ORISSA HIGH COURT

Dayanidhi Rath

Vs

B.S. Mohanty

O.J.C. No. 84 of 1953

(Panigrahi, C.J. and Narasimham, J.)

12.11.1954

JUDGMENT

Narasimham, J.

1. This is a petition under Article 226 of the Constitution by a ministerial officer of the Orissa Secretariat against an order of dismissal from service passed by Sri B.S. Mohanty, Secretary to the Government, Development Department by his order No.17886/D. dated 24-10-1952. The petitioner submitted a memorial to the Governor against the order of dismissal; but it was rejected.

2. Early in 1952, the petitioner was working as a temporary Grade II Upper Division Assistant in the Development Department. On 24-7-1952, the Secretary of that Department (Sri. B.S. Mohanty) framed three specific charges against the petitioner of insubordination, misbehaviour etc., and directed him by his order (No.13752) "to show cause why he should not be dismissed or otherwise punished". The petitioner showed cause and the usual departmental enquiry was held. After the termination of the enquiry the Under-Secretary of the Development Department issued the following Memo No.15833/D. dated 2-9-1952 to the petitioner :

> "Government of Orissa
> Development Department.
> Memo No.15833/D. Dated Bhubanswar, 2-9-1952
> To,
> Sri Davanidhi Rath
> Grade II U.D. Assistant (Under suspension), Development Department.
> With reference to the explanation dated 26-8-1952, submitted by Sri D. Rath on the charges framed against him a copy of the remarks of the Enquiring Officer on all the charges is forwarded to him and he is informed that in view of the Enquiring Officer's findings contained in the report with which Secretary agrees and in consideration of his past records of services it is proposed to remove him from Government service. He is

therefore hereby directed to show cause within a week from the date of receipt of this memo why the penalty of dismissal should not be inflicted on him for the charges proved against him. Any representation submitted by him to the Secretary on this behalf in time will be duly taken into consideration. He is also called upon to say if he would like to have any personal hearing in the matter by the Secretary to Government, Development Department."

In this memo the petitioner was informed that in view of the findings arrived at by the Enquiring Officer during the departmental enquiry with which the Secretary agreed, "it was proposed to remove him from Government service". He was, however, called upon to show cause why the penalty of dismissal may not be inflicted on him. He submitted a further representation which was fully considered but eventually the Secretary of the Development Department passed the order of dismissal (No.17886 /D.) dated 24-10-1952.

3. The main ground urged on behalf of the petitioner is that the penalty of 'removal from service' is lesser than the penalty of 'dismissal from service' and that having inflicted the first, the Secretary acted in contravention of Article 311(2) of the Constitution by passing the major penalty of dismissal.

4. Article 311 reproduces substantially the provisions of Section 240, Government of India Act, 1935 and the decisions of the Federal Court and. the Privy Council regarding the construction of that section of the Government of India Act would therefore, apply with full force. Prior to the passing of the Government of India Act, 1935 the Secretary of State had made the rules known as the Civil Services (Classification, Control and Appeal) Rules in which various classes of penalties that may be imposed on a civil servant (Rule 49), the authorities competent to impose such penalties and the procedure to be followed (Rule 55) in a departmental enquiry that may precede the imposition of such penalties were fully described. These rules were kept alive by the Government of India Act, 1935 and also by the Constitution, subject of course to certain adaptations which are not material for our present discussion. In Rule 49, seven classes of penalties have been described and the last two which are relevant for our purpose may be quoted:

"(vi) Removal from the civil service of the Crown, which does not disqualify from future employment.
(vii) Dismissal from the civil service of the Crown, which ordinarily disqualifies from future employment."

Hence, there is no doubt that 'removal' from service is a lesser penalty than 'dismissal' and that in the Service Rules the distinction between the two penalties is clearly maintained. Sub-sees. (2) and (3) of Section 240, Government of India Act, 1935 are as follows:

"Sub-section (2) - No such person as aforesaid shall be dismissed from the service of his Majesty by any authority subordinate to that by which he was appointed.

Sub-section (3) - No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in

regard to him."
The corresponding provisions of Article 311 of the Constitution are, however, as follows:

> "Article 311(1) - No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.
> (2) - No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

It will be noticed that though in the Government of India Act the expression 'removal from service' was not used, that expression was specially inserted in Article 311 of the Constitution so as to make it abundantly clear that even if the penalty that is intended to be inflicted on a civil servant is 'removal from service' the mandatory provisions of Article 311 of the Constitution should be complied with. It was pointed out by the Federal Court in an earlier decision reported in - *'Afzalur Rahman v. Emperor'*[1], that in construing the provisions of Sections 240 and 241, Government of India Act, the long standing practice based on the rules regulating the conditions of service of various classes of Government servants should be looked into. This observation would apply with equal force in construing Article 311 and it may, therefore, be reasonably held that when the Constitution makers used the expressions 'dismissed' and 'removed' in juxtaposition they were thinking of the two classes of penalties referred to in clauses (vi) and (vii) of R.49 of the Civil Services (Classification, Control and Appeal) Rules.

