
(1986) 07 KL CK 0040
In the High Court Of Kerala
Case No : W.A. No 583 of 1982

Isac Joseph

APPELLANT

Vs

The Senior Superintendent of Post

RESPONDENT

Date of Decision : 30-07-1986

Acts Referred:

Constitution of India, 1950 — Article 310(1), 311, 311(2)
Government of India Act, 1919 — Section 96B
Government of India Act, 1935 — Section 240

Citation : (1986) 23 KLJ 886

Hon'ble Judges : V.S. Malimath, C.J; Bhaskaran Nambiar, J

Bench : Division Bench

Advocate : O.V. Radhakrishnan and K.Radhamani Amma, for the Appellant; P.V. Madhavan Nambiar, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskaran Nambiar, J.—Third January 1977 is the crucial date, the date when Article 311(2) was amended by the 42nd Constitution Amendmend Act, 1976. Till then, "no civil servant could be dismissed, or removed or reduced in rank until he was given a reasonable opportunity of making representation on the penalty proposed". After the amendment, "it shall not be necessary to give such person an opportunity of making representation on the penalty proposed. The question for consideration is whether this amended provision dispensing with the necessity of issuing a second show cause notice before the penalty is imposed applies to disciplinary proceedings initiated earlier, but were pending on the date of the amendment. This problem arises on the following facts and under the following circumstances.

2. The Appellant was a Sub-Postmaster in the Post and Telegraph Department. There were serious allegations of grave misconduct, including misappropriation of government funds against him. He was suspended pending disciplinary proceedings on 28th June 1974 and charges were framed against him on 12th

December 1975 by the disciplinary authority, the Superintendent of Post Offices. The Appellant denied the charges and an Assistant Superintendent of Post Offices was appointed as the Inquiring Authority. He conducted an enquiry and submitted his enquiry report on 11th March 1979. He found that the Appellant was guilty of the main charges and thereafter the Appellant was dismissed from service by order dated 31st March 1979 with immediate effect. An appeal filed before the Director of Postal Services was dismissed by order dated 9th January 1980. The Appellant challenged the dismissal order (Ext. P-8) and the appellate decision (Ext. P-10) under Article 226 of the Constitution. The writ petition was dismissed and hence this appeal.

3. It is admitted that a second notice against the penalty sought to be imposed was not issued to the Appellant. He, therefore, contended that there was a violation of the provisions of Article 311(2) of the Constitution and the dismissal order was wrong and unconstitutional. 1 he dismissal order was issued after the amendment came into force. But the disciplinary proceedings were pending when the amendment was made on 3rd January 1977. It is, therefore, contended that the amendment effected from 3rd January 1977 did not affect the disciplinary proceedings initiated against the Petitioner prior to the said amendment and that he was entitled to protection of Article 311(2) as it stood prior to the amendment. This plea was met by the Department with the contention that the procedural requirement under Article 311(2) has been dispensed with by the 42nd amendment which came into effect from 3rd January 1977 and that the amendment is retrospective in operation and the Appellant was bound by the law as it stood on the date when the dismissal order was passed in 1979 when the amendment had already come into force. A learned Single Judge of this Court M.P. Menon, J. rejected the contention stating thus:

The second opportunity rule in Article 311(2), as it stood before 1977, was a matter of procedure. Its thrust was against the imposition of major penalties except in accordance with the procedure of giving the delinquents an opportunity to show cause against the specific penalty proposed, besides an opportunity of being heard at the enquiry stage. It may be possible to suggest that the provisions imposed a disability on the disciplinary authority to impose major penalties and conferred corresponding rights on delinquent Government servants; but the nature of the "right" was essentially procedural. If this is the true position, the rule against retrospectivity can have little application to the second opportunity rule.

Even otherwise the new proviso to Article 311(2) introduced by the Forty-second Amendment states in express terms that "it shall not be necessary" to give any opportunity of making representation against the penalty proposed. The same kind of negative language is used in the amended Sub-rule (4) of Rule 15. These, to my mind, clearly imply that in respect of pending disciplinary proceedings also, the intention was to do away with the second opportunity rule, even if the rule against retrospectivity had any relevance.

The proper approach to the question is to examine what the context of the right was, before the amendment of the Constitution and the Rules. The rights available to a delinquent under Article 311(2) were:

(i) to be informed of the charges against him;

(ii) to have a reasonable opportunity of being heard at the enquiry into the charges; and

