ORISSA HIGH COURT

Bidya Bhushan Mohapatra

Vs

State of Orissa

O.J.C. No. 216 of 1957

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

17.02.1959

JUDGMENT

Narasimham, C.J.

1. This is a petition under Article 226 of the Constitution against order No. 83/57- 16329 R dated 26-9-1957, of the Government of Orissa in the Revenue Department and dismissing the petitioner from Government Service.

2. The petitioner was a permanent non-gazetted Government Servant holding the post of Sub-Registrar under the Government of Orissa. On 2-8-1954 he was placed under suspension and departmental proceedings against him were enquired into by the Member, Administrative Tribunal, in accordance with the provisions of the Disciplinary Proceedings (Administrative Tribunal) Rules. 1951. After conducting the enquiry the Tribunal held him guilty of charges of corruption and reported to Government recommending his dismissal from service. Government sent a copy of his report to the petitioner and called upon him to show cause why he may not be dismissed from service. After considering his representation, the Government of Orissa passed order dismissing him from service as stated above.

3. Mr. B. K. Pal challenged the order of dismissal on two grounds :

> (i) In view of the decision of this Court *in Dhirendranath Das v. State of Orissa*[1] the proceedings of Disciplinary Proceedings (Administrative Tribunal) Rules 1951, in so far as they are applicable to non-gazetted Government servants should be held to be unconstitutional and hence the entire proceeding against the petitioner, including the order of dismissal dated the 26th September 1957, is invalid.
> (ii) The petitioner was not given a reasonable opportunity to defend himself in the Departmental proceeding.

4. In ILR 1958 Cut 11 : (AIR 1958 Orissa 96), it was held that clauses (a) and (b) of sub-rule (1) of Rule 4 of the Disciplinary Proceedings (Administrative Tribunal) Rules in their application to

non-gazetted Government servants are ultra vires the Constitution and hence invalid. It is unnecessary to repeat the reasons on which that decision was based. The petitioner was admittedly a non-gazetted Government servant and the charges against him dealt with matters described in clauses (a) and (b) of Sub-rule (1) of Rule 4 of the aforesaid Rules. We must, therefore, following the decision, hold that the entire departmental proceedings against the petitioner are invalid and the order of dismissal based on those proceedings is also invalid.

5. But we are informed by the Learned Advocate-General that Government have preferred an appeal to the Supreme Court against the aforesaid decision of this Court and that the appeal is still pending. As this case also may be taken up on appeal to the Supreme Court, we have considered it necessary to give our findings on the other questions raised in this application.

6. The procedure to be adopted by the Tribunal while conducting departmental proceedings against Government servants under the provisions of the said rules is contained in Sub-rules (1) and (2) of Rule 7 which are as follows :

> "7 (1). The Tribunal shall in each case, make such enquiry as may be deemed to be appropriate. (2) In conducting such enquiry the Tribunal shall be guided by rules of equity and natural justice and shall not be bound by formal rules relating to procedure and evidence."

The Rules do not say that the enquiry against the delinquent officer should be conducted in accordance with the provisions of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules or that the evidence against that officer should be taken in his presence, or that he should be given an opportunity to cross-examine the witnesses deposing against him, or to adduce evidence on his behalf. But in another Division Bench decision of this Court reported *in Baishnab Ch. Das v. State of Orissa*[2], it was held that the words "rules of equity and natural justice" occurring in Sub-rule (2) of Rule 7 of the Tribunal Rules quoted above, are wide enough to include all safe-guards provided in Rule 55 of Civil Services (Classification, Control and Appeal) Rules. Hence, even in a proceeding under the Tribunal Rules, after the formulation of specific charges against the petitioner, evidence should be properly adduced to prove those charges which are not admitted, the petitioner should get a reasonable opportunity to cross-examine the witnesses who may depose against him, and also to adduce evidence on his own behalf. The learned Advocate General did not contest the correctness of this principle but urged that it was substantially followed in the present case. It appears that after the framing of specific charges against the petitioner the Member, Administrative Tribunal, examined witnesses in his (petitioner's) presence and permitted him to cross-examine them. The petitioner's prayer for being represented by a lawyer was however disallowed though after the evidence against him was closed the petitioner was given an opportunity to examine witnesses on his behalf; and then, after reviewing the entire evidence, the Tribunal held him guilty and submitted its findings to Government.

