ORISSA HIGH COURT

Dhirendranath Das

Vs

State of Orissa

O.J.C. No. 391 of 1956

(R.L. Narasimham, C.J. and G.C. Das, J.)

21.11.1957

JUDGMENT

R.L. Narasimham, C.J.

1. This is an application under Article 226 of the Constitution by a Grade I Upper Division Assistant of the commerce Department of the Orissa Secretariat, against the order of the Government of Orissa No. 8307-Com, dated 3-9-1955, dismissing him from service.

2. On 27-11-1953, the Government of Orissa placed the petitioner under suspension and referred his case to the Tribunal constituted under the Disciplinary Proceedings (Administrative Tribunal) Rules 1951, in consequence of a report submitted by the Superintendent of Police, Enforcement, after confidential enquiry, to the effect that the petitioner and some other members of the ministerial staff of the commerce department had manipulated the figures in the Receipts Register so as to justify an increase in the staff. The sole member of the Administrative Tribunal Shri P. K. Kapila, framed specific charges against the petitioner, called upon him to submit his explanation, and held a regular enquiry under the said rules. The enquiry appears to have been held in conformity with the principles of equity and natural justice, the witnesses were examined in his presence, and he was given an opportunity to cross-examine them. Shri Kapila submitted his finding to the Government on 28-9-1954, stating that the charges were proved, and recommending that the petitioner should be dismissed from service. Then, Shri Kapila, in his capacity as Additional Secretary to Government in the Cabinet Department, sent a copy of his finding to the petitioner on 21-10-1954, and called upon him to show cause why the punishment proposed (meaning of course the punishment of dismissal) may not be passed against him.
This notice was apparently issued in compliance with the requirements of Article 311 (2) of the Constitution. The petitioner showed cause against the proposed punishment, but it was held to be unsatisfactory and Government eventually dismissed him from service on 3-9-1955. Before passing the order of dismissal Government consulted the Public Service Commission also, as required by Regulation 3 (a) (i) of the Orissa Public Service Commission (Limitation of Functions) Regulations.

3. In this application under Article 226 the petitioner first challenged the findings of Shri Kapila

and urged that the charges against him were not proved. This challenge is not open to him, inasmuch as there was some evidence to support the findings of Shri Kapila and in exercise of our extraordinary jurisdiction under Article 226, we cannot sit in iudgment over his finding like an appellate Court.

4. The main points of constitutional law, raised by Shri Srinivasa Misra on behalf of the petitioner are these:

> (i) In the notice dated 21-10-1954 issued by the Government to the petitioner, in purported compliance with the requirements of Article 311 (2) it was not expressly stated that the Government had accepted the findings of Shri Kapila and had tentatively come to the conclusion that the petitioner should be dismissed from service; and that consequently the notice is defective.
> (ii) The provisions of Clauses (a) and (b) of sub-rule (1) of Rule 4 of the Disciplinary Proceedings (Administrative Tribunal) Rules 1951 (hereinafter referred to as the 'Tribunal Rules') - are unconstitutional in their application to non-gazetted Governments servants as violative of Article 14.

5. The notice issued under Article 311 (2) on 21-10-1954 is as follows:

> "I am directed to enclose herewith a copy of the findings of the Member, Administrative Tribunal, Orissa in the proceeding against you, and you are hereby called upon to explain by the forenoon of 21-11-1954, as to why the punishment proposed should not be inflicted."

This notice is clearly defective inasmuch as it does not expressly say that Government have accepted the finding of the Tribunal or else that they have tentatively decided that the punishment of dismissal should be inflicted on the petitioner. In paragraph 11 of my judgment, in *Baishnab Charan Das v. State of Orissa*[1], I have pointed out the irregularity in issuing notices of this type, in purported compliance with the requirement of Article 311 (2). But in that case I held that in view of the affidavit filed by Government to the effect that the findings of the Tribunal were placed before the Chief Minister and his concurrence was obtained, not only as regards the correctness of the findings but also as regards the tentative punishment proposed to be inflicted on the delinquent Government servant the defect in the notice was only an irregularity. In the present case also, an affidavit has been filed by the Under-Secretary, political and Services Department Shri Nrushingha Charan Behera, to the effect that the findings of the Tribunal were actually placed before the Chief Minister on 18-10-1954 and approved by him, and also that the Government accepted the recommendation of the Tribunal about the proposed punishment to be inflicted, namely dismissal from service. There is no counter-affidavit by the petitioner challenging this statement of fact. Following, therefore, my previous decision in ILR (1957) Cut 177 : (AIR 1957 Orissa 70), I would hold that the defect in the notice dated 21-10-1954 issued by Government is a mere irregularity.