5. The petitioner was undoubtedly given opportunities at two different stages of the departmental enquiry to submit his representations to the Secretary. The first one was on 24-7-1952 when specific charges were framed and he was called upon 'to show cause why he should not be dismissed or otherwise punished'. This opportunity was given under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules and at that stage the charges against him remained unproved and the suggested punishment was also indefinite and somewhat hypothetical. After the termination of the departmental enquiry, however, he was rightly given another opportunity on 2-9-1952 to show cause against the action that was proposed to be taken against him.
This second opportunity was given in view of the decision of the Privy Council in - *'High Commr. for India v. I.M. Lal'*[2], where on a construction of the corresponding provisions (Section 240(2)) of the Government of India Act, their Lordships laid down that after coming to a definite conclusion regarding the charges and provisionally determining the actual punishment to follow, the civil servant concerned should be given an opportunity to show cause against the action proposed to be taken against him so as to give him an opportunity to represent against the punishment proposed as a result of the findings of the departmental enquiry. It is thus well-settled by authority that before passing an order of punishment against a civil servant such as 'dismissal' or 'removal' from service he should be informed about the punishment that was proposed to be passed against him and given an opportunity to make his
representations against that punishment. Doubtless, if the punishment that is proposed against him is of a graver kind but after hearing his representation he is awarded a lesser kind of punishment there may be no question of prejudice and a Court would hold that there was compliance with the provisions of Article 311(2) of the Constitution. In that case the well-known

principle that 'the greater contains the less' ('Omne majus continet in se minus') would apply. But if the punishment that is tentatively proposed against a civil servant is of a lesser kind, but after hearing his representation he is awarded a graver form of punishment he would be highly prejudiced and there would be non-compliance with the provisions of Article 311(2) of the Constitution.

6. This seems to have happened in the present case. I have already quoted the memo of the Under-Secretary of the Development Department dated 2-9-1952 in which it is categorically stated 'it is proposed to remove him from Government service'. The petitioner can reasonably say that he was under the impression that no penalty graver than removal from service would be passed against him and that the subsequent order of the Secretary dismissing him from service was not only prejudicial to him but would amount to contravention of constitutional safeguard provided in Article 311(2).

7. On behalf of 'the State, however, it was urged by the Government Advocate that the expressions 'removal from service' and 'dismissal from service' were used as synonymous expressions in the departmental roceedings as well as in the memo issued to the petitioner on 2-9-1952 and that the petitioner was, therefore, not misled by the slight verbal defect in that memo. I am, however, unable to accept this argument. The proceedings against the petitioner were instituted and conducted by senior gazetted Government servants who may be presumed to have known the provisions of R.49 of the Civil Services (Classification, Control and Appeal) Rules making a sharp distinction between 'removal' on the one hand and 'dismissal' on the other. There could be no justification for such senior gazetted officers to make confusion between the two expressions and to use them indiscriminately in the proceeding. I do not know if the confusion was partly due to their misconstruing the observations of the Privy Council in AIR 1948 P.C.121 at p.124 (para 13), where for the purpose of that case the terms 'dismissal' and 'removal' were accepted as synonymous. That case dealt with the construction of Section 240(2), Government of India Act, where, as already pointed out, there was no express provisions dealing with 'removal from Government service'. Their Lordships, however, held that the safeguard against dismissal from Government service of a civil servant provided in that section would equally apply when he is removed from Government service. But in the Constitution both the-expressions have been put in juxtaposition and in the Civil Services (Classification, Control and Appeal) Rules the essential distinction between the two classes of penalties was clearly maintained. Hence, I cannot accept the Government Advocate's argument that when the petitioner was informed that it was proposed to remove him from service he should have known that the penalty that was intended to be passed against him was dismissal from service.

8. It is true that in the memo dated 2-9-1952, the petitioner was called upon to show cause why the penalty of dismissal may not be passed against him and in the further representation dated 9-9-1952, made by the petitioner to the Secretary, he purported to show cause against the passing of the penalty of 'dismissal'. But these should be viewed against the background of the action that was proposed to be taken against him, namely, removal from service. A scrutiny of the relevant papers leads to the inference that though all concerned had overlooked the essential distinction between the two classes of penalties, yet the petitioner was led to believe that the extreme penalty that may be ultimately passed against him would be only removal from service. There can be no strict compliance with Clause (2) of Article 311 unless the penalty that is eventually passed is either the same, or lesser in degree than that which was proposed to be passed against a civil

servant.

9. I am satisfied that there has been contravention of the mandatory provisions of Clause (2) of Article 311 of the Constitution in consequence of which the order of dismissal (no.17886/D.) dated 24-10-1952, should be held to be void and inoperative. The petitioner is hereby declared to be still a temporary Grade II Upper Division Assistant in the Secretariat. He is entitled to costs of this petition which are assessed at Rs.100/-.

Panigrahi, C. J.

10. I agree.

Petition allowed.

Cases Referred.

[1] AIR 1943 FC 18
[2] AIR 1948 P.C 121