

(1957) 04 RAJ CK 0001
In the Rajasthan High Court
Case No : Civil Writ Case No. 2 of 1956

Kanhaiyalal

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 16-04-1957

Acts Referred:

Constitution of India, 1950 — Article 226, 309, 311, 311(2)

Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958 — Rule 16

Citation : AIR 1958 Raj 1 : (1958) RLW 1

Hon'ble Judges : Modi, J; Dave, J

Bench : Division Bench

Advocate : Chandmal, for the Appellant; Kansingh, Deputy Government Advocate, for the Respondent

Judgement

Dave J.

1. This is an application by Kanhaiyalal under Article 226 of the Constitution of India.
2. It would be proper first to set out those facts which are not in dispute between the parties and they are as follows:--

The petitioner was appointed as a clerk-cum-cashier in Tehsil Vallabhnagar, district Udaipur on 18th of February 1944. He was transferred to Tehsil Doongla as cashier on 12th April 1949 and later promoted to the post of accountant sometime in 1951. On 2nd April 1951, one Deepchand of Doongla filed a complaint against the petitioner before the Tehsildar Dcongla alleging that the petitioner had received from him, Rs. 204/12/-- in December 1949 or January 1950.

This amount was given towards the payment oft "Toji" which was a kind of "lagan", but the petitioner, instead of depositing it in the treasury, kept it with himself and gave no receipt for that amount to the complainant. On receiving this complaint the Tehsildar Vallabhnagar made an enquiry and then submitted a

report (Ex.1) to the Subdivisional Officer, Nimbahera on 16th of June 1951 saying that he was not satisfied with the correctness of the complaint and suggested that it would be proper for the Sub-divisional Officer himself to enquire into the matter.

Thereafter, the Sub-divisional Officer, Nimbahera made an enquiry, gave a charge-sheet (Ex. 2) to the petitioner on 23rd of July, 1951 and directed him to submit his reply on the same day. The petitioner submitted his reply (Ex. 3) and then the Sub-divisional Officer made his report (Ex. 4) to the Collector, Chittorgarh dated 25th July 1951 and recommended departmental action against the petitioner since he thought that the complaint was correct. The Collector in his turn forwarded the papers to the Revenue Secretary to the Government of Rajasthan recommending prosecution of the petitioner in a criminal Court".

The Revenue Secretary forwarded the papers to the Board of Revenue and the Board asked the Commissioner to give notice to the petitioner why he should not be removed from service. The matter again came to the Sub-divisional Officer in the reverse process and he framed a sort of charge (Ex. 5), and called upon the petitioner on 31st October 1952 to show cause why he should not be removed from service. The petitioner filed his reply. Those papers were then sent by the Sub-divisional Officer to the Collector Chittorgarh, who forwarded them to the Commissioner Udaipur. On the 3rd of March 1953 the Commissioner passed an order (Ex. 6) dismissing the petitioner from service with immediate effect.

The petitioner then filed an appeal to the Board of Revenue, but it was dismissed by its decision (Ex. 7) dated 19th May, 1954. Aggrieved by this order, the petitioner filed an appeal before the Government of Rajasthan which referred the matter to the Public Service Commission. Then, on the advice of the Public Service Commission, the petitioner's appeal was partly allowed and the punishment of his dismissal was altered to that of removal.

The petitioner moved a review application against this order (Ex. 8) dated 17th of November 1954 and after taking it into consideration, it was further ordered by the Government (vide Ex 9) that the order of the petitioner's removal from service would not disqualify him for future employment. This order was communicated to the petitioner by the Collector Dungarpur through his letter dated 3rd of June 1955 (Ex. 10). Thereafter the Collector Dungarpur gave him a temporary appointment as Jagir clerk on 15th June 1955 vide his order Ex. 12 but since it was a temporary job, it was terminated on 2nd August 1955.

3. The petitioner's contention is that though he is now eligible for appointment and he was actually given a temporary appointment after his removal, it is no solace to him, for he may or may not get any service in future. It is Urged that his very order of removal from service was illegal, that his past services have been wrongly wiped out, and that the said order should, therefore, be set aside. Among the grounds, which he has urged for challenging the validity of the said order of removal, it has been pointed out that the provisions of Rule 16 (a) of the

Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950 were not complied with.

It is stated that in the first instance it was incumbent upon the officer holding the enquiry to supply the petitioner with a statement of allegations on which the charge was based, but this was not done. Secondly, the evidence, on whose basis his order of removal is founded, was recorded in his absence and he was only given an opportunity to cross-examine the witnesses. He means to say that the evidence from the very start ought to have been recorded in his presence and it was not proper for the officer holding the enquiry to first record the statements of the witnesses in his absence and then simply ask him to cross-examine those witnesses. It is urged that even the principles of natural justice were thus not observed.