7. It is admitted that prior to the commencement of the departmental proceeding there was a previous confidential investigation by a Police Officer of the Enforcement
Department, who examined several witnesses during the course of that investigation. The same officer was allowed to conduct the case before the Member, Administrative Tribunal, but the

petitioner's prayer for being defended by a lawyer was rejected. Mr. Pal urged that this action of xthe Tribunal amounted to unfair discrimination against his client and thereby offended Article 14 of the Constitution. In my opinion, this argument is not acceptable. In a departmental proceeding, the delinquent Government servant is not entitled, as of right, to be represented by a lawyer (see sub-rule (2) of the R. 6 of the Disciplinary Proceedings (Administrative Tribunal). It is true that the enquiry should be conducted in the impartial manner and both parties before the Tribunal, namely the delinquent officer on the one hand and the officer conducting the case against him should be placed on the same footing. I find, however, that the petitioner's educational attainments are not in any way inferior to those of the Police officer who conducted the case against him. It was conceded during the course of arguments, by Mr. Pal that the petitioner is a law graduate; and some of the points raised by the petitioner in his representations to the Government clearly show that he was fully capable of defending himself. At every stage of the departmental proceeding whenever he thought that his interests were adversely affected the petitioner took care to file petitions before the member. Administrative Tribunal to be kept on record (see annexures M. M-2 and M-3). A close scrutiny of the representation to the Government (annexure R dated 4-8-1954) would show that he was fully aware of the case law regarding the rights of public servants in departmental enquiries and he was also fully competent to sum up the evidence for and against him. In view of the admitted position that he is a law graduate and in view of the manner in which he defended himself during the departmental proceeding as disclosed by the documents filed by him in this Court, I am satisfied that no prejudice has been caused in his defense merely because he was not permitted to engage a lawyer during the departmental enquiry.

8. Prior to the commencement of the departmental enquiry the petitioner made repeated requests to the authorities concerned for being furnished with copies of the report of the confidential investigation made by the officer of the Enforcement Department, including the statements of witnesses made against the petitioner before that officer in the course of that investigation. The Chief Secretary to the Government of Orissa, in the Cabinet Department letter No. 1733-Cab (A.T.) (Annexure L) gave the following reply

> "Please refer to your letter No. 19 BM dated 15th November. The depositions in question are in the nature of a preliminary, report or evidence recorded during the first stage of the enquiry which are not to be brought on record of the formal proceedings. These have not been submitted to the Tribunal nor will the Tribunal have access to these at any stage of the hearing. The Tribunal will solely depend on the evidence that it will itself record. It is therefore proposed not to give you copies of depositions."

9. Mr. Pal on behalf of the petitioner, urged that the assurance contained in the aforesaid letter of the Chief Secretary, to the effect that the evidence collected against the petitioner prior to the commencement of the departmental enquiry will not be mads available to the Tribunal and that the Tribunal will depend solely on the evidence collected by it alone, was not honoured and that copies of the previous statements of the witnesses were made available before Tribunal and that some of the findings of the Tribunal were based on those statements. Such a procedure, according to the petitioner, clearly violated the rules of natural justice.