6. The second constitutional question, however, requires serious consideration. In the previous decision I left open the question as to whether the Tribunal Rules, in their application to non-

gazetted Government Servants offend Article 14 of the Constitution because in that particular case the delinquent public servant was a gazetted officer, and this question was merely academic.

7. The Tribunal Rules were made in 1951 and prior to that year, the rules dealing with disciplinary action against Government servants of all classes (gazetted and non-gazetted) were contained in the Civil Services (Classification, Control and Appeal) Rules 1930; and in the subsidiary rules framed thereunder such as the Bihar and Orissa Subordinate Services Discipline and Appeal Rules 1935 and the Government Servants Conduct Rules which though originally made under Section 96B of the Government of India Act of 1919. should be deemed to be rules made under sub-rule (2) of Rule 48 of the Civil Services (Classification, Control and Appeal) Rules in their application to State Government Servants (whether gazetted or non-gazetted).
All these rules may be compendiously referred to in this judgment as the "Classification Rules", to distinguish them from the Tribunal Rules. Under the Classification Rules, seven classes of punishment, as described in detail in R. 49, may be imposed on a Government servant "for good and sufficient reason". The rules do not describe the nature of misconduct of the Government servant which would justify the imposition of those punishments, and it is left to the discretion of the superior authority "for good and sufficient reasons", to impose such penalties. Doubtless, the Government Servant Conduct Rules prohibit certain acts on the part of Government servants and failure to comply with those rules may amount to misconduct for which disciplinary action may be taken against them. But, apart from the provisions of the Government Servants Conduct Rules there are other classes of misconduct such as corruption, failure to discharge duties properly etc., which are not clearly specified in any of the rules. The Classification rules further provide that before imposing graver penalties like dismissal or removal from service, or reduction in rank, a formal proceeding should be drawn up against the delinquent Government servant under Rule 55. and a regular enquiry held in the presence of that Government servant. Rule 56 confers a right of appeal to the Governor against an order of punishment passed by the Government, in the case of gazetted Government servants. This was a real and substantial right under the Government of India Act 1935, when the Governor had over-riding powers. But after the advent of the Constitution it has become practically illusory inasmuch as the Governor is now bound to act on the advice of his Ministers. Gazetted Government servants can be dismissed only by Government, i. e., by the Governor acting on the advice of the Minister, and an appeal to the Governor against such an order of dismissal cannot succeed, unless the Minister himself is prepared to re-consider his previous order. But in the case of non-gazetted Government servants this right of appeal is real and sometimes very effective. The appointing authority of non-gazetted Government servants is not the Government but an inferior authority like the Head of the Department or the Head of the Office, and R. 4 of the Bihar and Orissa Subordinate Service Discipline and Appeal Rules 1935 which are still continued in force expressly confers on a member of the Subordinate services a right of appeal to the authority immediately superior to the authority which imposed on him any of the penalties described in R. 49 of the Classification Rules. Rule 6 of the said rules describes the various matters to be considered by the appellate authority. His powers are co-extensive with those of the original authority: he may weigh the evidence, disagree with findings of fact, and also interfere with the penalty and pass such orders as he thinks proper. The coming into force of the Constitution in 1950 did not affect his powers in any way.

8. The tribunal Rules of 1951 are made applicable both to gazetted and non-gazetted Government servants. The only distinction made is that a gazetted Government servant has the

