
(1981) 09 KAR CK 0002
In the Karnataka High Court
Case No : WP 17572/80. 18th

Mahabaleshwar Pandrinath Naik

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 21-09-1981

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : (1982) 1 KarLJ 105

Hon'ble Judges : A. K. Lakshmeshwar, J;V. S. Malimath, J

Judgement

Malimath. J.-This Writ petition has come before this Division Bench on a reference made by Rama Jois, J., on the ground that this case involves important questions regarding interpretation of Art. 311(2) of the Constitution of India.

2. The petitioner Sri M.P. Naik held a civil post under the State Government as Senior Chemist in the Government Sandal Wood Oil Factory, Shimoga. Alleging that he is guilty of certain mis-conduct, certain charges were framed against him and an enquiry was held by the Enquiry Officer appointed for the purpose by the State Government. The Enquiry Officer appears to have submitted his report after conclusion of the enquiry on the 1st of June 1976. Nearly four years thereafter the State Government passed the impugned order on 9.7.80 (Annexure-P.) holding the petitioner guilty of certain charges and imposing the penalty of removal from service with immediate effect. It is the said order that is challenged by the petitioner in this writ petition.

After the report of the enquiry officer was submitted to the State Government and before the Government passed the impugned order. Art. 311(2) of the Constitution was amended by the Constitution Forty Second Amendment) Act 1976. The amended Art. 311(2) came into force with effect from 3.1.77. By the said amendment the words and where it is proposed, after such enquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed but only on the basis of the evidence adduced during such enquiry" were omitted, and for the

words "provided that this clause shall not apply" the following words were substituted:

"Provided that where it is proposed after such inquiry 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:

Provided further that this clause shall not apply-"

Before the amendment Art. 311(2) required that a reasonable opportunity of making representation on the penalty proposed should be afforded. By the amendment it is expressly provided that it is not necessary to afford an opportunity to make representation at the second stage of inquiry in regard to the penalty proposed to be imposed

4. The procedure for holding disciplinary enquiries is governed by the Karnataka Civil Services (Classification, Control and Appeals) Rules 1957 (hereinafter referred to as the Rules) made by the Governor in exercise of the powers conferred by proviso to Art. 309 of the Constitution. Rules 11 and 11A of the Rules are the principal rules that regulate the procedure for the imposition of major penalties like dismissal, removal and reduction in rank. Rules 11 and 11A contained detailed provisions in the matter of holding disciplinary proceedings consistent with the provisions of Art. 311 of the Constitution before its amendment. After Art. 311(2) was amended with effect from 3-1-1977 the Governor amended sub-rule (3) of Rule 11A and deleted sub-rule (4) of Rule 11A by the Karnataka Civil Services (Classification, Control and Appeal) (Amendment) Rules 1977, which came into force on the 20th January 1977, the date on which the said Rules were published in the Karnataka Gazette.

5. Sub-rule (2) of Rule 11 of the Rules provides that where the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a Government servant, it may itself inquire into or appoint an authority to inquire into the truth thereof. Sub-rules (3) to (18) contain detailed provisions from the stage of framing charges to the stage of production of evidence. Sub-rule (19) provides that the Inquiring Authority may after completion of production of evidence hear the Presenting Officer, if any, appointed and the Government, servant or permit them to file written briefs of their respective cases, if they so desire. Sub-rule (20) enables the Inquiring Authority to hold an enquiry ex-parte in certain, circumstances. Sub-rule (21) prescribes the procedure to be followed when the disciplinary authority who is competent to impose minor penalties comes to the conclusion that any of the major penalties specified in clauses (v) to (viii) of Rule-8 are required to be imposed. Sub-rule (22) prescribes the procedure to be followed when an Inquiring Authority after having heard and recorded the whole or any part of the evidence ceases to exercise jurisdiction and he is succeeded by another Inquiring Authority. Sub-rule (23) provides that after the conclusion of

the enquiry a report shall be prepared which shall contain: (a) the articles of charge and the statement of the imputations of misconduct or misbehaviour, (b) the defence of the Government servant, in respect of each Articles of charge, (c) an assessment of the evidence in respect of each articles of charge, and (d) the findings on each article of charge, and the reasons therefor. The Explanation to this sub-rule empowers the Inquiring Authority to record findings on a charge different from the original article of charge after giving the Government servant an opportunity of defending himself against such article of charge. This sub-rule further provides that the Inquiring Authority where it is not itself the Disciplinary Authority shall forward to the Disciplinary authority the records of the Inquiry, which shall include: (a) the report prepared by it under clause (i), (b) "the written statement of defence, if any, submitted by the Government Servant, (c) the oral and documentary evidence produced in the course of the inquiry, (d) written briefs if any, filed by the Presenting Officer or the Government servant or both during the course of the inquiry, and (e) the orders, if any, made by the Disciplinary Authority and the Inquiring Authority in regard to the inquiry.

