Annexure-2) and notwithstanding interim Order dated 07.12.2001 passed in O.A. No.1182 of 2001 by the learned Odisha Administrative Tribunal in the presence of counsel appearing for the opposite parties directing not to proceed with the disciplinary proceeding during the pendency of criminal case, he was dismissed from service by the Disciplinary Authority *vide* Order No.3643, dated 12.09.2001. The plea of the Disciplinary Authority that such interim order could come to his knowledge after passing final order of dismissal was negatived by the learned Tribunal in its Order No.41 dated 20.03.2013 in CP No.71(C) of 2002 (arising out of Order in O.A. No.1182 of 2001), which fact is reflected in Order dated 21.08.2013 of the Collector, Kandhamal. Such being admitted factual position, the order of dismissal passed *vide* District Office Order No.3643/Estt., dated 12.09.2001 was withdrawn and as a consequence thereof, the petitioner was reinstated in service by Office Order dated 24.09.2013 (Annexure-8). The petitioner got retired from service on attaining age of superannuation on 31.03.2018 during pendency of appeal before the Revenue Divisional Commissioner (Southern Division), Berhampur. The factual narration as made in the pleadings supported by documents evinces that the suspension from 30.09.2000 remained in force till dismissal from service by final Order dated

12.09.2001 passed by the Disciplinary Authority despite interim order of the learned Odisha Administrative Tribunal. Said Order dated 12.09.2001 has been withdrawn by Order No.1485/BBE-Con.-VI-2/2013, dated 21.08.2013 (Annexure7).

8.4. Diligent consideration of the above undisputed factual matrix transpires that the case of the petitioner does not fall within the expression "the Government servant who has been dismissed ... or suspended is reinstated or would have been reinstated but for his retirement on superannuation while under suspension" and, hence, there was no competence with the Authority concerned to make a specific order "regarding the pay and allowances to be paid to the Government servant ... for the period of suspension ending with the date of his retirement on superannuation" and to decide "whether or not the said period shall be treated as a period spent on duty", inasmuch as he got superannuated with effect from 31.03.2018 after being reinstated by Order dated 24.09.2013.

8.5. Taking cue from the observation made by this Court in *Bani Bhusan Dash Vrs. State of Odisha, 2021 (II) OLR 1022 [Review against said Judgment being RVWPET No. 28 of 2022 has been dismissed on 28.11.2022]*, the contention raised by the learned Additional Standing Counsel stemming on the provisions contained in Rule

91 of the Odisha Service Code is liable to be repelled, and this Court does so. Apposite here to extract relevant observation made in *Bani Bhusan Dash (supra)*:

> *"11. In Samir Kumar Mitra Vrs. State of Orissa and others, W.P.(C) No.20827 of 2016 disposed of on 25.08.2016, the Division Bench of this Court categorically held that in absence of any provision under OCS (CCA) Rules, 1962, the decision of the authorities to treat the period of suspension as leave due is not permissible. In paragraph-12 of the said judgment, this Court held as follows:*
>
> *'It is not in dispute that treating the period of suspension as leave due is not prescribed under the Statute and when the period of suspension has been treated to be leave due, it also amounts to punishment, but since it is not prescribed under the statute and we are also not in agreement with the argument advanced on behalf of the Government before the learned Tribunal that even if it is not prescribed under Rule 13, but as per Rule 12(6) of the Rules, the Disciplinary Authority, while passing the final order of punishment or of release in the disciplinary proceedings against a Government servant, shall give directions about the treatment of period of suspension, which is passed not as a measure of substantive punishment, but as suspension pending enquiry and indicate whether the suspension would be the punishment or not. The reason for deciding the said view is that the authorities have not reflected in the order as to whether the order of suspension is by way of punishment or not. Hence, passing the order*

regarding suspension cannot be said to be in terms of the provisions of Rule 12(6) of the Rules. Accordingly, that part of the order, which related to treating the period of suspension as leave due, is not sustainable and accordingly quashed.'

In view of the aforesaid analysis, this Court is of the considered view that the alleged 3rd punishment imposed in the impugned order Annexure-8 dated 15.09.2018 cannot sustain in the eye of law.

12. *It is of relevance to note here the well made principle enshrined in criminal jurisprudence extending legal maxim "nulla poena sine lege", which means that a person should not be made to suffer penalty except for a clear breach of existing law. In S. Khushboo Vrs. Kanniammal and Anr, AIR 2010 SC 3196, the Apex Court held that a person cannot be tried for an alleged offence unless the legislature has made it punishable by law and it falls within the offence as defined under Sections 40, 41 and 42 of the Indian Penal Code, 1860, Section 2(n) of Code of Criminal Procedure, 1973 or Section 3(38) of the General Clauses Act, 1897.*

13. *Even though the aforementioned principle has been laid in connection with a criminal case, but the analogy can also be applicable to the present context, which has been referred to of the judgment of the Apex Court in Vijay Singh Vrs. State of U.P. and others, (2012) 5 SCC 242 = AIR 2012 SC 2840. Thereby, on this score only the 2nd punishment imposed vide order impugned under Annexure-8, having not been contemplated in any of the provisions of the service rules applicable to the employees of DRDA or even in the OCS (CCA) Rules,*

1962, such punishment is not maintainable in the eye of law."

8.6. In the case at hand, since the allegations levelled against the petitioner in the criminal case could not be substantiated which resulted in acquittal by the learned Special Judge (Vigilance) invoking power under Section 248(1) of the Code of Criminal Procedure, 1973 and the punishment inflicted in the disciplinary proceeding under Rule 13 got set aside by the Appellate Authority in exercise of power under Rule 29 of the OCS (CCA) Rules, the petitioner should not be made to suffer penalty in the manner which is reflected in the fresh Order dated 05.04.2021 of the Disciplinary Authority purported to have been passed as a sequel to Appellate Order *vide* Memo No.8706, dated 23.12.2019 with reference to advice *vide* Letter dated 10.12.2020 of the Revenue and Disaster Management Department. The mandate in Rule 30 of the OCS (CCA) Rules makes it clinches that the Disciplinary Authority is required to give effect to Appellate Order without being influenced by advisory received from any other source. Therefore, Order dated 05.04.2021 as passed by the Disciplinary Authority-opposite party No.3 does require intervention of this Court.

9. In view of the above, this Court finds that Order dated 05.04.2021 (Annexure-15) is not tenable in the eye of

law. Accordingly, this Court invoking power of extraordinary jurisdiction under Article 226 of the Constitution of India is inclined to quash the Order dated 05.04.2021 passed by the Collector, Kandhamal. Accordingly, the order impugned is quashed.

9.1. Needless to say that the opposite parties are required to extend all consequential service benefits including financial benefit, which the petitioner is entitled to in the light of the discussions made *supra*, which shall be granted within a period of three months from today.

9.2. With the above observations and directions, the writ petition stands disposed of, but there shall be no order as to costs.

(MURAHARI SRI RAMAN)
JUDGE

High Court of Orissa, Cuttack
The 9th October, 2024//MRS/Laxmikant/Suchitra