Thirdly, it is urged that after the charge was framed he was not asked to state if he wanted an oral enquiry to be held. The enquiry made by the Sub-divisional Officer behind his back was done before the charge was given to him. Lastly, it is urged that the Commissioner of Udaipur, who passed the order of dismissal did not make any enquiry himself nor did he give any finding. It is contended that he did not apply his mind and passed an order for his dismissal on the mere ground that he had not produced any evidence in defence. According to the petitioner, the provisions of Article 311 of the Constitution of India also were not complied with, and, therefore, it is prayed that his order of removal should be set aside.

4. It is further urged by the petitioner that although there was no order from the Government for the recovery of Rs. 205/- which he was said to have embezzled, the Tehsildar Vallabhnagar forcibly recovered this amount from him under orders of the Collector. The petitioner paid this amount under protest and got the receipt (Ex.. 11). It is contended that even the procedure prescribed under the Public Demands Recovery Act was not followed, that he has been wrongly deprived of his money and, therefore, it is further prayed that the opposite party be directed to refund the above mentioned amount to him.

5. In reply, it has been urged on behalf of the non-petitioner that the provisions of the Rajasthan "Civil Services (Classification, Control and Appeal) Rules, 1950, were substantially complied with and that even if there has been some irregularity, the non-observance of these rules does not furnish the petitioner any cause of action. It is stated that a charge-sheet was given to the petitioner and as it contained all the allegations, it was not necessary to give him a separate statement of allegations. He was given full opportunity to cross-examine the witnesses. It is urged that the authorities have terminated the petitioner's services after examining the merits of the case against him and this Court cannot enter into the merits of the order. As regards the amount of Rs. 205/-, it is stated that it has been recovered according to the Public Demands Recovery Act.

6. The first question, which calls for determination is whether the order of removal of the petitioner is vitiated on account of non-compliance of any rule of

procedure or principles of natural justice and because he was not given a reasonable opportunity of showing that the evidence on which he was condemned was not worthy of any reliance.

7. Before proceeding to determine this question, it would be proper to set out the relevant portion of Article 311 of the Constitution of India. It is as follows:

"311(1) No person who is a member of a civil service of the Union or an All-India Service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed, or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

8. In the present case We are not concerned with the first Clause of the article since it is not the petitioner's case that he was dismissed or removed by an authority subordinate to that by which he was appointed. Similarly, the provisos to Clause (2), and Clause (3) of the article, have no bearing on this case and, therefore, they have not been reproduced here. We have only to see if the provisions of Clause (2) of the above article have been complied with. According to this Clause, no person who is a member of a civil service of the Union or an All-India Service or a civil service of a State or who holds a civil post under the Union or the State shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

This Clause corresponds with Clause (3) of Section 240 of the Government of India Act, 1935. The language of that Clause was exactly the same as that of Clause (2) of Article 311. That Clause came for consideration before their Lordships of the Privy Council in AIR 1948 121 (Privy Council) and since then it is a settled view that the person charged has a right of reasonable opportunity of showing cause twice. In other words, there are two stages in such a proceeding; the first being when the charges are enquired into and at this stage the person required to meet the charges should be given a reasonable opportunity to demolish the charge, and the second stage comes when the enquiring authority comes to the conclusion that the charge is proved and the question of proper punishment comes before it.

A notice has again to be given to that person to show cause against the punishment which is proposed to be given to him. It was urged by learned Deputy Government Advocate that Article 311, Clause (2) would come into play only if the second opportunity for showing cause against the punishment proposed to be given is not afforded to the person charged. We have given due consideration to this argument, but in our opinion, this does not seem to be correct. It is true that in *High Commissioner for India v. I. M. Lall*. (A) referred above, their Lordships were considering the question of applicability of this

provision to the second opportunity, but this does not mean that the statute does not give to the person charged a statutory right of being given a reasonable opportunity of demolishing the charge at the stage of enquiry. We may refer to the following observation of their Lordships appearing in the said case:

"Their Lordships..... see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry..... 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 enquiry.""