6. Rule 11A of the Rules which is the next rule prescribes the procedure to be followed by the Disciplinary Authority on receipt of the Enquiry report. Sub-rule (i) empowers the Disciplinary Authority to remit the case to the Inquiring Authority for further enquiry and report if the circumstances of the case justify such a course of action. Sub-rule (2) provides that the Disciplinary Authority shall if it disagrees with the findings of the Inquiring Authority on any articles of charge to record its reasons for such disagreement and record its own findings if the evidence on record is sufficient for the purpose. Sub-rule (3) before it was amended in January 1977 provided that if the disciplinary authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in clauses (i) to (iv) of Rule 8 of the Rules should be imposed, it shall notwithstanding any thing contained in rule 12 make an order imposing such penalty. The proviso to the said rule provides that in every case where it is necessary to consult the Commission, the records of the Inquiry shall be forwarded to the Commission by the Disciplinary Authority for its advice on the penalties to be imposed on the Government servant and such advice shall be taken into consideration before making any order imposing any penalty on the Government servant. Sub-rule (4) before its deletion in January 1977 read as follows:

(i) If the Disciplinary Authority having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties specified in clauses (v) to (viii) of rule 8 should be imposed on the Government servant, it shall- (a) furnish to the Government servant a copy of the report of the enquiry held by it and its findings on each article of charge, or where the inquiry has been held by an Inquiring Authority, appointed by it, a copy of the report of such authority and a statement of its findings on each article of charge together with brief reasons for its disagreement, if any, with the findings of the Inquiring Authority and where the inquiry is held by the Vigilance Commission under rule 14A, a copy of

the findings of the Inquiring Officer with the recommendations of the Vigilance Commissioner, and (b) give the Government servant a notice stating the penalty proposed to be imposed on him and calling upon him to submit within fifteen days of receipt of the notice or such further time not exceeding fifteen days, as may be allowed, such representation as he may wish to make on the proposed penalty on the basis of the evidence adduced during the Inquiry held under rule 11.

(ii) (a) In every case in which it is necessary to consult the Commission, the record of the notice given under Clause-(i) and the representation made in pursuance of such notice, if any, shall be forwarded by the Disciplinary Authority to the Commission for its advice on the penalties proposed to be imposed on the Government servant.

(b) The Disciplinary Authority shall after considering the representation, if any, made by the Government servant and the advice given by the Commission, determine what penalty, if any, should be imposed on the Government servant and make such order as it may deem fit.

(iii) Where it is not necessary to consult the Commission the Disciplinary Authority shall consider the representation, if any, made by the Government servant in pursuance of the notice given to him under clause (i) and determine what penalty, if any, should be imposed on him and make such order as it may deem fit."

As already stated this sub-rule (4) of Rule 11A has been deleted with effect from 20.1.77. So far as sub-rule (3) is concerned, the words "any of the penalties specified in clause (i) to (iva) of rule 8" are substituted by the words "one or more of the penalties specified in rule 8".

7. The clear effect of the amendment made to the Rules to bring them in tune with the amended Art. 311 (2) of the Constitution is to do away with the procedure prescribed by rule 11A(4) and to provide that after receipt of the Enquiry Officer's report, the Disciplinary Authority may proceed to record its findings on the charges and to impose on the Government servant one or more of the penalties including the major penalties of removal, dismissal or reduction in rank provided by rule-8 of the Rules. If the Disciplinary Authority is himself the Inquiring Authority, the Explanation to sub-rule (2) of Rule-11 provides that the reference in sub-rule (7) to sub-rule (20) and in sub-rule (22) to the Inquiring Authority shall be construed as a reference to the Disciplinary Authority. Consequently it follows that when the Disciplinary Authority is himself the Inquiring Authority, it has to follow the procedure prescribed under sub-rule (19) of Rule-11, which provides that after production of evidence, it should hear the presenting Officer appointed and the Government servant or permit them to file written briefs of their respective cases, if they so desire. It is after giving an opportunity of hearing to the Presenting Officer and the Government Servant that the Disciplinary Authority can proceed to record its findings and to impose

any of the penalties contemplated by Rule 8 as provided by Rule, 11A(3) as amended. If the disciplinary Authority is not the Inquiring Authority itself has to give an opportunity of hearing as contemplated by sub-rule (19) of Rule-11 and submit its report after the completion of the Inquiry to the Disciplinary Authority as contemplated by sub-rule (23) of Rule-11. Before rule 11A was amended the Disciplinary Authority on receipt of such a report was required to arrive at tentative findings on the charges framed after considering the report of the Inquiring Authority and the material collected during the course of the Inquiry. Thereafter it was required to furnish to the Government a copy of the report of the Inquiry held, a statement of its findings on each article of charge, with brief reasons for its disagreement, if any, with the findings of the Inquiring authority and a notice stating the penalty proposed to be imposed on him and calling upon him to submit his representation within the specified time. It is after considering the cause shown by the Government servant both in regard to the merits of the charges and in regard to the proposed penalty, that the Disciplinary Authority was required to arrive at its final conclusion in regard to the charges and record its findings. If found guilty it could impose appropriate penalty. The amendment of Rule 11A in January 1977 makes it appear that the Disciplinary Authority is not required to follow any such procedure after receiving the report from the Inquiring Authority under rule (23) of Rule 11A.

