ORISSA HIGH COURT

Krishna Gopal Mukherji

Vs

State (Orissa)

Original Jurisdiction Case No. 126 of 1958

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

10.09.1959

JUDGMENT

Narasimham, C.J.

1. In this application under Article 226 of the Constitution, the petitioner who was holding the Gazetted post of Sub-Engineer of the Irrigation 'Department of the Government of Orissa has challenged the validity of an order of the Government of Orissa in the Works Department, No. 3 E-11E-7/51-21, dated 24-1-1952, removing him from service, on the ground that the provisions of clause (2) of Article 311 wrere not complied with.

2. The material facts are as follows : On 19-12 1950, the then Chief Engineer-cum-Secretary to the Government of Orissa in the Public Works Department, Mr. J. Shaw, framed five charges against the petitioner and called upon him to submit his explanation to those charges. The charges dealt mainly with false measurement in the billing of earth-work an a portion of Kathjuri Embankment with a view to favor a contractor named Bhramarbar Behera. The petitioner submitted his explanation on 31-12-1950. Then, Mr. Shaw on 29-5-1951, issued the notice to the petitioner :

> "Your letter of 3-12-1950 has been received giving your explanation on the various charges framed against you, in my letter No. 122-Res. Irrigative of 19-12-1950. It is regretted that your explanations on some of these charges in this departmental exquiry are not found acceptable as noted in the report below and you are requested to show cause within fourteen days from the receipt of this notice as to why you should not be dismissed from Government service for false measurement and false representation and billing of work,"

This notice was issued, obviously, with a view to satisfy the requirements of clause (2) of Article 311 of the Constitution. The petitioner submitted a further explanation to this notice, on 12-6-1951. The main point taken by him in that explanation was that some of the charges were technical in character and did not justify the passing of the extreme punishment of dismissal. He

further submitted that remaining charges were the subject-matter of a criminal case that was then pending against him, and requested the Government to stay the passing of final orders in the departmental proceedings till the termination of that criminal case. His explanation was not found satisfactory and then, on 21-7-1951 his case was sent to the Public Service Commission for their views. The Commission, however suggested to Government in their letter No. 1504-P.S.C. dated 22-8-1951, that the petitioner should be given further opportunity for personal hearing by a P.W.D. Secretary other than Mr. Shaw who had made the preliminary investigation and on whose report the charges were mainly based. By that time the post of Chief Engineer-cum-Secretary, Works Department, had been split up and Mr. Joneja, an I.A.S. Officer was holding the post of Secretary, Works Department. That Officer gave a personal hearing to the petitioner, took into consideration some other documents filed by the petitioner, and then submitted a report to the Public Service Commission to the effect that the charges were proved. Then, on 22-12-1951, the Public Service Commission, in their letter No. 2176 P.S.C. recommended the removal of the petitioner from service and Government accepted their petitioner recommendation and removed him from service, on 24-1-1952.

3. The main contention of Mr. R.K. Das in support of this application is that the explanation submitted by the petitioner on 31-12-1950, to Mr. Shaw was not placed before the Government, namely the Minister for Works, the Chief Minister, and the Governor, and that they did not come to a finding that the charges were proved. He further urged that the notice of Mr. Shaw dated 29-5-1951 (quoted above) was issued by him, on his own responsibility and was not issued after obtaining the approval of the Government. Mr. R. K. Das urged that! the notice under Clause (2) of Article 311 should issue under the direction of the authority who is competent to pass the proposed punishment on the delinquent public servant and where such a notice has been issued by an authority subordinate to the competent authority, without the latter's direction, it would be invalid.

4. Clause (2) of Article 166 of the Constitution says that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in the Rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order made or executed by the Governor. The Orissa Government's Rules of Business made under the aforesaid Article contain the following provisions for authentication of orders made by the Governor :

> "Rule 11. All orders or instruments made or executed by order or on behalf of the Government of Orissa shall be expressed to be made by or by order of or executed in the name of Governor of Orissa.

Rule 12. Every order or instrument of the Government of the State shall be signed either by a Secretary, a Joint Secretary, a Deputy Secretary, an Under-Secretary or an Assistant Secretary or such other officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument.