10. There is doubtless some force in this argument. I may now examine the charges in detail.

Charge 1 (e) : This charge deals with acceptance of Rs. 6/1/- as illegal gratification by the petitioner from one Sri Basudeb Birtia on 2-1-1954. During the departmental enquiry the main witnesses examined to substantiate this charge are P.Ws. 15, 17 and 18. But the evidence of these three witnesses completely exonerated him from this charge. The Tribunal appears to have thought that these witnesses had been gained over. It admitted in evidence their previous statements made under Section 164 Cr. P. Code during the preliminary Police investigation and on the basis of these statements held him guilty. It was admitted in the report of the Tribunal that these witnesses were not confronted with their previous statements under Section 164 Criminal Procedure Code but the Tribunal thought that this was not material. I may quote the following passage from the Tribunal's findings :

> "The statements under Section 164 Cr. P. Code of prosecution witnesses 15, 17 and 18 were taken over by the Administrative Tribunal and marked as exhibits in the case. They are exhibits 1, 2 and 3. From these it will be clear that the witnesses, at the time of recording of the statement, categorically supported the prosecution version of the story. They were not, however, at the time of examination before the Tribunal, confronted with the statement under Section 164 Criminal Procedure Code and were not asked to establish whether what they stated before the Magistrate or what they stated before the Tribunal was true.

I do not however feel that though Sri Mohapatra has pressed this point in his explanation, that it is a valid ground for the Tribunal to reject the statement made under Section 164 Criminal Procedure Code They were made much earlier in the course of this case and as they have been recorded by Magistrate and I have no suspicion that any undue influence was exercised to make the witnesses give evidence solely for the benefit of the prosecution case, nor have we anywhere in the record anything to show that these witnesses were inimical to the interests of Mohapatra. This being the case, I am accepting the Section 164 Cr. P. Code statements." Here the Tribunal has clearly gone against the rules of natural justice. The Chief Secretary in his letter quoted above had already given an assurance to the petitioner that the Tribunal would depend solely on the evidence recorded by itself. If that evidence did not establish the charge and the Tribunal wanted to use the previous statements of the witnesses, in fairness to tine petitioner those statements should also have been put to the witnesses during their examination before the Tribunal, thereby giving then an opportunity to explain the apparent contradiction between their evidence before the Tribunal and their previous statements recorded under Section 164 Cr. P. Code. The spirit of Section 145 of the Evidence Act should be complied with. Having thus confronted the witnesses with their own previous statements, the Member in charge of the Tribunal should have given a further opportunity to the petitioner to cross-examine those witnesses with reference to their previous statements recorded under Section 164 Criminal Procedure Code It will be against all rules of natural justice to admit in evidence, against a delinquent servant, the previous statements of witnesses who have deposed against him, without giving him an opportunity to cross-examine those witnesses in respect of these statements. It is true that the petitioner cross-examined these witnesses when they were examined at the earlier stage of the departmental proceeding. But as those witnesses did not support the charge the cross-examination must necessarily have been very brief. If the Tribunal wanted to use the previous statements of those witnesses in preference to their subsequent statements during the

departmental enquiry, the petitioner should have been given a further opportunity to cross-examine them. In my opinion, therefore, the finding of the Tribunal in respect of charge 1 (e) must be held to be vitiated by a failure to observe the rules of natural justice. Charge 1 (a) : This charge relates to acceptance by the petitioner of illegal gratification of Rs. 30/- from one Durga Prosad Purohit of Barapalli (P.W. 2). The principal witnesses to substantiate this charge is Durga Prasad himself who stated that for the purpose of registration of a sale deed he was compelled to pay Rs. 30/- as illegal gratification and that he placed the sum on the table of the petitioner. The petitioner cross-examined this witness with a view to show that the sum of Rs. 30/- was meant to cover registration fee only and was not paid by way of illegal gratification. In fact he succeeded in getting the following answer from this witness :

"Apart from this Rs. 30/- we did not pay anything to any other."

But after the cross-examination was over, the Tribunal elicited the following answer from this witness :

"In addition to Rs. 30/- I have paid Rs. 27/80/0 as fees."

