

PATNA HIGH COURT

Gopi Kishore Prasad

Vs

State of Bihar

Misc. Judicial Case No. 474 of 1953

(Ramaswami and Kamla Sahai, JJ.)

19.01.1955

JUDGMENT

Ramaswami, J.

1. In this case, the petitioner Gopi Kishore Prasad has moved the High Court for the issue of a writ in the nature of certiorari to quash an order of the Government of Bihar dated 23-7-1953 discharging the petitioner from Government service as Probationary Sub-Deputy Collector.

2. The petitioner Gopi Kishore Prasad was appointed as a temporary Sub-Deputy Collector in the year 1944 and in 1946 the petitioner was vested with the powers of a first class Magistrate. On 8-12-1947 the petitioner was appointed to a Substantive post in the Bihar Subordinate Civil Service and was placed on probation. On 4-11-1952 the Government of Bihar issued a notice to the petitioner asking him to show cause why his services should not be terminated. The notice is annexure-'A' to the application. In this notice the Government say that the petitioner had earned notoriety as a corrupt officer while he was posted at Jamshedpore, and that his judicial work was carefully scrutinized by the Government and in eight criminal cases the orders of acquittal passed by the petitioner were found to be perverse. The notice further states that from May 1949 to March 1951 the petitioner was posted at Nawada and there also his reputation was bad. The petitioner was transferred later on to Gaya and his work at Gaya was also found unsatisfactory. The petitioner made a representation to the Government in response to the notice. The petitioner denied the charges of corruption and bribery and requested the permission of the Government to inspect the records of the cases which he had decided at Jamshedpore. The petitioner also prayed for an opportunity to cross-examine the Collector and the Commissioner who had sent adverse reports against him. The petitioner further submitted that he should be given a copy of the confidential reports of the Collector and the Commissioner upon which the notice of the Government was based. But the Government of Bihar permitted the petitioner only to examine the records of the criminal cases which he had tried at Jamshedpore. The Government did not permit the petitioner to inspect the confidential reports sent by the Collector and the Commissioner and the Government also declined the request of the petitioner that he should be permitted to lead evidence or to cross-examine the Collector and the Commissioner upon whose report the Government had taken action. On 23-7-1953 the Government of Bihar passed an order

terminating the services of the petitioner as a Probationary Sub-Deputy Collector. It was alleged on behalf of the petitioner that the Government of Bihar had no justification for withholding the confidential reports from being shown to the petitioner during the proceedings. It is further alleged that the procedure contemplated by Article 311(2) of the Constitution was not followed by the Government and the petitioner was entitled to a second notice in terms of the language employed in that article. It was also submitted that the petitioner should have been allowed to examine witnesses on his behalf and also to cross-examine the Collector and the Commissioner upon whose confidential reports the notice of discharge was based. It was stated on petitioner's behalf that R.55 of the Civil Services (Classification, Control and Appeal) Rules applied to his case and the full procedure contemplated by that article should have been followed. It was therefore argued that the order of discharge passed by the Government dated the 23rd July 1953 was illegal and ultra vires on the ground of all these irregularities of procedure.

3. The first submission made on petitioner's behalf is that the procedure contemplated by R.55 has not been followed and the order of discharge passed by the Government was therefore illegal and void. In support of his argument Mr. Baldeva Sahai referred to R.55 which states-

"Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which have led to his conviction in a criminal Court) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The ground on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so direct, an oral inquiry shall be held. At that inquiry, oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof....."

Counsel submitted on the basis of this rule that the petitioner should have been heard in person, that the allegations should have been reduced to the form of definite charge or charges and that oral evidence should have been taken on behalf of the Government and the petitioner should have been given opportunity to cross-examine the Collector or the Commissioner or the other persons who made confidential reports. In my opinion the argument addressed on behalf of the petitioner is not well founded. Rule 55 was amended on 15-11-1947 by notification No.8184-A of the Government of Bihar. Rule 49 was also amended by the same notification. Before the amendment Rule 55 did not apply to the case of a probationer for the explanation of Rule 49 stated that the discharge of a person appointed on probation would not amount to removal or

dismissal within the meaning of that rule. But Rule 49 was amended on 15-11-1947 by the notification, already referred to, and an explanation was added to R.49 to the following effect:

"The discharge of a probationer, whether during or at the end of the period of probation, for some specific fault or on account of his unsuitability for the service, amounts to removal or dismissal within the meaning of this rule."