8. It was submitted by Sri B.B. Mandappa, learned High Court Government Advocate that after the amendment of Rule 11A the Disciplinary Authority is not required to furnish a copy of the enquiry officer's report to the Government Servant or to give an opportunity of showing cause before recording its final findings on the articles of charges framed against the government servant. He submitted that after the receipt of the Report of the Inquiring Authority all that the Disciplinary Authority has to do is to consider the report and arrive at a final conclusion without giving further opportunity of showing cause to the government servant either in regard to the merits of the charges or in regard to the proposed penalty to be imposed on him. He submitted that that is the principal departure that has been brought about by the amendment of Rule 11A, which amendment, according to him, has been brought about consistent with the amendment to Art. 311(2) of the Constitution.

9. It is not disputed in this case that the State Government has followed the procedure precisely as indicated by the learned High Court Government Advocate. The report of the Inquiry Officer was submitted to the Disciplinary Authority on 1.6.76. After receiving that report, the State Government, which is the Disciplinary Authority did not furnish a copy of the report of the Inquiry Officer to the petitioner. What the State Government did was to consider the report of the Inquiry Officer received by it under rule 11A (23) and to record its findings without giving a further opportunity of showing cause to the petitioner. After recording its findings in regard to the charges levelled against the petitioner in that manner, the State Government has proceeded to impose the penalty of removal from service without giving further opportunity of making representation

in regard to the proposed penalty.

10. On behalf of the petitioner Sri T.S. Ramachandra, learned Advocate contended that the inquiry in this case having admittedly commenced some time in the the year 1974 when the charges were framed against the petitioner, the inquiry was required to be held in accordance with Art. 311(2) of the Constitution as it stood before its amendment with effect from 3.1.77 and in accordance with the unamended rule-11A of the Rules. He pointed out that it is not disputed that the procedure prescribed by sub-rule (4) of Rule-11A. before its deletion was not followed by the State Government in this case. He further submitted that the petitioner was not given a reasonable opportunity of being heard as required by Art. 311(2) of the Constitution and that he was also not afforded an opportunity of making representation in regard to the penalty proposed. He further contended that the inquiry in this case should have been concluded following the procedure prescribed by Rule 11A before its amendment and in accordance with sub-art. (2) of Art. 311 of the Constitution before its amendment with effect from 3.1.77.

11. Sri B.B. Mandappa, learned High Court Government Advocate, on the other hand contended that sub art (2) of Art. 311 of the Constitution and sub-rules (3) and (4) of Rule 11A of the Rules, having been amended, in the year 1977 the State, Government was right in following the amended provisions of Art. 311(2) and Rule 11A of the Rules. Sri Mandappa submitted that though the disciplinary inquiry was commenced against the petitioner before the amendment of the Rules and Art. 311 of the Constitution,, as the inquiry had not been concluded, the State Government was right in following the procedure that was consistent with the amended Art. 311 (2) and amended provisions of rule 11A of the Rules. But, it was maintained by the learned advocate for the petitioner that even if the provisions of amended Art. 311(2) of the Constitution could be applied to this case, the impugned order cannot be sustained, the same having been passed without giving a reasonable opportunity of being heard, to which opportunity the petitioner is entitled to even in accordance with the amended Art. 311 (2) of the Constitution.

12. We shall first take up for consideration the question as to whether the enquiry which commenced in this case before the amendment was required to be concluded in accordance with the unamended provisions of rule 11A of the Rules. It was contended by Sri T.S. Ramachandra learned Advocate for the petitioner that Art. 311(2) of the Constitution has conferred a valuable right on all persons holding civil posts under the State which right, being a substantive right, cannot be denied unless the amendment to Art. 311(2) is given retrospective effect by express provision in that behalf or by necessary implication. He submitted that the Constitution (Forty Second Amendment) Act, 1978 does not in express terms give retrospective effect to the amended Art. 311(2). He is also right in pointing out that there is no express provision making the amended Art. 311(2) applicable to pending disciplinary proceedings. He further submitted that there is

nothing to indicate that by necessary implication retrospective effect is given to amended Art. 311(2) so as to make the same applicable to pending proceedings. Sub-art. (1) of Art. 311 of the Constitution provides that a Government servant shall not be dismissed or removed by an authority subordinate to that by which he was appointed. Sub-art (2) to Art. 311 prescribes that the penalty of dismissal, removal or reduction in rank should not be imposed except after an enquiry. The unamended article of the Constitution of India provided that he should be informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. It further provided that where it is proposed, after such inquiry, to impose on him any such penalty, he should be given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced. during such enquiry. It is, therefore, clear that what was contemplated by Art, 311(2) of the Constitution was, framing of charges, affording of a reasonable opportunity of being heard in respect of the charges and of affording a reasonable opportunity of making a representation in regard to the penalty proposed.