This answer would completely destroy the effect of the cross-examination. The Tribunal was undoubedly justified in putting this question, but in fairness to the delinquent officer he would have been given a further opportunity to cross-examine this witness with a special reference to the aforesaid answer. It appears that the prayer of the petitioner was rejected and on the same day the petitioner filed a petition (annexure M-2) mentioning this fact. In my opinion, the Tribunal acted against the rules of natural justice in rejecting the petitioner's prayer to cross-examine the witness, especially after having elicited from the witness a very damaging answer after the main cross-examination was over. The Tribunal committed another breach of the natural justice by taking into consideration entries in the diary of the Sub-Inspector of Police (Enforcement). Extracts from the diary were not proved formally in the proceeding, nor was the petitioner given an opportunity to cross-examine the Sub-Inspector with reference to that entry. The Tribunal should not therefore have relied on the entries in that diary for the purpose of coming to any conclusion as to whether the charge was established or not. For these reasons I would agree with Mr. Pal that the findings of the Tribunal in respect of charge l-(a) also must, be held to be invalid as being based on failure to observe the rules of natural justice. Charge 1 (b) : The petitioner was acquitted of this charge and hence it is unnecessary to discuss the same.
Charge 1 (c) : This charge relates to the acceptance of illegal gratification amounting to Rs. 18/- from one Basudev Birtia on 13-1-1954. The principal witnesses to prove this charge are P.Ws. 15 and 16. There was doubtless some discrepancy in their evidence. But the Tribunal believed the evidence of P.W. 16 and held the petitioner guilty of this charge. It is not the function of this court, while exercising its jurisdiction under Article 226 of the Constitution, to examine the weight to be given to a particular piece of evidence. The rules of natural justice have been observed by the Tribunal while giving (the findings in respect of this charge. Charge 1 (d) : This charge relates to acceptance of illegal gratification of Rs. 22/- by the petitioner from one Tribikram Panda on 13-1-1954. The principal witness to prove this charge are P.Ws. 12 and 13. I find no departure from the rules of natural justice by the Administrative Tribunal in coming to its findings in respect of this charge. Charge 2 :- This is a general charge which deals with the acquisition by the petitioner of property worth more than Rs. 11000/- during his stay in

Sambalpur from 1950. This acquisition was said to be quite disproportionate to the income that he was actually earning at that time. The petitioner gave an explanation to the effect that he was the member of a joint family which had substantial property and that there were some other members of his family who were also earning. He also examined one witness to establish this defense. The Tribunal, however, rejected this plea and held that the explanation was not acceptable and therefore held him guilty of this charge. Subsequent to the termination of the proceeding, the petitioner in his letter dated 4-8-1956 (Annexure R) addressed to the Government, wanted a further "opportunity to adduce evidence on his behalf and gave a list of witnesses to be summoned and a list of documents to be called for. This prayer was rejected. Government accepted the findings of the Tribunal, basing their decision on the evidence already recorded by the Tribunal. Mr. Pal urged that the petitioner was entitled to adduce further evidence even after the issue of notice under Article 311(2) of the Constitution by the Government and that by declining to giving him this opportunity Government have in substance, deprived him of an opportunity to defend himself and thus violated the rules of natural justice. Mr. Pal has relied on some observations in a Division Bench decision of this Court reported *in Bamdev Misra v. State of Orissa* [3]where it was held that after the issue of notice under Article 311 (2) the delinquent Government servant should, if so desired by him, be given an opportunity to adduce evidence to show that he was innocent of the charges.

11. This leads to the most important question for decision in this application, viz. whether a delinquent Government servant is entitled to adduce evidence to prove his innocence even after the receipt of the notice under Article 311(2) of the Constitution, even though he was given that opportunity, during the departmental proceeding to do so and he had availed himself of that opportunity. It is true that there are some observations in the aforesaid Division Bench decision which might support the view that this opportunity should be given twice. But that case can be distinguished on facts because there, (it appears from the report), that during the main departmental enquiry under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules the petitioner was not given any opportunity of adducing any evidence on his behalf because the enquiring officer thought that the facts established in the charge were practically admitted in the explanation given by the delinquent officer
concerned. In the instant case, however, during the departmental enquiry conducted by the Tribunal the petitioner was given such an opportunity and in fact he examined one witness on his behalf and declined to examine other witnesses though they were cited by him earlier.