choice, under sub-rule (2) of Rule 4 of the said Rules, to require his case to be heard by the Tribunal, while a non-gazetted Government servant has no such choice and the Government have an unfettered discretion under sub-rule (1) of Rule 4. either to refer his case to the Tribunal or allow the enquiry to be conducted in accordance with the procedure prescribed by the Classification Rules. The Tribunal Rules widen the scope of 'misconduct" of a Government servant, as ordinarily understood, by giving definitions to such expressions as "failure to discharge duties properly", "personal immorality" etc. Under Rule 4. the following acts of misconduct of a public servant alone may be referred to the Tribunal: (a) corruption, (b) failure to discharge duties properly, (c) irremediable general inefficiency in a public servant of more than ten years standing, and (d) personal immorality. Excluding clauses (c) and (d) which perhaps may not come within the commonly accepted notion of 'misconduct' in a proceeding under the Classification Rules, it is clear that charges of corruption and failure to discharge duties properly may also be enquired into under the provisions of the Classification Rules. To this extent the two sets of rules overlap and deal with practically the same subject-matter. Under the Tribunal Rules, the Tribunal is required to make an enquiry in Camera following the rules of equity and natural justice. The elaborate procedure laid down in R. 55 of the Classification Rules, is not expressly incorporated in the Tribunal Rules, but I have held in my decision reported in ILR 1957 Cut 177: (AIR 1957 Orissa 70), that they apply by implication and that they are included in the general expression "rules of equity and natural justice." In the enquiries held under both sets of rules the delinquent servant is not given the right to be represented by counsel and it is left to the discretion of the enquiring officer to allow him, or not to allow him to be represented by a legal adviser.

9. The main difference between the two sets of rules arises from (1) the nature of the punishment proposed, and (2) the right of appeal. Under the Tribunal Rules the findings of the Tribunal including the proposed punishment are submitted to Government and are in the nature of a recommendation which the Government may or may not accept. But the Government are bound to consult the Public Service Commission before they pass final orders. Government have the power to impose the penalty of compulsory retirement under sub-rule (2) of Rule 8 of the Tribunal Rules in addition to the other penalties described in R. 49 of the Classification Rules. The right of appeal is expressly barred by sub-rule (3) of Rule 9. The Tribunal Rules do not say that every case against a Government servant, whether gazetted or non-gazetted, in which the acts of misconduct alleged are any of those described in sub-rule (1) of Rule 4 of the said Rules, should be invariably referred to the Tribunal.
Thus, if there are two non-gazetted Government servants both of whom have committed identical acts of misconduct such as failure to discharge duties properly, it is left to the unfettered discretion of the Government to refer the case of one of them to the Tribunal for enquiry under the said rules, and to allow the enquiry against the other public servant to be held departmentally by his superior officers under the provisions of the Classification Rules. The former public servant will have no right of appeal, but he will have the satisfaction of his case being enquired into not by his immediate superiors, but by an independent authority, namely, the Member Administrative Tribunal, whose recommendation will be subjected to further scrutiny by the Public Service Commission, and the final authority to pass any order of punishment will be the Government. The latter public servant however, though denied the advantage of having his case investigated by independent authorities, is given a statutory right of appeal. The procedure laid down in the Classification Rules may be described as the normal procedure for taking disciplinary action against Government servants, whether gazetted or non-gazetted; and the

procedure laid down in the Tribunal Rules may be described as a drastic procedure. Shri Misra, relying on a series of decisions of the Supreme Court, reported in *Surajmall Mohta and Co. v. Visvanatha Sastri*[2]*, Shree Meenakshi Mills, Ltd. v. A. V. Viswanatha Sastri*[3]*,* and *Muthiah Chettiar v. I. T. Commissioner. Madras*[4]*,* urged that the existence of two sets of statutory rules side by side dealing with persons placed in identical circumstances and giving an unfettered discretion to the Executive to apply one set of rules to one person and another set to another person, would offend the equality clause guaranteed by Article 14 of the Constitution.

10. The Advocate-General on the other hand, urged that the Tribunal Rules were meant to deal with instances of grave misconduct on the part of Government servants and that in any case the deprivation of the right of appeal is more than compensated by the right of enquiry by an independent authority, the right of consultation with another independent authority namely the Public Service Commission, and the passing of final orders by the Government themselves, instead of by a subordinate authority like the Head of the Department or Head of the Office.