At the same time, the following sub-paragraph was added to Rule 55:

"The full procedure prescribed in this rule need not be followed in the case of a probationer discharged in the circumstances described in explanation II to Rule 49. In such cases, it will be sufficient if the probationer is given an opportunity to show cause in writing against the discharge after being apprised of the grounds on which it is proposed to discharge him and his reply duly considered before orders are passed."

It is clear in view of the amendments of Rules 49 and 55 that the petitioner was not entitled to a full inquiry as contemplated by the first paragraph of R.55. The argument of Mr. Baldev Sahai on this point must therefore be rejected.

4. The next submission made by the learned counsel for the petitioner is that in any event the confidential reports upon which the notice of discharge was made should have been given to the petitioner. It was contended that the petitioner should have been given a fair opportunity of meeting the allegations before the government decided to pass the orders of discharge. It was argued that there was a violation of natural justice in this case and the order of discharge must therefore be quashed by a writ of certiorari. In my opinion the argument addressed by the counsel is correct.

It appears from Annexure-"A" of the application that the notice of discharge was based upon certain reports received by the Government while the petitioner was employed as Sub-Deputy Collector at Jamshedpur. Annexure-"C" also states that "confidential enquiries were made and it was found that while employed at Jamshedpur Mr. Gopi Kishore Prasad had the reputation of being a corrupt officer". It was argued by the Government Pleader on behalf of the respondent that the annual confidential reports for the years 1949 to 1952 were communicated to the petitioner and in support of his contention the Government Pleader referred to annexure-'D'.

It may be true to say that the annual confidential reports were communicated to the petitioner but the notice of discharge dated 4-11-1952 is not based merely on the annual confidential Reports but also on certain inquiries made at Jamshedpur. and the confidential reports submitted by the officers making these inquiries. The complaint of the learned counsel for the petitioner is that these special confidential reports were not made available to the petitioner before he was asked to show cause against the notice of discharge. The Government Pleader produced during the hearing of this case the original record of the proceedings in the Secretariat. It appears from these proceedings that the order of discharge was passed by the Government not merely upon the annual confidential reports of the Collector and the Commissioner but also upon two special reports made by the Commissioner of Chotanagpur Division dated 31-5-1952 and by the Deputy Inspector General, Criminal Investigation Department, dated 16-6-1951. These two special reports contain matters which are highly relevant and prejudicial to the petitioner and in my

opinion, these reports should have been shown to the petitioner or their contents communicated to him before he was asked to show cause against the notice of discharge. It is a matter of general principle that a person should not be condemned on ex parte statements and no order of removal or discharge should be passed against a Government servant unless he has been given a real and effective opportunity of refuting the statements upon which his notice of discharge is based. This follows from the principle of law embodied in the maxim 'audi alteram partem'. It is true that the final order of discharge of a probationer is an administrative act but the proceedings leading to that final order are quasi judicial in character and the principle embodied in the maxim 'audi alteram partem' therefore applies to such proceedings. This view is borne out by the judgment of Lord Loreburn in - '*Board of Education v. Rice*¹', (A).

"Comparatively recent statutes have extended if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance as in many others, what comes for determination is sometimes a matter to be settled by discretion involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that it is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