12. The true scope of R. 55 of the Civil Services (Classification, Control and Appeal) Rules with special reference to the right conferred on a public servant by Article 311 (2) of the Constitution has been fully discussed in a recent decision of the Supreme Court reported in *Khem Chand v. Union of India*[4], where the previous law on the subject has been fully considered. It was held that "reasonable opportunity" envisaged to the Government servant by Article 311 (2) includes –

> (i) an opportunity to deny his guilt and establish his innocence;
> (ii) an opportunity to defend himself by cross-examining the witnesses produced by him and by examining himself or any other witness in respect of his defense; and
> (iii) finally an opportunity to make his representation as to why the proposed punishment should not be inflicted on him. Rule 55, in essence, deals with (i) and (ii) above and if that had been fully complied with, the Government servant cannot again claim a further right

to adduce any more evidence on his behalf after he has been found guilty of the charges and the tentative punishment proposed to be inflicted upon him has been decided on. I may quote the following observations from the aforesaid decision of the Supreme Court :

"Of course, if the Government servant has been through the enquiry under Rule 55 it would not be reasonable that he should ask for a repetition of that stage, if duly carried out which implies that if no enquiry has been held under Rule 55 or any analogous rule applicable to the particular Government servant, then it will be quite reasonable for him to ask for an enquiry."

Thus, it has been authoritatively laid down that if there was an enquiry either under Rule 55 of the Classification Rules, or under any analogous rule (such as R. 7 (1) and (2) of the Disciplinary Proceedings (Administrative Tribunal) Rules), the delinquent Government servant is not entitled to a second opportunity to defend himself after the notice under Article 311 (2) of the Constitution is served on him. But if there was no enquiry under Rule 55 of the Classification Rules or any analogous Rule or if such enquiry was not duly carried out, he will be entitled by virtue of Article 311 (2) to a full opportunity to defend himself, including the opportunity to adduce evidence on his behalf to prove his innocence. ILR (1956) Cut 305 can. therefore be distinguished on the ground that there the enquiry under Rule 55 was not duly carried out inasmuch as the delinquent Government servant was not given an opportunity to defend himself, by adducing evidence on his behalf, at any stage.

13. In the instant case, the petitioner got a full opportunity to adduce all available evidence on his behalf before the Administrative Tribunal. Hence, he was not entitled after the receipt of notice under Article 311 (2) about the proposed punishment, to a further opportunity to adduce evidence to establish his innocence. Doubtless if new
facts come to light or if the findings of the Tribunal or of the Government are based on evidence not adduced, during the departmental enquiry the Government servant concerned would be entitled to a further opportunity not only to cross-examine witnesses with reference to the new facts that were taken into consideration against him, but also to adduce rebutting evidence. But these questions do not arise now. No new facts were taken into consideration against the petitioner so as to justify his asking for a second opportunity to adduce evidence on his behalf at such a belated stage. In my opinion, therefore, the finding of the Tribunal in respect of charge No. 2 is unassailable.

14. Our order on this application is, therefore, as follows :

(i) We would, following ILR (1958) Cut II : (AIR 1958 Orissa 96) hold that the entire departmental proceedings against the petitioner, including the order of dismissal dated 26-9-1957, are invalid and inoperative, and restore the proceedings against the petitioner to the stage at which they were on 23-8-1954, prior to their reference to the Administrative Tribunal.

(ii) If, however, the said decision be held by the Supreme Court to be incorrect, we would direct that the findings in respect of charges 1(a) and 1(e) should be set aside as being opposed to the rules of natural justice, but the findings in respect of charges 1(c) and 1(d)

and charge 2 need not be disturbed. It will be then left to Government to decide whether, on the basis of these charges, the punishment of dismissal should be maintained or else whether a lesser punishment would suffice.

15. There will be no order for costs.

Das, J.

16. I agree.

Order accordingly.

Cases Referred.

[1] ILR 1958 Cut 11 : (AIR 1958 Oris 96)
[2] ILR 1957 Cut 177 : (AIR 1957 Oris 70)
[3] ILR (1956) Cut 305
[4] AIR 1958 SC 300