9. It is quite clear from the said observation that in the view of their Lordships, the person charged has a statutory right at both the stages and it) was in this sense that Clause (3) of Section 240 of the Government of India Act, 1935 was interpreted. If Article 311 is interpreted to mean to provide only for the second statutory right, namely the reasonable opportunity of showing cause being given only before the proposed punishment is imposed, then the safeguard provided by this article would become meaningless. It would be a paradox to say that the Constitution of India considered the second opportunity to be given more importance and, therefore, it has provided statutory right for that, while the statutory right for the first opportunity is to be sought elsewhere. In fact, it is the first opportunity which is far more important than the second one because if the person charged is able to demolish the accusation made against him, the occasion for the second opportunity may never arise. Before the decision of their Lordships in *High Commissioner for India V. I. M. Lall. (A)* it was generally thought that the first opportunity was quite enough, but their Lordships gave it a different interpretation and held that the civil servant had a right to get two statutory opportunities.

Simply because the case before their Lordships was about the second opportunity, it can not be said that the first opportunity was considered outside the purview of Section 240, Clause (3) of the Government of India Act, 1935. We, therefore, think that Article 311, Sub-clause (2) of the Constitution of India requires that the civil servant to whom charge is given is entitled to have an opportunity to show cause at two stages: firstly, at the stage of the enquiry of the charges levelled against him and secondly, after he is found guilty and punishment is provisionally proposed to be given to him.

10. We have now to see whether the petitioner was given reasonable opportunity of meet/ing the charges at the first stage. It may be pointed out that the procedure in which reasonable opportunity should be afforded at the enquiry stage is given in Rule 16 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950. It is urged by learned Deputy Government Advocate that this rule is provided only, for the guidance of the officer conducting the enquiry and it does not give statutory right to the person charged. We find ourselves unable to agree with this argument.

The Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950 have been made in exercise of the powers conferred by Article 309 of the Constitution of India and, therefore, it cannot be said that they are only made for the guidance of the officers. In our opinion, they are as much binding on the Government as on the civil servants. In *Sobhagmal Vs. State*, although the question did not come for determination in the form it has been put before us, the following observation made therein goes to support our view. It was observed as follows:

"It may be pointed out that Rule 16 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950, corresponds to Rule 55 mentioned in the observations of their Lordships of the Privy Council. Therefore, a civil servant is entitled under Rule 16 to be informed in writing of the grounds on which it is proposed to take action, and to be afforded an adequate opportunity to defend himself."

11. We respectfully agree with the view mentioned above and we also think that this rule gives a right to a civil servant that the enquiry against him should be conducted against him in the manner provided therein and it is not left to the whim and caprice of the officer conducting the enquiry to hold it in the manner it pleases him. If such a view is adopted, then every officer conducting the enquiry would do so in his own way and it would give rise to several disputes and it would become difficult to find out in every case whether a reasonable opportunity was given. It is in order to set up a uniform standard that this rule has been provided and, therefore, in our opinion, the officer conducting the enquiry must adhere to it.

12. The next question which then arises is whether the provisions of this rule were complied with in the petitioner's case. The procedure laid down by this rule is as follows:

"The grounds 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 directs, an enquiry shall be held. At that enquiry, 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, give evidence and to have such witnesses called, as he may wish provided that the officer conducting the enquiry may, for special and sufficient reason 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".

13. It would appear that according to the procedure laid down by this rule, the

officer conducting the enquiry has to do the following things:

- (1) He has to reduce to the form of a definite charge or charges the grounds on which it is proposed to take action.
- (2) The charge must be communicated to the person charged.
- (3) The person charged should also be given a statement of the allegations On which the charge or if there are more than one charges, each charge is based.
- (4) If there are any other circumstances, which are proposed to be taken into consideration in passing orders in this case, they should also be communicated to the person charged.
- (5) After the charge is given, the person charged should be given a reasonable time to put in a written-statement of his defence and to state whether he desires to be heard in person.
- (6) If he so desires and even if he does not desire, but if the authority concerned so directs, an oral enquiry must be held.

14. The rule then proceeds to lay down the procedure as to how the enquiry should be held, It says:

- (a) Oral evidence should be heard as to such of the allegations as are not admitted,
- (b) the person charged must be given opportunity to cross-examine the witnesses,
- (c) he should be given an opportunity to produce evidence and to have such witnesses called as he may wish. Here the officer conducting the enquiry has been given a discretion that he may refuse to call a witness for special and sufficient reason, but he must record those reasons in writing.
- (d) the proceedings Conducted by the said officer must contain:
 - (i) sufficient record of the evidence,
 - (ii) statement of findings,
 - (iii) the grounds for the findings.

