

SUPREME COURT OF INDIA

State of Orissa

Vs.

Dhirendranath Das

C.A.No.103 of 1959

(S. K. Das, M. Hidayatullah, K. C. Das Gupta, J. C. Shah and N. Rajagopala Ayyangar, JJ.)

18.08.1960

JUDGEMENT

SHAH, J. :

1. Dhirendranath Das - respondent to this appeal - was appointed a lower Division Assistant in the Secretariat of the Government of Orissa. Later, the respondent was promoted as an Upper Division Grade I Assistant and was posted in the Commerce Department, and was at all material times a non-gazetted servant of the State. On November 27, 1953, by order of the Secretary to the Government of Orissa, Commerce Department, the respondent was placed under suspension pending an enquiry conducted by the S. P. Enforcement into cases of alleged manipulation of figures in the receipt registers maintained by certain employees in the commerce Department. By order of the Governor of Orissa, the case of the respondent along with the cases of certain other persons was referred for enquiry on January 23, 1954, to an Administrative Tribunal consisting of one P. K. Kapila, as sole member of the Tribunal, The Tribunal framed charges against the respondent and called upon him to show cause why he should not be dismissed from service. The respondent submitted his reply to the notice. The Tribunal held an enquiry and on September 28, 1954, recorded a finding that it was proved on the evidence that the respondent was guilty of the charges against him and recommended that he be dismissed from service. Notice was then issued to the respondent to show cause why the punishment proposed by the Tribunal should not be inflicted upon him. After considering the explanation submitted by the respondent, the Government of Orissa by order dated August 3, 1955, dismissed the respondent from service.

2. The respondent submitted a petition under Art. 226 of the Constitution of India to the High Court of Judicature, Orissa praying for a writ declaring illegal the order of dismissal passed against him and further declaring that he continued to remain "in the service of" the Government of Orissa. The High Court held that in directing the enquiry under the Disciplinary Proceedings (Administrative Tribunal) Rules, 1951 - hereinafter referred to for the sake of brevity as the "Tribunal Rules" instead of an enquiry under the Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935 - hereinafter referred to as the "Service Rules" discrimination was practised against the respondent, and accordingly declared that cls. (a) and (b) of sub-r. (1) of R. 4 of the Tribunal Rules, 1951 in their application to non-gazetted Government servants infringed the guarantee under Art. 14 of the Constitution, and directed that the entire departmental proceedings against the respondent held by the Tribunal and the orders of punishment passed by the Government be declared inoperative, and further directed that the disciplinary proceedings against the respondent be restored to the stage which they had reached on November 27, 1953, before the case was referred to the Tribunal.

Against the order passed by the High Court, this appeal has been preferred.

3. It is evident that under the Tribunal Rules, the enquiry is made by the Tribunal to whom the case is referred by the Governor. The findings of the Tribunal are merely in the nature of recommendations, which the Government may, but is not bound to, accept. The Government is however bound before passing final orders to consult the Public Service Commission. Under the Service Rules which apply to non-gazetted Government servants, an enquiry is held by the departmental head of the public servant concerned and there is a right of appeal to the authority immediately superior to the authority who imposes a penalty upon the public servant. The High Court on the materials placed before it held that at the material time, the Tribunal Rules and the Service Rules were simultaneously in operation and it was open to the Government to direct an enquiry against a non-gazetted public servant charged with misdemeanour under either set of rules, and that the Tribunal Rules were "less advantageous and more drastic than" the Service Rules, and the conferment of an unfettered discretion on the Executive to apply either set of rules would offend against Art. 14 of the Constitution. Admittedly, under the Tribunal Rules, the public servant against whom a penalty is imposed has no right of appeal against the finding and recommendation of the Tribunal which a person similarly situated may have if an enquiry were held under the Service Rules. The Tribunal Rules do contemplate an enquiry by a person not connected with the department of the public servant and the rules also provide that before passing an order to the prejudice of the public servant concerned, the Public Service Commission shall be consulted, but those compensatory safeguards do not, in our judgment, make the procedure prescribed by the Tribunal Rules any the less discriminatory. If it was open to the government of Orissa to direct an enquiry against a non-gazetted public servant either under the Tribunal Rules or under the Service Rules, there being a substantial difference in the protection to which the public servant concerned was entitled, a clear case of discrimination arose. Article 14 of the Constitution enjoins the State not to deprive any person of equality before the law. If against two public servants similarly circumstanced, enquiries may be directed according to procedures substantially different at the discretion of the Executive authority, exercise whereof is not governed by any principles having any rational relation to the purpose to be achieved by the enquiry, the order selecting a prejudicial procedure, out of the two open for selection, is hit by Art. 14 of the Constitution.

4. Mr. Bindra appearing on behalf of the State did not attempt seriously to challenge the correctness of the view taken by the High Court on the question of discrimination. But counsel urged that at the material time, the Service Rules were not in operation and the only rules under which an enquiry could be directed against the respondent were the Tribunal Rules and, therefore, by directing enquiry against the respondent thereunder, the guarantee of equal protection of the Constitution was not violated. Counsel urged that by virtue of Art. 313 of the Constitution read with Art. 309 proviso, the Service Rules were superseded on the promulgation of the Tribunal Rules and the Government of Orissa could not direct an enquiry against the respondent under Service Rules. Counsel urged that the assumption made by the learned Judges of the High Court that both the sets of rules were in force at the material time and either set could be resorted to by the Government for directing an enquiry against a non-gazetted public servant, was unwarranted. We may, however, point out that this argument was never advanced in the High Court; it was not set out in the application for leave to appeal to this court and does not also find place in the statement of case filed in this court on behalf of the State. We do not think that we would be justified in permitting counsel at this late stage to raise a contention which has not been raised at any earlier stage. If we were to entertain this argument, it would necessitate a radical enquiry into the source of the power in exercise of which the Tribunal Rules were promulgated and whether those rules superseded the earlier rules. The High Court has recorded a clear finding that both the sets of rules were in force in the year 1952, and if

the Service Rules were not in fact in force, we would have expected the State to raise that contention prominently before the High Court. Even in the argument before us, counsel for the State did not contend that the Service Rules were wholly superseded by the Tribunal Rules, since the latter rules contained a provision permitting a Gazetted Officer charged with misdemeanour to elect whether a proposed enquiry shall be conducted according to the procedure prescribed by the Service Rules. In these circumstances, we refuse to entertain the argument which is advanced for the first time in this court.

5. If the two sets of rules were in operation at the material time when the enquiry was directed against the respondent and by order of the Governor, the enquiry was directed under the Tribunal Rules which are "more drastic" and prejudicial to the interests of the respondent, a clear case of discrimination arises and the order directing enquiry against the respondent and the subsequent proceedings are liable to be struck down as infringing Art. 14 of the Constitution. We therefore dismiss the appeal. There will be no order as to costs.

Appeal dismissed.

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