(iii) to make representations against the penalty, if found guilty at the enquiry and if a major penalty is proposed, Rights (i) and (ii) are intact even after the amendment, and what is taken away is only the right under (iii). That right was to make representations "where it is proposed, after such enquiry, to impose on him any such penalty". The right accrued after the enquiry, after his guilt was found to be established and in case the disciplinary authority thought it fit to propose a major penalty. In many disciplinary proceedings initiated with the object of inflicting major penalties, the enquiry may ultimately reveal only minor lapses requiring imposition of minor penalties only; and in such cases, the delinquent was not entitled, even as matters stood prior to January 1977 to claim the second opportunity of making representation against the penalty. In other words, the mere circumstance that proceedings were initiated for imposition of major penalties was no guarantee for getting the second opportunity; the guarantee or the right depended upon the conclusion of the enquiry, the finding recorded and the proposal emanating at that stage. In the present case, disciplinary proceedings were no doubt initiated against the Petitioner in December 1974 under Rule 14, prescribing the procedure for imposing major penalties; but that circumstance was insufficient, even as Article 311(2) and the Rules stood at the time, to ensure him of a right to make representation against the penalty to be proposed after the enquiry. The right could have accrued only after 11th March 1979 when alone the enquiry report was drawn up; there was no such right, whether substantive, procedural or constitutional, before that period. That means no pre-existing right was affected by the amendment of Article 311(2) in January 1977 or of Rule 15 in August 1978. The amendments operated only on facts which came into existence subsequent thereto. In that sense, the case does not even raise the problem of invoking the rule against retrospectivity.

4. The evolution of the service law of the civil servants has been from contract to status. Even though originally, the relationship of the civil servant with the Government was essentially contractual in nature, terminable at the behest of the employer on the terms of the contract, Government of India Act, 1919 (9 and 10 clause 101), in Section 96B declared "every person in the civil service of the Crown holds office during His Majesty's pleasure", subject to the provisions of that Act and the rules made thereunder. This right to hold office "during pleasure" was however subject to a statutory safeguard that a civil servant could not be dismissed by an authority subordinate to that which he was appointed. Came later, the Government of India Act, 1935. Section 240 of that act

statutorily reiterated that the member of the civil service holds office during "pleasure". This pleasure doctrine was, however, subject to two important limitations:

- (i) No Civil servant could be dismissed by an authority subordinate to which he was appointed; and
- (ii) No such person 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.

The Government of India Act, 1935 only assured a reasonable opportunity and did not statutorily espouse for two show cause notices, one after framing a charge and the other after the finding of guilt. But this content of reasonable opportunity was defined by judicial decisions and in particular, by the Privy Council in AIR 1948 121 (Privy Council) . The Privy Council agreed with the majority decision of the Federal Court that the reasonable opportunity required "not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the persons concerned must there be given a reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken". In fact, the majority view of the Federal Court in I.M. Lall v. Secretary of State AIR 1945 F.G. 9 expressed thus:-

In our judgment each case will have to turn on its own facts, but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed.

The second opportunity rule in disciplinary proceedings against a civil servant was thus a judicial innovation instead of a statutory prescription. While the constitution engrossed the pleasure doctrine in Article 311(2) relating to the tenure of the government servant, this accepted interpretation of the content of "reasonable opportunity" received the constitutional seal of approval in 1963 by the 15th Constitutional amendment, under which Article 311(2) was amended, inserting a specific express provision regarding "a reasonable opportunity of making representation on the penalty proposed". The civil servant was no longer the victim of contractual caprice: He has position and rights recognised and approved by the Constitution. He has a status protected and assured by the basic, fundamental law of the land, the Constitution. As stated by the Supreme Court in Union of India v. Tulsiram Patel AIR 198 S.C. 1416 "the pleasure doctrine is not based upon, any special prerogative of the Crown but upon public policy". This decision in terms reiterated the stand taken in Roshan Lal Tandon Vs. Union of India (UOI), when it was observed:

In other words, the legal position of a Government servant is more one of status

than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties.

The same position thus continued for about 32 years from 1945 when in 1977 Article 311(2) was amended by inserting a proviso reading thus:

Provided that where it is proposed after such enquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the; evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed.

Thus the mandatory requirement of a second show cause notice regarding penalty was dispensed with and the absence of such notice did not invalidate the dismissal order with effect from 3rd January 1977.

5. It is in this legislative background that the decision has now to be rendered. The question that is debated is that the insistence of a second notice is merely a procedural requirement and the constitution amendment did have retrospective operation affecting proceedings which were pending on the date when the amendment came into force. It is contended, on the other hand, that a valuable right expressly conferred by the Constitution in 1963 has been taken away in 1977 and thus the right which accrued to the parties when the proceedings commenced is preserved, notwithstanding the amendment in 1977. Strong reliance is made on decisions holding that a substantial right of appeal available, at the time a suit was instituted, was preserved throughout the rest of the career of the suit unless that right was expressly taken away or excluded by necessary implication. It was also brought to our notice that where the Constitution amendment was intended to have retrospective operation, there was provision to that effect and the absence of any such positive provision or any indication that this amendment was intended to be retroactive showed that the object was only to enforce the provision prospectively. So run the contentions.