EXPLANATION. - In this rule, the reference to Secretary, a Joint Secretary, a Deputy Secretary, an Under-Secretary and an Assistant Secretary shall include references, respectively, to an Additional Secretary, an Additional Joint Secretary, an Additional Deputy Secretary, an

Additional Under-Secretary and an Additional Assistant Secretary." The letter of Mr. Shaw dated 29-5-1951, is not authenticated in the manner indicated above. He issued that letter as Secretary to Government in the Works Department but he has not stated anywhere that the letter was issued by him under the direction of the Government. Nor does it say that the Government were not satisfied with the petitioner's explanation and that they had tentatively decided to dismiss the petitioner from service. In the last portion of that letter also he has not stated that it was issued "By Order of the Governor". Hence the bar on Judicial scrutiny imposed by clause (2) of Article 166 of the Constitution will not apply and the learned Advocate General also did not properly take his stand on that clause, and filed the affidavit of the Assistant Secretary of the Works Department to show the various dates on which the relevant file was submitted to the Minister for Works, the Chief Minister and the Governor.

5. After the communication of the charges to the petitioner the file was submitted to the Minister for Works on 21-12-1950 and he approved the suggestion to place the petitioner under suspension. Again on 2-1-1951 the file was put up before the Chief Minister in connection with the proposal to start a criminal case against the petitioner : and it was also placed before the Governor. After that, the file was not placed before the Minister until the petitioner had submitted his explanation to the second notice on 12-6-1951. Then, on 7-7-1951 the Minister for Works approved the proposal to dismiss the petitioner from service and the Chief Minister also agreed with this view on 16-7-1951. Subsequently, on 17-7-1951 the Governor also signed the file in token of his approval. Thereafter the case was referred to the Public Service Commission.

6. It will thus be seen that prior to 17-7-1951 the Government tentatively did not hold petitioner guilty of the charges, nor did they decide on the nature of punishment which they proposed to pass against him. The notice of Mr. Shaw dated 29-5-1951 was issued on his own responsibility without the approval either of the Minister for Works or of the Chief Minister or of the Governor.

7. The main question is whether, under the aforesaid circumstances, the notice of Mr. Shaw dated 29-5-1951 under Article 311 (2) of the Constitution is wholly invalid. On behalf of the State the learned Advocate General contended that though the notice might have been issued irregularly, yet, when the Minister for Works, the Chief Minister and the Governor subsequently saw the file on the 7th July, 16th July and 17th July, 1951 respectively, and agreed with the Secretary, the irregularity in the said notice may be taken to have been cured.

8. In my opinion, this argument is not tenable. The true scope of clause (2) of Article 311 has been recently explained by their Lordships of the Supreme Court in *Khem Chand v. Union of India*[1], following the decision of the Privy Council in *High Commissioner of India v. I. M. Lall*[2], There it was pointed out that the substance of R. 55 of the Civil Services (Classification, Control and Appeal) Rules was bodily lifted out of the Rules; and together with an additional opportunity embodied in Section 240 (3) of the Government of India Act, 1935, so as to give statutory protection to
Government servants was now incorporated in Article 311 (2) so as to convert the protection into a "Constitutional safeguard." Such a constitutional safeguard to a public servant cannot be whittled down on the ground that, any defect in the notice under Article 311 (2) is a mere irregularity which can be cured by the subsequent action of the Government. In the aforesaid decision, their Lordships of the Supreme Court further pointed out that clause (2) of Article 311 requires that the 'competent authority' should first satisfy itself that the charges are established,

then apply its mind to the gravity or otherwise of the proved charges and tentatively propose the punishment to be inflicted. It is only then that the notice on the delinquent servant to show cause against that proposed punishment should issue. The facts of Khem Chand's case, AIR 1958 SC 300, are very similar to those of the present case. There, the delinquent public servant (Khem Chand) was a Sub-Inspector under the Delhi Audit Fund and the authority competent to appoint and dismiss him from service was the Deputy Commissioner of Delhi. Charges were framed against him and a preliminary departmental enquiry was held by one Mahipal Singh under the orders of the Deputy Commissioner. Then, the enquiry was completed by one Mr. J. B. Tandon under the orders of the Deputy Commissioner. Mr. Tandori held that some of the charges were proved against Khem Chand and recommended his dismissal from service. The Deputy Commissioner approved his recommendation and then Khemchand was dismissed. Their Lordships of the Supremo Court pointed out :