13. All these steps contemplated by Art. 311 of the Constitution pertain to the procedure in the matter of holding disciplinary inquiry. The essential character of the provision of Art. 311 (2), which is procedural in character, cannot become otherwise merely because this procedural requirement is engrafted in the Constitution itself. It is necessary to state that in none of the decisions of the Supreme Court to which our attention was drawn in this behalf has Article 311(2) been described as conferring a substantive right on holders of civil posts. In *Khem Chand v. Union of India*, AIR 1958 SC 300. Art. 311(2) has been described as a Constitutional protection or safeguard. Though it is a Constitutional protection or safeguard, it appears to us that it is a protection or safeguard guaranteed by the Constitution in the matter of procedure to be followed in a disciplinary inquiry. In *Parshotham Lal Dhingra v. Union of India*, AIR 1958 SC 36, it has been observed that certain amount of security of tenure is provided by Art. 311(2) of the Constitution. The Supreme Court has observed that Art. 311(2) has the effect of giving certain amount of security of tenure inasmuch as the services of holders of civil posts cannot be terminated in an arbitrary manner and can be dealt with only by following the procedure prescribed by Art. 311(2) of the Constitution. In *Dattatraya Govind v. State of Maharastra*, AIR 1977 SC 915, the Supreme Court dealing with the second proviso to Art. 31A(1) held that though by the said proviso limitation, has been imposed on the power of the legislation, the limitation on the power of the legislation from the point of view of the State, is conferment of right from the point of view of the holder of the land within the ceiling limit. On the basis of the said decision it was contended that the limitation on the power of the appointing authority imposed by Arti. 311(2) has the effect of conferring a positive right on the holder of a civil post. The analogy in our opinion is not very apt. Art. 31 occurs in Part III of the Constitution which in express terms contains the fundamental rights guaranteed by the Constitution. It is clear that, what has been conferred by Art. 31 is a

fundamental right. Merely because the said right has been conferred by imposing limitation on the legislative power of the State, the essential character of the conferment of the right on a citizen does not get altered. Hence, it is not possible to apply the principle laid down in Dattatraya Govind's case for construing Art.

311(2) of the Constitution. Reliance was placed by Sri Ramachandra on the decision of the Bombay High Court in *S. Framji v. Union of India*, AIR 1960 Bom. 14.

It is observed in the said case that Art. 311 confers certain Constitutional rights upon a civil servant and undoubtedly a breach or infringement of any of the statutory rights afforded to a civil servant under Art. 311 confers a right upon him and he can come to Court and complain of the breach or infringement. The High Court of Bombay was not required in that case to consider as to whether Art. 311 deals with procedural safeguards or with conferment of substantive rights. The observation regarding conferment of right" is not made with reference to sub-article (2) of Art. 311, but has been made with reference to Art, 311 as a whole. It is no doubt true that a breach of the provision of Art. 311(2) entitles the concerned holder of a civil post to complain about the breach and secure appropriate reliefs. Whenever there is a breach, the concerned holder of a civil post gets a right for redressal of his grievance. But that does not mean that sub-art (2) of Art. 311 does not deal with procedural matter but confers substantive rights on holders of civil posts. Our attention was also drawn to the decision of the Supreme Court in *Bachhittar Singh v. State of Punjab*, AIR 1963 SC 395. The Supreme Court dealing with sub-Art. (2) of Art. 311 has observed that departmental proceedings taken against a Government servant are not divisible and that there is just one continuous proceedings and that none of them can be regarded as administrative and therefore, the order made cannot be regarded as an administrative order. As Art. 311(2) of the Constitution requires a notice to be given to the person concerned as also an opportunity of being heard and having regard to the nature of the enquiry, it was held that the proceeding is judicial in character and not administrative. This observation of the Supreme Court does not convey that Art. 311(2) does not deal with procedure, but deals with substantive rights. The reasons given by the Supreme Court clearly indicate that the stages contemplated by Art. 311(2) are necessarily stages which are taken in proceedings akin to judicial proceedings. None of the decisions relied upon by Sri Ramachandra, in our opinion, help us to come to the conclusion that Art. 311(2) confers substantive rights and does not deal with procedure.

14. It is well settled that amendments to procedural law have retrospective effect and therefore, govern pending proceedings as well. As Art. 311(2) prescribes only the procedure to be followed in the matter of holding disciplinary inquiry, amendment of the same which pertains to procedure will have retrospective effect. Therefore, the amended provisions have to be followed in respect of pending proceedings.