The principle has been reiterated by the Court of appeal in - '*Errington v. Minister of Health*², In that case a local authority had made a clearance order under Section 1 of the Housing Act, 1930, and had submitted the order to the Minister of Health for confirmation. Objections were made by the owners. The Act required that a public inquiry should be held and the Minister should consider the objections made by the owners' and the report of the person who held the inquiry before he passed the order of confirmation. It was held by the Court of appeal that in deciding whether or not he shall confirm the clearance order the Minister occupied a quasi judicial function and must not take into consideration any matters other than those mentioned in paragraph 4 of the first schedule of the Act. If the Minister holds a private inquiry to which the owners are not invited or takes into consideration ex parte statements with which the owners have had no opportunity of dealing he was not acting in accordance with correct principles of justice and his confirmation of the clearance order would be ultra vires and the owners would be entitled to get the confirmation order quashed by a writ of certiorari. To the same effect also is the decision of the Court of Appeal in - '*R. v. Architects' Registration Tribunal*³, (C). The Supreme Court of India has also laid down a similar principle in - '*Dhakeshwari Cotton Mills Ltd. v. Commr. of Income-tax, West Bengal*⁴', It was observed by Mahajan, C.J. in that case that the Tribunal had violated the fundamental rule of justice firstly by not disclosing to the assessee what information had been supplied to it by the Departmental representative, and secondly by not giving an opportunity to the assessee to rebut the material furnished to it by the Tribunal. It was held for these reasons that the assessee had not obtained a fair hearing, and the assessment made

by the Income-tax authorities and affirmed by the Tribunal should be set aside. It is clear in the present case that the petitioner was not shown the special reports of the Commissioner of Chotanagpur Division and of the Deputy Inspector General, Criminal Investigation Department and there has been a violation of the principle of natural justice. It follows that the order of discharge made by the Government dated 23-7-1953 is illegal and ultra vires.

5. The next question presented for determination is whether the petitioner should have been given a second notice under Article 311(2) of the Constitution before the final order of discharge was passed against him. It was argued on behalf of the petitioner that even though the amended R.55 contemplated only a summary inquiry in the case of a probationer officer, the provision of Article 311(2) of the Constitution required that a second notice should be given before the final order of discharge was made. It was however pointed out on behalf of the respondents that a probationer was always liable to be discharged in case his conduct was not satisfactory and there was no necessity of giving a second notice as contemplated by Article 311(2) of the Constitution. The point is not free from difficulty but upon the whole I am satisfied that the petitioner is entitled to a second notice after summary inquiry had been made into the allegations of bribery and corruption made in the first notice. This view is based upon the interpretation placed by the Judicial Committee upon the language of Section 240(3) of the Government of India Act in - *'High Commr. for India v. I.M. Lall'*, Section 240(3) of the Government of India Act was in the following terms:

"(1) Except as expressly provided by this Act, every person who is a member of a Civil Service of the Crown in India, holds office during His Majesty's pleasure(3) No such person as aforesaid shall be dismissed..... until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him....."

It should be noticed that Section 240(3) of the Government of India Act was couched in the same language as Article 311(2) of the Constitution. It was held by the Judicial Committee in I. M. Lall's case that no action was proposed within the meaning of Section 240(3) until the authority had come to a definite conclusion upon the charges brought against a civil servant and the actual punishment to follow was provisionally determined upon. Before that stage was reached, the charges were unproved and the suggested punishments were merely hypothetical. It was on that stage being reached that the Act gave the civil servant the opportunity for which sub-section (3) made provision. At page 242 of the report Lord Thankerton states:

"Their Lordships agree with the view taken by the majority of the Federal Court. In their opinion, sub-section (3) of the S.240 was not intended to be, and was not a reproduction of Rule 55 which was left unaffected as an administrative rule. Rule 55 is concerned that the civil servant shall be informed 'of the grounds on which it is proposed to take action', and to afford him an adequate opportunity of defending himself against charges which have to be reduced to writing; this is in marked contrast to the statutory provisions of 'a reasonable opportunity of showing cause against the action proposed to be taken in regard to him'. In the opinion of their Lordships, no action is proposed within the meaning of the

sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Before that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage.

If the civil servant has been through an inquiry under Rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the inquiry." It was pointed out by the Government Pleader in this case that a probationer was not entitled to a full inquiry contemplated by the first paragraph of R.55 of the Civil Services (Classification, Control and Appeal) Rules. I do not think that the argument has any bearing on the interpretation of Article 311(2). In the case of a probationer the inquiry contemplated by R. 55 is a summary inquiry but nevertheless Article 311(2) of the Constitution applies to the case for the explanation to the amended R.49 states that

"the discharge of a probationer for some specific fault or on account of his unsuitability for the service, amounted to removal or dismissal within the meaning of this rule."