15. The first grievance of the petitioner is that he was not given a statement of the allegations on which the charge was based. It is admitted by the non-petitioner that this defect was there, but it is contended that the charge itself was explicit and, therefore, this was merely an irregularity which did not prejudice the petitioner's case on merits. We may point out that the provisions for giving a statement of the allegations is not redundant and it should not be lightly ignored.

The charge would not usually contain the details of the allegations on which it is

founded and, therefore, provision has been made that the person charged should be given a statement of the allegations on which the charge or if there are more than one charges each charge is based and if there are any other circumstances which are proposed to be taken into consideration while passing orders on the case, they should also be communicated to that person so that he may not remain in darkness about any circumstance which is sought to be used against him. The failure on the part of the enquiring officer to provide the person charged with a statement of allegations and of the circumstances referred above may, therefore, in particular cases be considered as a good ground for quashing the decision.

But in the present case, we find that the charge was quite elaborate and contained all the allegations on which it was based. The enquiring officer did not take into consideration against the petitioner any other circumstances in finding him guilty and, therefore, the failure in providing the petitioner with the statement of allegations was a mere irregularity which did not affect the merits of the case. If this were the only grievance of the petitioner, we would not have interfered in this matter.

16. The next and real grievance of the petitioner, however, is that the witnesses were examined in his absence by the officer conducting the enquiry and then he was asked only to cross-examine them, This was also done before the charge was framed. In other words, no enquiry was made after the charge was given to the petitioner. This factual position has not been controverted by the non-petitioners, but learned Deputy Government Advocate has proceeded to urge that the petitioner had an opportunity to demolish the evidence produced against him by cross examination and that he is not prejudiced simply because the witnesses were not examined before him from the very beginning,

It is further urged that the petitioner did not ask for an oral enquiry in reply to the charge and, therefore, it was not necessary to examine the evidence in his presence thereafter. We have given our careful consideration to the arguments advanced from both the sides in this behalf. We must make it clear that we are not entering into the merits of the case since it is not within our province to do so in our extraordinary jurisdiction, but we may point out that the case against the petitioner was really based on oral evidence. The facts alleged against the petitioner were not that "the tenants directly deposited the revenue with him, but what was alleged was, that one Deepchand of Doongla had brought to the petitioner Rs. 204/13 to be deposited on behalf of certain tenants along with certain forms which are called "Arj Irsal."

It was Deepchand's allegation that he had deposited the money with the petitioner but he was not given any receipt. It is not denied that Deepchand presented his complaint for the first time before Tehsildar Doongla on 2nd April 1950 and it was alleged by him that the money was given to the petitioner sometime in December 1949 or January 1950. Thus according to Deepchand himself, the complaint was presented by him after nearly four or five months

from the data of alleged occurrence. The petitioner's contention is that the Arj Irsal forms were of different dates. Form No. 22 of Rs. 75/5 was of 10-1-1950. the second form No. 59/2 of Rs. 50/7 and the third form No. 60/2 of Rs. 55/1 were of 20-1-1950. while the fourth form No. 73 of Rs. 23/15 was of 8-2-1950.

It has been further urged by him that when these forms themselves were issued in January and February, the money could not possibly be deposited with him by Deepchand in December 1949 nor could the amount of the fourth form which was of February 1950 be deposited in January 1950. It is admitted by the non-petitioners that no receipt was given by the petitioner to Deepchand. Under the circumstances, the whole case against the petitioner rested on oral evidence and the main question to be determined was whether Deepchand had given the money to the petitioner or he was only trying to save for himself the money which he had received from others.

In view of these circumstances, it was very necessary for the officer conducting the enquiry that he should have recorded the entire oral evidence in the presence of the petitioner. Even apart from any particular rule or procedure natural justice required that the entire evidence I ought to have been recorded in his presence. In failing to do so, the officer conducting the enquiry not only violated the procedure laid down by Rule 16 but acted even against the principles of natural justice.

17. Learned Deputy Government has tried to justify the action of the Sub-divisional Officer by saying that he had allowed opportunity of cross-examination to the petitioner. In our opinion, this is a very feeble argument. The statements, which the Sub-divisional Officer had recorded in the absence of the petitioner, were taken by him only to find out if there was a prima facie case against the petitioner. If he was satisfied that there was a prima facie case --and it seems that he was so satisfied-- then he should have drawn up a charge on their basis and given that charge to the petitioner together with a statement of the allegations on which the charge was framed together with the circumstances, if any, which he proposed to take into consideration against the petitioner in passing his orders on the case. Thereafter, he should have given reasonable time to the petitioner to give his reply.