6. It is unnecessary to consider in this case whether Article 311(2) is a law relating merely to procedure. Assuming for arguments sake, it is not a procedural law, and that the amendment could not have affected a vested right accrued earlier, the Petitioner can still succeed only if he shows that he had an anterior right to a second notice. We have, therefore, necessarily to consider the content of the right granted under Article 311(2) prior to its amendment and the stage when the right would accrue. Before 3rd January 1977, a second notice before penalty was a constitutional command. Article 311(2) cast a duty on the authority and conferred a corresponding, right on the civil servant in the course of the disciplinary proceedings against him. Failure to follow the constitutional directive resulted in the automatic invalidity of the action that followed. The order of dismissal violating the mandate of Article 311(2) as it then stood, was void. The civil servant had a protective right to a second notice before he was dismissed from service.

7. This leads us to the next question as to when exactly the right to a second notice accrued. In Lall's case AIR 1940 P.C. 121, Speaking for the Judicial Committee of the Privy Council, Lord Thankerton observed:-

In the opinion of then 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....

This was accepted in Khem Chard's case where Their Lordships stated thus:

A close perusal of the judgment of the Judicial Committee in I.M. Lall's case (B), will, however, show that the decision in that case did not proceed on the ground that an opportunity had not been given to I.M. Lall against the proposed punishment merely because in the notice several punishments were included, but the decision proceeded really on the ground that this opportunity should have been given after a stage had been reached where the charges had been established and the competent authority had applied its mind to the gravity or otherwise of the proved charge tentatively and proposed a particular punishment.

In Ram Chander Vs. Union of India (UOI) and Others, it was held thus:-

The fifteenth amendment, in fact, clarified the legal position under the existing law by requiring that opportunity must be given to the delinquent government servant not only at the first stage to be heard in respect of the charges but also at the second stage i.e., after the disciplinary authority had come to a tentative conclusion of guilt at the conclusion of the inquiry and had decided upon the punishment proposed to be inflicted. It was a necessary and sufficient safeguard against arbitrary and excessive executive action written into the Constitution. Unfortunately, now the forty-second amendment has achieved what the Fifteenth Amendment could not. By the Constitutional amendment, the government has taken away the essential constitutional safeguard.

The amendment to Article 311(2) inserted by the 42nd amendment which came into effect on 3rd January 1977 is prospective in operation. It did not apply and could not affect decisions rendered, dismissal, removal or reduction in rank ordered prior to that date. It did not affect rights which accrued to a civil servant prior to that date. The language of the law indicated the width and amplitude of the scope of the amendment. The right to a second notice against the proposed penalty arises only after the authority finds that the civil servant is guilty of the charges framed against him. At that stage, when that right has accrued, his right will be governed by the law in force on that date. Thus in cases where the disciplinary authority entered a finding of guilt against the civil servant prior to

the 3rd January 1977 that civil servant would be entitled to a second notice as contemplated under Article 311(2) as it then stood. If the finding of guilt was arrived at after that date, then there was no right to a second notice, as the same has been dispensed with under the 42nd amendment.

8. Any other interpretation is likely to defeat the intent and object of the amendment to Article 311(2). From 1945 at least till 1977, the civil servant had been led to believe rightly that he need make his representations on the question of punishment only at a later stage of the disciplinary proceedings, when a finding of guilt is arrived at against him. If, in that belief, he did not make any representation earlier regarding the penalty, his stand was right and he committed no wrong. Now when he is told that the absence of a second notice will not invalidate the dismissal order, he is now alerted and hereafter he may have to take all the pleas including the quantum of punishment that may be imposed later, at the first stage itself, when he is given the first show cause notice after the charges are framed. The principle of a salutary application of a prospective law not affecting rights which accrued earlier has thus been adopted to reach the conclusion that the right to a second notice which accrued before 3rd January 1977 was not affected by the amendment.

9. In the view we have taken, it is unnecessary for us to consider in detail the decision in *Mahabaleshwar v. State of Karnataka* (1982) 1 KLJ 105 and that of the Bombay High Court in *Shripatrao Dajisaheb Ghatge and Another Vs. The State of Maharashtra and Another*, .

10. On the facts of this case, the right to a second notice arose only in 1979 when the disciplinary authority found that he was guilty. At that stage there was a constitutional eclipse of his right to a second notice. He no longer had any right to insist that he could be dismissed only after a notice regarding the proposed penalty. There was thus no violation of Article 311(2) of the Constitution.

11. The counsel for the Petitioner made an oral prayer for raising a new contention which was not raised in the pleadings in the Original Petition and also before the learned Single Judge at the time of hearing. He contended that there was violation of the principles of natural justice in that the copy of the enquiry was not furnished to the Petitioner before the order of dismissal was made. This contention was not raised when the Petitioner filed the departmental appeal. No factual foundation was laid in the Original Petition to raise this ground. This was not argued before the learned Single Judge. This plea was not even raised in the memorandum of grounds in this appeal. Under the circumstances, we did not allow the petitioner's counsel to raise this ground and take the counsel for the department by surprise. No other points raised.

The Writ Appeal is thus dismissed but without any order as to costs.