15. Even assuming for the sake of argument that Sri Ramachandra is right in his

contention that the Constitutional safeguards or protections conferred by Art. 311(2) of the Constitution have the status of a substantive right; we may examine as to whether the amended Art. 311(2) would govern pending proceedings. The amendments affecting substantive rights can be given retrospective effect either by express provision to that effect or by necessary implication. It is no doubt true that there is no express provision giving retrospective effect to the amended provisions of Art. 311(2). Sri Mandappa, learned High Court Government Advocate however, maintained that having regard to the intent of the amendment and the language employed, it is abundantly clear that by necessary implication retrospective effect has been given to Art. 311(2) and that therefore, the amended Article applies even to pending proceedings. In *Gannatha Prasad v. State of U.P.*, AIR 1961 SC 1245, the Supreme Court was required to examine as to whether Art. 311(2) of the Constitution applies to a departmental inquiry commenced before the coming into force of the Constitution and concluded after the Constitution came into force. In that case enquiry was commenced against a Police Officer under the U.P. Disciplinary Proceedings (Administrative Tribunal) Rules 1947.

Under rule 10 of the said Rules the Governor was enjoined to pass an order of punishment in terms recommended by the Tribunal. Though an inquiry had commenced in that case before the commencement of the Constitution, the Governor's order came to be passed after the Constitution came into force. It is necessary to point out that the Police Officers were not entitled to safeguards similar to those provided by Art. 311 of the Constitution. In that case the Supreme Court held Rule 10 of the U.P. Disciplinary Proceedings (Administrative Tribunal) Rules, to the extent it made it obligatory on the part of the Governor to accept the recommendation of the Tribunal is bad on the coming into force of the Constitution as the same is inconsistent with Art. 311 of the Constitution. As that part of the rule was found to be severable and as the Supreme Court came to the conclusion that the Governor made the order on the basis that he was not bound by the recommendation of the Tribunal, the order was upheld. The Supreme Court held that the Police Officer in that case was entitled to protection under Art. 311 of the Constitution, even though the enquiry commenced before the Constitution, as the order of dismissal was passed after the Constitution came into force. It is clear from this decision of the Supreme Court that in regard to pending disciplinary proceedings commenced before the Constitution, the provisions of Art. 311(2) were held to be applicable, the order of dismissal having been passed after the Constitution came into force. The language employed in Art. 311 makes it abundantly clear that on the coming into force of the Constitution, no holder of a civil post can be dealt with otherwise than in accordance with Article 311 of the Constitution. It is because of this mandate of Art. 311 that the Supreme Court came to the conclusion that though the inquiry had commenced before the Constitution came into force, the order of dismissal having been made after the Constitution came into force, the same could be passed only after complying with the provisions of Art. 311 of the Constitution.

In *Government of AP v. Mohammed Mominuddin*, AIR 1964 AP 206, the decision of the Supreme Court in *Jagannatha Prasad Sharma*'s case was followed and it was held that Art. 311 applies to an inquiry which was commenced before the Constitution came into force, as the final order was passed after the Constitution came into force.

16. Sri T.S. Ramachandra, learned counsel for the petitioner, contended that if the Parliament intended that the amended Art. 311(2) should govern pending proceedings, it would have made an express provision to that effect similar to the one which was made under the Constitution (Forty-second Amendment) Act, by which Art. 226 was also amended. Sec. 58 of the Constitution (Forty Second Amendment) Act makes special provision as to pending proceedings under Art. 226 of the Constitution. But there is no such express provision so far as Art. 311 is concerned. In *Shripatrao Dajisaheb v. The State of Maharashtra*, AIR 1977 Bom. 384, the Bombay High Court dealing with the amendment of Art. 227 of the Constitution which was also brought about by the Forty-second Amendment Act, held that the fact that there was no express provision making the amended Art. 227 applicable to pending proceedings leads to the inference that the Parliament did not intend that the amended Art. 227 should govern the proceedings pending under Art. 227 of the Constitution on the date of the amendment. Though there is express provision providing that the amended Art. 226 shall be applicable to pending proceedings, there is no such express provision in regard to Art. 227 or 311 (2) of the Constitution. But in our opinion the said circumstance cannot be regarded as a conclusive circumstance for coming to the conclusion that the amended provisions of Art. 311(2) are not applicable to pending proceedings. Each provision has to be examined in the context in which it occurs and having regard to the object sought to be achieved. Before the amendment of Art. 311 (2), an opportunity of making representation in regard to the punishment proposed was required to be given. This opportunity was required to be given after the Government servant was informed of the charges and an inquiry was held giving him a reasonable opportunity of being heard in respect of those charges. In the statement of objects pertaining to the amendment of Art. 311(2) of the Constitution, it is stated that this clause seeks to amend Art. 311(2) denying the Government servant an opportunity of making a representation at the second stage of the inquiry against the penalty proposed to be imposed on him. The object of the amendment is only to deny to the Government servant an opportunity of making a representation in regard to the proposed penalty. It is obvious that it was considered unnecessary to give an opportunity to the Government servant of making a representation in regard to the proposed penalty. The Parliament has eliminated one step in the inquiry so that the disciplinary proceedings can be concluded expeditiously. As the Government servant is entitled to a reasonable opportunity of being heard in respect of the charges framed against him, giving a further opportunity in the matter of making representation about the proposed penalty appears to have been considered as unnecessary. As the object is of ensuring speedy disposal of

