M. Gopala Krishna Naidu

Vs

State of Madhya Pradesh

Civil Appeal No. 2376 of 1966

(J. C. Shah, S. M. Sikri, J. M. Shelat, V. Bhargava JJ)

24.08.1967

JUDGMENT

SHELAT, J. -

Prior December 17, 1947 the appellant was serving as an Overseer in the Public Works Department of the Central Provinces and Berar Government. On December 17, 1947 he was suspended from service and prosecuted under section 161 of the Penal Code. The trial resulted in his conviction but that was set aside in appeal on the ground that no proper sanction for prosecution was obtained. He was again prosecuted on the same charge but the Special Judge trying him quashed the charge sheet on the ground that the investigation had not been carried out by the proper authorities. In revision the High Court of Nagpur held that the Special Judge was in error in so holding but recommended that the prosecution should not be proceeded with as nearly 10 years had gone bu since it was launched against the appellant. Following the recommendation the prosecution was dropped but a department inquiry was held on the same charges. The Inquiry Officer found the appellant not guilty but the Government disagreed with that finding and served a notice to show cause why he should not be dismissed. By an order dated December 5, 1960 the Government held that the charges against the appellant were not proved beyond reasonable doubt. It also held that the suspension and the departmental inquiry "were not wholly unjustified". The order then directed that the appellant should be reinstated in service with effect from the date of the order and retired from that date, he having already attained superannuation age on September 5, 1952, and that the entire period of absence from duty should be treated as period spent on duty under F.R. 54(5) for purposes of pension only, but that he should not be allowed any pay beyond what he had actually received or what was allowed to him by way of subsistence allowance during the period of his suspension.

On a representation made by him against the said order having been rejected the appellant filed a petition Art. 226 of the Constitution in the High Court of Madhya Pradesh for quashing the said order and for an order directing the Government to treat the period of absence from duty as period spent on duty under cl. 2 of the said Fundamental Rule and to revise the pension payable to him under that clause. The High Court dismissed the Petition but granted certificate to file this appeal and that is how this appeal has come up before us.

Fundamental Rule 54 on the interpretation of which this appeal depends is as follows :-

> "(1) When a Government servant who has been dismissed removed or suspended is reinstates; the authority competent to order the reinstatement shall consider and make a specific order -

(a) Regarding the pay and allowance to be paid to the Government servant for the period of his absence from duty; and

(b) Whether or not the said period shall be treated as a period spent on duty;

(2) Where the authority mentioned in sub-rule (1) is of opinion 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 and allowances to which he would have been entitled, had he not been dismissed, removed or suspended, as the case may be.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe.

Provided that the payment of allowances under clause (2) or clause (3) shall be subject to all other conditions under which such allowances are admissible.

Provided further that such proportion of such pay and allowances shall not be less than the subsistence and other allowances admissible under Rule 53.

(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 desired, 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."

On behalf of the appellant two points were urged before the High Court; (1) that before passing the impugned order the appellant ought to have been given a reasonable opportunity to show cause against the action proposed and (2) that it was clues 2 and not clause 5 which applied to his case. The High Court rejected both the contentions and, as aforesaid, dismissed the petition. Counsel for the appellant canvassed the same contentions before us. Mr. Sen on behalf of the State, however, argued that F.R. 54 does not in express terms lay down a duty on the part of the authority to give an opportunity to show cause to the government employee and therefore the question would be whether the Rule imposed such a duty by necessary implication. He urged that the Rule cannot be said to lay down such duty by implications in as much as the impugned order is only a consequential order. That it was passed following a departmental inquiry held against the appellant during the course of which opportunity to show cause was already afforded. He contended that the only duty laid down by F.R. 54 was that the Government should consider whether the appellant was fully exonerated and in case of suspension whether such suspension was wholly unjustified and that once the authority formed the opinion that it was not so, cls. 3 and 5 would apply. The Government having formed the opinion that the suspension was not wholly unjustified clause 5 applied and the impugned order was not liable to be challenged.

The first question which requires consideration is whether there was a duty on the competent authority to afford an opportunity to the appellant to show cause before that authority formed the

opinion as to whether he was fully exonerated and whether his suspension was wholly unjustified. Under F.R. 54 where a Government servant is reinstated, the authority has to consider and make a specific order (i) regarding pay and allowances payable to him for the period of his absence from duty and (ii) whether such period of absence should be treated as one spent on duty. The consideration of these questions depends on whether on the facts and circumstances of the case the Government servant had been fully exonerated and in case of suspension whether it was wholly unjustified. If the authority forms such an opinion the Government servant is entitled to full pay and allowances which he would have been entitled to had the order of dismissal, removal or suspension, as the case may be, not been passed. Where the authority cannot form such an opinion the Government servant may be given such proportion of pay and allowances as the authority may prescribe. In the former case the period of absence from duty has to be treated as period spent on duty for all purposes and in the latter case such period is not to be treated as period spent on duty. But the authority has the power in suitable cases to direct that such period of absence shall be treated as period spent on duty in which case the government servant would be entitled to full pay and allowances.