> "When the Deputy Commissioner accepted the report and confirmed the opinion that the punishment of dismissal should be inflicted on the appellant, 'it was on that stage being reached' that the appellant was entitled to have a further opportunity, given to him, to show cause why that punishment should not be inflicted on him. There is therefore no getting away from the fact that Article 311 (2) has not been fully complied with and the appellant has not had the benefit of all the constitutional protection and accordingly his dismissal cannot be supported."

The words underlined (here in ' ') by me in the aforesaid passage are very important. The dismissing authority must be satisfied first that the charges against the delinquent public servant are proved and then he must tentatively decide about the punishment to be inflicted on him and it is only when the latter stage is reached that the notice under Clause (2) of Article 311 should issue under his authority to the delinquent servant to show cause against that punishment.

9. In the present case Mr. Shaw's position may be taken to be similar to that of Mr. Tandon in Khem Chand's case (AIR 1958 SC 300). If Mr. Shaw was satisfied that the charges were proved and then, on his own responsibility, he issued the notice under clause (2) of Article 311 of the Constitution to the petitioner to show cause against the punishment proposed by him, viz. dismissal, it cannot be held that the requirements of constitutional safe-guard embodied in the aforesaid clause have been satisfied. The explanation of the petitioner dated 31-12-1950 against the charges, should have been submitted to Government immediately on its receipt with the note of Mr. Shaw and then the Government would have satisfied themselves whether in their view the charges were proved. It was only then that they could decide on the nature of the punishment to be inflicted on the petitioner and call upon him to show cause against that punishment.

10. The mere fact that the file subsequently passed through the Minister for Works, the Chief Minister and the Governor and that they all approved the action of Mr. Shaw would not amount to sufficient compliance with the provisions of Article 311 (2). It may be that if the Government had seen the file at the earliest stage they may not have necessarily accepted the Chief Engineer's finding to the effect that the charges were proved. It is also not unlikely that they might not have agreed with his recommendation that the tentative punishment proposed against the petitioner should be extreme punishment of dismissal. If they had tentatively decided that a lesser punishment than reduction in rank would suffice, the necessity for a notice under clause (2) of

Article 311 would not have arisen. But if the file is withheld from the Government at the critical stage but submitted later on after the petitioner had been informed that the charges were proved and after he was called upon to show cause why the proposed punishment may not be inflicted, they may consider it too late at that stage to reverse the decision of the Secretary and may be constrained to approve his action. The petitioner is clearly entitled to a finding froM the competent authority (i.e. the authority competent to dismiss him) to the effect that the charges were proved to their satisfaction, prior to his being called upon to show cause against the proposed punishment.

11. I must therefore hold that the letter of Mr. Shaw dated 29-5-1951 would not amount to a proper notice as contemplated by Clause (2) of Article 311 of the Constitution and as no subsequent notice was issued to the petitioner after the completion of the enquiry by Mr. Joneja that provision of the Constitution must be held to have been contravened. The Order of removal dated 24-1-1952 must accordingly be declared invalid and inoperative. The departmental proceedings against the petitioner are restored to the stage at which they were prior to 29-5-1951. It is open to the Government either to continue the proceedings and dispose of the same according to law or to drop the proceedings if they are so advised. We were informed that the petitioner attained the age of superannuation sometime in 1954 and this is a circumstance which the Government would undoubtedly consider before they finally make up their mind. It is indeed unfortunate that an order of removal passed in 1952 should be set aside after an interval of seven and a half years, but this delay is due mainly to the action of the Government in delaying the disposal of the appeal filed by the petitioner and in passing final orders on his prayer for compassionate pension. The final orders were passed by Government only on 28-2-1958 and this application under Article 226 of the Constitution was filed on 30-6-1958.

12. The petition is allowed with costs. Hearing fee is assessed at Rs. 100/- (One hundred only).

Das, J.

13. I agree.

Petition allowed.

Cases Referred.

[1] AIR 1958 SC 300
[2] AIR 1948 PC 121