Article 311(2) of the Constitution therefore applies to this case and a probationer is entitled under that article to a second notice requiring him to show cause against the action to be taken, viz., against the order of discharge from Government service. A similar view of the law has been expressed by a Division Bench of the Nagpur High Court in - '*Tribhuvannath v. Govt. of the Union of India*'⁶, and - '*M.A. Waheed v. State of Madhya Pradesh*'⁷. In my opinion, the petitioner was entitled to a second notice after the Government had reached the finding that the allegations were proved against the petitioner, and in the absence of such a notice it must be held that the final order of discharge passed on 23-7-1953 is void and inoperative.

6. In view of these considerations I hold that a writ in the nature of certiorari should be issued to quash the order of the Government of Bihar dated 23-7-1953 discharging the petitioner from Government service. I would accordingly allow this application.

Kamla Sahai, J.

7. The question whether two notices have to be given to a probationer before he can be discharged is one of considerable difficulty. A view that can reasonably be taken is that two notices need not be given to such an officer.

8. As my learned brother has pointed out, Rules 49 and 55 of the Civil Services (Classification, Control and Appeal) Rules were amended by Notification No.8184-A, dated 15-11-1947. Before this amendment, the explanation to R.49 provided that the discharge of a person during the period of probation did not amount to removal or dismissal within the meaning of the rule. Rule 55, as it then stood, did not, therefore, apply to a person on probation. By the amendment, the explanation to R.49 has been renumbered as explanation I and Explanation II has been added.

This explanation provides that the discharge of a probationer even during the period of probation "for some specific fault or on account of his unsuitability for the service" amounts to removal or dismissal within the meaning of this rule. The third sub-paragraph which has been added to R.55 by the amendment lays down that the full procedure prescribed in the first sub-paragraph of that Rule need not be followed in the case of a probationer, and that in the case of a probationer who is to be discharged in the circumstances described in explanation II to Rule 49, "it will be sufficient if the probationer is given an opportunity to show cause in writing against the discharge after being apprised of the grounds on which it is proposed to discharge him....."

9. AIR 1948 PC 121 was the case of a confirmed officer. Their Lordships of the Judicial Committee were concerned in that case with Section 240(3) of the Government of India Act, and what is now the first sub-paragraph of R.55. The language in Article 311(2) of the Constitution is the same as used in Section 240(3), Government of India Act, 1935. The present sub-paragraph 1 of R.55 clearly contemplates the issue of a notice to an officer and an open enquiry in his presence after he has put in a written statement of his defense. Such a notice was given to I.M. Lal. Their Lordships held in view of the words used in Section 240(3) of the Government of India Act that a second notice was necessary after the enquiry had been concluded and, the charges having been proved, dismissal of the officer had been provisionally decided upon. There is no doubt that even under Article 311(2) of the Constitution, a notice has to be given to an officer when it is provisionally decided that he should be dismissed or removed. It may be argued with considerable force, however, that the notice contemplated under the third sub-paragraph of Rule 55 as added by the notification referred to above is also a notice which has to be given after the discharge of the probationer has been provisionally decided upon. This appears to follow from the fact that sub-paragraph (3) of Rule 55 requires a notice to be given "to show cause in writing against the discharge." The words "after being apprised of the grounds on which it is proposed to discharge him" as used in that sub-paragraph strongly tend to show that discharge of the probationer must be provisionally decided upon before notice is given. It may, therefore, be reasonably concluded that the notice has to be issued under both the provisions at the same stage and that one notice will, therefore, be sufficient.

10. I consider it unnecessary, however, to discuss this point any further and to give my final conclusion, because I entirely agree with my learned brother that there has been a violation of the principles of natural justice as the petitioner was not allowed to see the special reports of the Commissioner of Chotanagpur Division and the Deputy inspector General, Criminal Investigation Department, two of the important materials upon which the Government of Bihar decided to discharge him.

11. I, therefore, agree that a writ of certiorari should issue in this case as proposed by my learned brother.

Application allowed.

Cases Referred.

¹(1911) AC 179

²(1935) 1 KB 249

³(1945) 2 All ER 131

⁴AIR 1955 SC 65
⁵AIR 1948 PC 121
⁶ AIR 1953 Nag 138
⁷AIR 1954 Nag 229