11. There is no provision in the Tribunal Rules making those rules applicable only to cases of grave misconduct on the part of Government servant and excluding such acts from the scope of the Classification Rules. The gravest penalty that can be imposed on a Government servant is dismissal from service and that penalty can be imposed, after holding an enquiry even under the Classification Rules. R. 11 or the Tribunal Rules declares that nothing in those Rules shall be deemed to affect the conduct of disciplinary proceedings in cases other than those specifically dealt with under the provisions of those Rules. The effect of this rule is that if disciplinary proceedings are taken against a particular public servant under the provisions of the Tribunal Rules for an act of misconduct, he cannot also be dealt with under the Classification Rules for the same act of misconduct. But there is no legal bar to another public servant who has committed an identical act of misconduct, from being dealt with under the Classification Rules. The existence of an additional penalty by way of compulsory retirement from service in the Tribunal Rules, is not material for the present discussion inasmuch as we are concerned here with a case of dismissal from service which penalty can be imposed both under the Tribunal Rules and under the Classification Rules. In the absence of any indication, either in the preamble or in the body of the Rules, I am unable to accept the contention of the Advocate-General that
all grave acts of misconduct on the part, of a Government servant were intended to be
dealt with only under the provisions of the Tribunal Rules.

12. The second contention of the Advocate-General also cannot stand scrutiny. It is very similar to the argument raised by the Solicitor-General in AIR 1954 SC 545, which was rejected by their Lordships of the Supreme Court In that case under the provisions of the Income-tax Act which would normally apply to all tax-evaders there was a right of appeal, second appeal, and revision, but where the case of an evader was dealt with under the provisions of sub-section (4) of Section 5 of Central Act 30 of 1947, the case of the assessee was required to be heard by an Investigation Commission comprising a Judge of a High Court and two other responsible persons.
It was urged by the Solicitor General that the constitution of such a Commission was a good substitute for the rights of appeal, second appeal, and revision conferred by the Income-tax Act inasmuch as the members of the Commission were as good a tribunal as the totality of persons comprising the Income-tax Officer, the Appellate Assistant Commissioner, and the Appellate Tribunal. Their Lordships of the Supreme Court however, were not prepared to accept that contention. In the present case also it cannot be said that the totality of persons comprising the

Member, Administrative Tribunal the Public Service Commission, and the Government will be a good substitute for the Head of the Office or the Head of the Department and the statutory appellate authority. The right of appeal is a very valuable right. As pointed out by Sir John Pratt, C. J. in the *King v. Chancellor, Masters and Scholars of the University of Cambridge*[5]*,*

> "It is the glory and happiness of our excellent constitution that to prevent any injustice no man is to be concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief. For this purpose, the law furnishes him with appeals, with writs of error, and false judgment."

So far as public servants are concerned this right of appeal was considered so fundamental that in the Government of India Act, 1935, in Clause (c) of sub-section (3) of Section 241, it was expressly provided that any rule regulating the conditions of service of all public servants must make provision for at least one appeal against an order of punishment imposed by the competent authority. In view of the fallibility of human nature, It will be unjust to deprive a public servant who is faced with such a drastic punishment as dismissal from service for misconduct, of the benefit of having the evidence against him assessed by two independent authorities which a right of appeal alone can confer. Doubtless, there are other remedies by way of memorials or representations to superior authorities and by way of applications to this Court under Article 226, but the powers of the superior authorities and of this Court in these instances to disturb the findings of fact of the original authorities, are very circumscribed. It is true that under the Tribunal Rules an independent authority like the Public Service Commission is entitled to consultation. But its powers are merely advisory and the Government are not bound to accept its advice. Moreover in a recent decision of the Supreme Court, in *State of U. P. v. Manbodhanlal Srivastava*[6]. it was
held that consultation with the Public Service Commission before taking disciplinary action, as provided in Article 320 (3) (c) does not mean that the public servant can enforce such a right of consultation in a Court of law and that even if there is an omission to consult the Commission an order of punishment passed by the Government cannot be held to be invalid. Hence, in essence there is only one authority to decide not only on the facts but also on the punishment.

13. I must therefore hold that so far as non-gazetted Government servants are concerned the provisions of the Tribunals Rules are less advantageous' and more drastic than those of the Classification Rules and the conferment of an unfettered discretion on the Executive to apply either of these rules for the purpose of taking disciplinary action against a non-gazetted Government servant would offend Article 14 of the Constitution.

14. There is doubtless a fine distinction between cases of the present type and those of another type where though a special law is made for the purpose of being applied to a particular class of persons, an unfettered discretion is conferred on the Executive to decide whether a particular person falls under that class so as to come within the scope of the special law. In *Venkatachalam v. Thahgal Kunju Musaliar*[7]*,* their Lordships of the Supreme Court dealt with a case of the latter type and held that in such circumstances conferment of unfettered discretion on the Executive would not render the special law invalid. There the question for consideration was the constitutionality of Travencore Act 14 of 1124 which was specially enacted for the purpose of catching substantial evaders of income-tax who had made huge profits during the war period.