It is true that the order under F.R. 54 is in a sense a consequential order in that it would be passed after an order of reinstatement is made. But the fact that it is a consequential order does not determine the question whether the government servant has to be given an opportunity to show cause or not. It is also true that in a case where reinstatement is ordered after a departmental inquiry the government servant would ordinarily have had an opportunity to show cause. In such a case, the authority no doubt would have before him the entire record including the explanation given by the government servant from which all the facts and circumstances of the case would be before the authority and from which he can form the opinion as to whether he has been fully exonerated or not and in case of suspension whether such suspension was wholly unjustified or not. In such a case the order passed under a rule such as the present Fundamental Rule might be said to be a consequential order following a departmental inquiry. But there are three classes of cases as laid down by the proviso in Art. 311 where a departmental inquiry would not be held, viz., (a) where a person is dismissed, removed or reduced in rank on the ground of conduct which has led to his convocation on a criminal charge, (b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied for reasons to be recorded in writing that it is not reasonably practicable to hold such an inquiry; and (c) where the President or the Governor as the case may be is satisfied that in the interest of security of the State it is not expedient to hold such inquiry. Since there would be no inquiry in these classes of cases the authority would not have before him any explanation by the government servant. The authority in such cases would have to consider and pass the order merely on such facts which might be placed before him by the department concerned. The order in such a case would be ex-parte without the authority having the other side of the picture. In such cases the order that such authority would pass would not be a consequential order as where a departmental inquiry has been held. Therefore, an order passed under Fundamental Rule 45 is not always a consequential order nor is such order a continuation of the departmental processing taken against the employee.

It is true as Mr. Sen pointed out that F.R. 54 does not in express terms lay down that the authority shall give to the employee concerned the opportunity to show cause before he passes the order. Even so, the question is whether the rule casts such a duty on the authority by implication. The order as to whether a given case falls under cl. 2 or cl. 5 of the Fundamental Rule must depend on the examination by the authority of all the facts and circumstances of the case and his forming the opinion therefrom of two factual findings; whether the employees was fully exonerated and in case of suspension whether it was wholly unjustified. Besides, an order passed under this rule would

obviously affect the government servant adversely if it is is one made under cls. 3 and 5. Consideration under this rule depending as it does on facts and circumstances in their entirely, passing an order on the basis of factual finding arrived at from such facts and circumstances and such an order resulting in pecuniary loss to the government servant must be held to be an objective rather than a subjective function. The very nature of the function implies the duty to act judicial. In such a case if an opportunity to show cause against the action, proposed is not afforded, as admittedly it was not done in the present case, the order is liable to be struck down as invalid on the ground that it is one in breach of the principles of natural justice.

In the State of Orissa v. Dr. (Miss) Binapani Devi and others ([1967] 2 S.C.R. 625) this Court held that an order fixing the date of birth of the government servant concerned there and declaring that she should be deemed to have retired on a particular date on the basis of the date so determined without giving an opportunity to show cause against the action proposed was invalid on the ground that the determination was in violation of the principles of natural justice. It was there observed :-

> "The State was undoubtedly not precluded, merely because of the acceptance of the date of birth of the first respondent in the service register, from holding an inquiry if there listed sufficient grounds for holding an enquiry and for refining her date of birth. But the decision of the State could be based upon the result of an enquiry in a manner consonant with the basic concept of justice. An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fairplay. The dealing authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is however under a duty to give the person against whom an enquiry is held an opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice."

We find that the High Court of Maharashtra has also taken in V. R. Gokhale v. State of Maharashtra (I.L.R. [1963] Bom. 537) the same view which we are inclined to take of the nature of function under R. 152 of the Bombay Civil Service Rules, 1959, a rule in terms identical to those of F.R. 54 before us.

In our view, F.R. 54 contemplates a duty to act in accordance with the basic concept of justice and fair play. The authority therefore had to afford a reasonable opportunity to the appellant to show cause why cls. 3 and 5 should not be applied and that having not been done the order must be held to be invalid.

The appeal is allowed and the High Court's order is set aside. The competent authority is directed to consider the question de novo after giving to the appellant a reasonable opportunity to show cause against the action propped against him. The respondent will pay to the appellant costs of this appeal as also the costs of the petition in the High Court.

G.C.

Appeal allowed.

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