disciplinary proceedings, there is no good reason to continue the applicability of the amended provision only to proceedings initiated after the amendment. All Government servants will be treated alike if it is held that the amendment governs pending proceedings. No hardship or injustice will also be caused to those against whom proceedings were pending on the date of the amendment. Imposition of penalty depends on the gravity of the offence and the circumstances of the case. When reasonable opportunity of being heard in respect of the charges is afforded, the Government servant is not precluded from putting forth his submission in regard to the penalty as well. Having regard to the clear object of the Parliament to deny opportunity of making representation in the matter of imposition of punishment, it is reasonable to hold that the intention of the Parliament was that Art. 311(2) as amended should govern pending proceedings as well. Even assuming for the sake of argument that what is conferred by Art. 311(2) is a substantive right, the Parliament has by necessary implication given retrospective effect to the amended provision to make it applicable to pending proceedings as well. We have therefore, no hesitation in taking the view that the amended provisions of Art. 311(2) govern pending proceedings also.

17. The next question for consideration is as to whether the impugned order has been passed in accordance with the amended provisions of Art. 311 of the Constitution. We have already pointed out that the impugned order has been made by the State Government in accordance with the amended provision of Rule 11A, which amendment was made with a view to bring the Rules in tune with the amended provisions of Art. 311(2) of the Constitution. In this case after receiving the report of the Inquiry Authority, the State Government has proceeded to hold the petitioner guilty of certain charges and to impose the penalty of removal from service. Before taking such action, the State Government did not give any opportunity of showing cause to the petitioner. Sri Mandappa submitted that the State Government was not required to give such an opportunity. He submitted that reasonable opportunity as contemplated by Art. 311(2) has been afforded to the petitioner as the petitioner was permitted to cross-examine the witnesses for the Department, to produce evidence in support of his case and was actually heard by the Inquiring Authority. The Inquiring Authority in this case is not the disciplinary authority, but is an authority subordinate to the disciplinary authority.

After receiving the report of the Inquiring Authority, the disciplinary authority considered the same, recorded its findings and passed the final order imposing the penalty. The petitioner was not given any opportunity of showing cause as to why the report of the Inquiring Authority should not be taken into consideration or relied upon. As the disciplinary authority took into consideration the Inquiry Officer's report, to meet which the petitioner was not given any opportunity whatsoever, it cannot be said that the petitioner was afforded reasonable opportunity as required by Art. 311(2) of the Constitution. In *State of Maharashtra v. Bhaishankar Avalram Joshi*, AIR 1969 SC 1302, the Supreme

Court has observed as follows in paragraphs 6, 7, 8 and 9:

"6. The High Court held that the failure on the part of the competent authority to provide the plaintiff with a copy of the report of the Enquiry Officer amounted to denial of reasonable opportunity contemplated by Art. 311(2) of the Constitution.

7. It seems to us that the High Court came to a correct conclusion. The plaintiff was not aware whether the Enquiry Officer reported in his favour or against him. If the report was in his favour, in his representation to the Government he would have utilised its reasoning to dissuade the Inspector General from coming to a contrary conclusion, and if the report was against him he would have put such arguments or material as he could to dissuade the Inspector General from accepting the report of the Enquiry Officer. Moreover, as pointed out by the High Court, the Inspector General of Prisons had the report before him and the tentative conclusions arrived at by the Enquiry Officer were bound to influence him, and in depriving the plaintiff of a copy of the report he was handicapped in not knowing what material was influencing the Inspector General of Prisons.

8. As observed by Gajendragadkar, J., as he then was in *Union of India v. H.C. Goel*. 1964-4 SCR 718 at p. 728=(AIR 1964 SC 364) at p. 368, "the enquiry report along with the evidence recorded constitute the material on which the Government has ultimately to act. That is the only purpose of the enquiry held by competent officer and the report he makes as a result of the said enquiry."

9. It is true that the question whether reasonable opportunity has or has not been afforded to the Government servant must depend on the facts of each case, but it would be in very rare cases indeed in which it could be said that the Government servant is not prejudiced by the non-supply of the report of the Enquiry Officer."

It is thus clear from the decision of the Supreme Court that the petitioner has been denied reasonable opportunity, he not having been furnished with the Enquiry Officer's report which the Disciplinary Authority has taken into consideration. We have, therefore, no hesitation in coming to the conclusion that the final order made by the State Government is in violation of Art. 311(2) of the Constitution.

18. It is no doubt true that Rule 11A after its amendment does not contemplate furnishing of copy of the Inquiry Officer's report and giving an opportunity of showing cause to the Government servant in the light of the Inquiry Officer's report. Sub-Rule (3) of Rule 11A as amended indicates that the Disciplinary Authority can proceed to record findings on consideration of the report of the Inquiry Officer without furnishing a copy of the report to the Government servant and without giving the Government servant an opportunity to show cause in the matter. Though the action taken by the State Government may be in accordance with Rule 11A as amended, it was contended that the same cannot be sustained, the action having been taken denying reasonable opportunity of being heard to which the petitioner is entitled under Art. 311(2) of the Constitution. If the

emended provisions of Rule 11A are inconsistent with the provisions of Art. 311(2) of the Constitution, it is obvious that the inconsistent rule has to be ignored and the Constitutional provision has to be followed.