Since the petitioner's reply was in the negative, he should have thereafter proceeded to hold oral enquiry in the petitioner's presence. While holding this enquiry, he should have examined the witnesses ab initio in the presence of the petitioner and then he should have afforded him an opportunity to cross-examine them. The evidence, which he had recorded in the absence of this petitioner, could not be used by him against the petitioner except for corroborating or contradicting the evidence of witnesses. It was not enough to tell the petitioner that he could cross-examine the witnesses. The purpose of examining the witness from the very beginning in the presence of the person charged is to afford to such person an opportunity to see what actually they are deposing and also to see the manner in which they give their statements.

Moreover, when the person charged is present, the witnesses also feel their responsibility that they should try to stick to the bare truth and not try to embellish their statements or put embroideries thereon. If the witnesses are already pinned down to a certain statement and the person charged is merely asked to cross-examine them, then the natural tendency for the witnesses is to stick to that version and it becomes very difficult for the person charged to demolish their evidence. This method of enquiry is, therefore, incorrect and is not envisaged by the procedure laid down in Rule 16 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules.

18. It has already been mentioned above that the Sub-divisional Officer did not conduct any enquiry at all after the charge was given to the petitioner. Learned Deputy Govt. Advocate says that the petitioner ought to have expressed his desire for an oral enquiry in response to the charge. This argument is also not tenable because the petitioner had definitely denied the charge & under the circumstances, an oral enquiry before him was necessary. It would appear from the analysis of Rule 16 which has been made above that while giving a charge the officer conducting the enquiry should also ask the person charged to put in a written statement of his defence and also "to state whether he desires to be heard in person".

If he so desires or the authority concerned so directs, an oral enquiry must be held. Learned Deputy Government Advocate has urged that the words "if he so desires" begin with a new sentence and, therefore, an Oral enquiry may be held only if the person charged expresses clearly that such an enquiry should be held. What he means is that his mere saying that he wants to be heard in person is not enough to compel the officer conducting the enquiry to start such enquiry. In our opinion, this is no more than mere quibbling. When the person charged denies the charge and says that he wants to be heard in person, then it means that he wants that an oral enquiry should be held.

In our opinion, the words "if he so desires" "must be read in the context of the sentence immediately preceding it which requires that the person charged will be asked to state whether he desires to be heard in person. Read in this context, the words "if he so desires" would mean "if he desires to be heard in person". It would then follow as a natural corollary that he wants an enquiry to be held unless he expressly says that he does not want an inquiry. In the present case, no such enquiry was held after the charge.

We find that in the charge given to him, the petitioner was not even asked to state if he wanted to be heard in person. It may further be pointed out that he was asked to give his reply on the same day i.e. he was not given reasonable time to put in a written statement of his defence. The Sub-divisional Officer has not recorded any reasons or the circumstances which led him to command the petitioner to give his reply on the very day. We are thus satisfied that the petitioner was not given reasonable opportunity of meeting the charge. We further find that although the Commissioner had given notice to the petitioner at

the second stage for showing cause against the action proposed to be taken in regard to him, he does not seem to have applied his mind to the evidence against the petitioner because he has not made any reference to it.

He imposed punishment on the petitioner by simply saying that he had not led any evidence in defence. It was not enough to refer to the weakness of the defence which could be very little, if any. in such a case. He should have referred to the evidence against the petitioner and given his finding on its strength. It appears that the higher authorities themselves realised the weakness of the case against the petitioner and, therefore, the order of his dismissal was changed into that of removal and he was even held eligible for reappointment. Ordinarily, in cases, where a public servant commits criminal breach of trust, he is not re-employed. Anyway, this is not the reason which has led us to allow the petitioner's application. The main reason which compels us to allow this application is that the officer conducting the enquiry has not followed the procedure laid down in Rule 16 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules and, thus the petitioner has not been given reasonable opportunity of defending himself. He is, therefore, entitled to have the order of his removal set aside.

19. As regards the question regarding the realization of Rs. 205/- from the petitioner, it would be enough to say that We cannot justify that action against the petitioner for the simple reason that his order of removal is being set aside and so long as it is not found against him that he has embezzled any money alleged to have been given to him by Deepchand, the State cannot withhold the money which it has realised from the petitioner.

20. The petitioner's application is, there fore allowed. The order of his removal from service of the State of Rajasthan is set aside. It need hardly be stated that the non-petitioner is free to direct) that an enquiry be properly held against the petitioner. But so long as the charge is not established against him, it is but proper that the money realised from him should be re turned to him. The petitioner will receive his costs from the non-petitioner.