The procedure prescribed in that Act was of a drastic nature whereas the procedure prescribed in the Income-tax Act was the normal one. Their Lordships observed that profiteers who had evaded income-tax during the War period formed a class by themselves and when a separate piece of legislation is made with a view to catch them, such a law will not offend Article 14 inasmuch as there is a reasonable nexus between the object sought to be achieved by the Act and the drastic procedure prescribed therein. The mere fact that the selection of persons to whom that special Act should apply, was left to the discretion of the Government, would not render the Act itself unconstitutional because the selection is guided by the objective of the special Act, and if, in individual cases, Government arbitrarily exercise this power, the order of Government may be subjected to challenge as unconstitutional, but not the statute itself. The same principle was reiterated in *Panna-lall Binjraj v. Union of India*[8], where it was held that Section 5 of the Income-tax Act, giving unlimited discretion to the Commissioner of Income-tax to transfer a case from one Income-tax Officer to another, was not unconstitutional because the power was guided and controlled by the purpose which was sought to be achieved by the Income-tax Act and such wide discretion must necessarily be given. Instances of abuse of the discretion may be corrected by challenging the order of transfer and hot the statutory provision conferring the power to transfer.

15. This principle, however, is fundamentally different from the principle laid down in the aforesaid three Supreme Court decisions. If two laws, one the normal law and

the other a special law, exist side by side and there is nothing to indicate that the special law was intended to apply exclusively to a particular class of persons and both the laws can be validly applied to persons placed in identical circumstances, and the Executive are given an unfettered discretion to pick and choose amongst those persons, for the purpose of applying either of the two laws, the special law would offend Article 14. I have already shown that misconduct of non-gazetted Government servants as described in Clauses (a) and (b) of sub-rule (1) of Rule 4 of the Tribunals Rules may be dealt with either under those Rules or under the Classification Rules at the unfettered discretion of the Government. The power of the Government is arbitrary, unfettered and unguided. Gross discrimination between non-gazetted Government servants who may have committed identical acts of misconduct is authorized by the Tribunal Rules and hence I must hold them to be unconstitutional.

16. In the result. I would declare Clauses (a) and (b) of sub-rule (1) of Rule 4 of the Disciplinary Proceedings (Administrative Tribunal) Rules 1951, in their application to non-gazetted Government servants, to be ultra vires the Constitution and invalid. The entire departmental proceeding against the petitioner held by the Tribunal and the subsequent orders of punishment passed by the Government are declared to be inoperative. The disciplinary proceedings against the petitioner are restored to the stage at which they were on 27-11-1953 before the case was referred to the Tribunal, and the Government may dispose of it according to law.

17. The constitutionality of Clauses (c) and (d) of sub-rule (1) of Rule 4 of the Tribunal Rules, does not arise for decision in this application. Those clauses relate to irremediable general inefficiency and personal immorality of a public servant which though not creditable to him may not amount to "misconduct" so as to justify the imposition of any penalty under the Classification Rules. For the first time, the Tribunal Rules made these acts also "misconduct" for the purpose of drawing up disciplinary proceedings and imposing appropriate punishments including the

punishment of compulsory retirement from service. Hence so far as these acts are concerned there are no two laws existing side by side and there is only one law, namely, the Tribunal Rules dealing with them. It is true that Government are given the necessary discretion under the aforesaid sub-rule to apply the Tribunal Rules to the public servant concerned, but on this ground alone Clauses (c) and (d) of sub-rule (1) of Rule 4 cannot be struck down as unconstitutional because the principles laid down in AIR 1956 SC 246, would prima facie apply. It is however unnecessary to decide this question finally in this application.

18. The application is allowed with costs. Hearing fee Rs. 100/-. (Rupees one hundred only).

G.C. Das, J.

19. I agree.

Application allowed.

Cases Referred.

[1] ILR (1957) Cut 177: (AIR 1957 Oris 70)
[2] AIR 1954 SC 545
[3] AIR 1955 SC 13
[4] AIR 1956 SC 269
[5](1723) 93 ER 698, at pp. 702-703
[6] Civil Appeals 27 and 28 of 1955: (AIR 1957 SC 912)
[7] AIR 1958 SC 246
[8] AIR 1957 SC 397