19. But, it was contended by Shri Mandappa, learned High Court Government Advocate that the amended provisions of rule 11A of the Rules, are consistent with the amended provisions of Art. 311(2) of the Constitution. He submitted that in cases where an Inquiring Authority is appointed, such authority after completion of production of evidence is required to hear the Presenting Officer, if any, appointed and the Government Servant or permit them to submit written briefs of their respective cases if they so desire, as provided by rule 11(19). After giving such an opportunity of hearing if the report is submitted by the Inquiring Authority, it was contended that the question of the Disciplinary Authority giving a further opportunity at that stage does not arise. He submitted that the very purpose of amending Art. 311(2) of the Constitution is to deny the Government servant such a second opportunity. In support of his contention he relied upon the decision of the Supreme Court in the case of *State of Assam v. Bimal Kumar Pandit*, AIR 1963 SC 1612 and invited our pointed attention to paragraph-6 of the judgment which may be extracted as follows:

"Art. 311(1) provides, inter alia that no person covered by the said sub-article shall be dismissed or removed by an authority subordinate to that by which he was appointed. We are not concerned with this sub-article in the present appeal. Art. 311(2) provides that no such person as specified in Art. 311(1), 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. It is now well settled that a public officer against whom disciplinary proceedings are intended to be taken is entitled to have two opportunities before disciplinary action is finally taken against him. An enquiry must be conducted according to the rules prescribed in that behalf and consistently with the requirements of natural justice. At this enquiry, the public officer concerned would be entitled to test the evidence adduced against him by cross-examination, where necessary, and to lead his own evidence. In other words, at this first stage of the proceedings he is entitled to have an opportunity to defend himself. When the enquiry is over and the enquiring officer submits his report, the dismissing authority has to consider the report and decide whether it agrees with the conclusions of the report or not. If the findings in the report are against the public officer and the dismissing authority agrees with the said findings, a stage is reached for giving another opportunity to the public officer to show why disciplinary action should not be taken against him. In issuing the second notice, the dismissing authority naturally has to come to a tentative or provisional conclusion about the guilt of the public officer as well as about the punishment which would meet the requirement of justice, in his case, and it is only after reaching conclusion in both these matters provisionally that the dismissing authority issues the second notice. There is no doubt that in response, to this notice, the public officer is entitled to show cause not only against the action

proposed to be taken against him, but also against the validity or the correctness of the findings recorded by the enquiring officer and provisionally accepted by the dismissing authority. In other words, the second opportunity enables the public officer to cover the whole ground and to plead that no case had been made out against him for taking any disciplinary action and then to urge that if he fails in substantiating his innocence, the action proposed to be taken against him is either unduly severe or not called for. This position is not in dispute.

From these observations of the Supreme Court it was contended that Art. 311(2) before its amendment contemplated two opportunities and the second opportunity consisted of giving an opportunity of showing cause against the proposed penalty. It was submitted that when such an opportunity was given the Government servant was entitled to show cause not only against the proposed penalty but also in regard to the tentative finding arrived at by the Inquiring Authority. Shri Mandappa submitted that as the purpose of amendment of Art. 311(2) is to reduce from two opportunities contemplate by the original sub-article to one opportunity, the Government servant stands deprived, of the second opportunity to which the Supreme Court has adverted to in paragraph-6 of the judgment referred to above. Art. all (2) before its amendment provided for giving of a reasonable opportunity of being heard in respect of the charges levelled against the Government servant and another opportunity of making representations in regard to the proposed punishment. It is necessary to point out that an essential distinction was made under Art. 311(2) of the, Constitution before its amendment in regard to the nature of the two opportunities to be given to the Government servant. Whereas the first is an opportunity of being heard in respect of the charges levelled against the Government servant, the second opportunity is only an opportunity of making representations in regard to the penalty proposed. By the amendment the obligation to afford the opportunity of making representation in regard to the proposed penalty is taken away. But the primary obligation of affording reasonable opportunity of being heard in respect of the charges levelled continues without any abridgement even after Art. 311(2) is amended. What is the content of the reasonable opportunity of being heard has to be considered. In paragraph 6 of the judgment the Supreme Court has described how the two opportunities contemplated by Art. 311(2) can be afforded. They were not required to examine the precise content of each of the two opportunities required to be given. They have not stated that the right of the Government servant to show cause against the tentative findings is not part of the right of reasonable opportunity of being heard in respect of the charges, but is part of the right to make representations against the penalty proposed. In our opinion, though this right may conveniently be exercised on receiving a notice proposing penalty, it is really part of the first right of being heard in respect of the charges. The opportunity is to persuade the authority to take the view that the charges levelled against the Government servant are not satisfactorily proved and cannot therefore form part of the opportunity to persuade the authority in regard to the appropriate penalty.

20. It is no doubt true that the Supreme Court has stated that when an opportunity of making representation is given, the Government servant is entitled to show cause not only against the penalty proposed but also in respect of the merits of the charges levelled against the Government servant. The content in which these observations were made by the Supreme Court must not be lost sight of. What the Supreme Court was considering in paragraph-6 of its judgment is the normal procedure followed in the matter of holding disciplinary proceedings when an Enquiry Officer is appointed. It is not as though that there is an obligation in every case that the Disciplinary Authority should appoint an Inquiring Authority. The Disciplinary Authority can always hold an enquiry without authorising the Inquiring Authority to make an enquiry into the matter. Paragraph-6 deals with normal cases where an Enquiry Officer is appointed by the Disciplinary Authority. What is emphasized by the Supreme Court in paragraph-6 of its judgment is that the Disciplinary Authority after it receives the findings from the Inquiring Authority has to arrive at a tentative finding on consideration of the Inquiring Officer's report and thereafter give an opportunity of making representation to the Government Servant. The Supreme Court has emphasized that the findings arrived at, at that stage by the Disciplinary Authority on consideration of the Enquiry Officer's report would be tentative findings. As the findings arrived at by the Disciplinary Authority are tentative findings, it is obvious that before taking final decision by the Disciplinary Authority an opportunity has to be given to the Government servant to have his say in regard to the tentative findings that the Disciplinary Authority has arrived at. It is for that purpose stated that when an opportunity of making a representation is afforded to the Government servant, he is entitled not only to show cause against the tentative findings of the Disciplinary Authority but also to show cause against the proposed penalty. Though the opportunity to show cause against the tentative findings is coupled with the opportunity of making a representation in regard to the proposed penalty, the two opportunities belong to two different realms. The first one falls in the realm of reasonable opportunity of being heard contemplated under Art. 311(2) in respect of the charges framed against the Government servant and the second one falls in the realm of an opportunity of making representations in regard to the proposed penalty contemplated by Art. 311(2) of the Constitution. Merely because the two stages are clubbed together for the sake of convenience, it cannot be said that if opportunity of making representations is taken away by the amendment, along with it the opportunity of showing cause against the tentative finding is also taken away. Such a conclusion will denude the reasonable opportunity of being heard which is contemplated by Art. 311(2). If the Disciplinary Authority proceeds to record its final findings without furnishing copy of the Enquiry Officer's report to the Government servant and without giving the Government servant an opportunity of having his say in respect of the Enquiry Officer's report, it amounts to denying reasonable opportunity of being heard in respect of the charges levelled against him.

If the Disciplinary Authority is relying upon the Enquiry Officer's report, the contents of which are not made known to the Government Servant, and if he is not given an opportunity of having his say in the matter, it is impossible to say that Government Servant was given a reasonable opportunity of being heard. The Supreme Court has in categorical terms held in the case of *State of Maharashtra v. Bhaishankar Avairam Joshi* that it amounts to denial of reasonable opportunity to rely upon the Enquiry Officer's report without furnishing a copy of the same and without enabling the Government Servant to have his say vis-a-vis the findings recorded by the Enquiry Officer in his report. We have, therefore, no hesitation in taking the view that the opportunity to show cause to be given to the Government Servant after furnishing a copy of Enquiry Officer's report is a part of the reasonable opportunity of being heard contemplated by Art. 311(2) before as well as after its amendment. What has been denied by the amendment of Art. 311(2) is only an opportunity of making representations in regard to the proposed penalty. The amendment to Art. 311(2) does not take away the right of the Government servant to be supplied with the copy of the report of the Enquiry Officer and to an opportunity of showing cause vis-a-vis the findings recorded by the Enquiry Officer in his report. Hence, it is not possible to accept the contention of Shri Mandappa that the amended provisions of rule 11A are consistent with the amended provisions of Art. 311(2) of the Constitution. They are inconsistent to the extent that there is no provision for furnishing a copy of Enquiry Officer's report and of giving an opportunity to the Government servant of showing cause after furnishing a copy of Enquiry Officer's report. As the procedure prescribed by the amended provisions of rule 11A is inconsistent with the provisions of Art. 311(2) of the Constitution, the State is under a constitutional obligation to afford to the Government Servant the opportunity contemplated by amended Art. 311(2), notwithstanding the deficiency in rule 11A. Hence, the petitioner is entitled to receive a copy of Enquiry Officer's report and further he is entitled to an opportunity of showing cause in that behalf. As we have come to the conclusion that rule 11A as amended is not consistent with the provisions of Art. 311(2) of the Constitution, we invite the attention of the State Government to this incongruous situation so that rule 11A can be suitably amended.

21. As this writ petition is being allowed on the ground of noncompliance with the mandatory requirements of Art. 311(2) of the Constitution, we consider it unnecessary to go into the merits of the contentions urged by the petitioner.

22. For the reasons stated above, this writ petition is allowed and the impugned order of the State Government at Annexure-B dated 9.7.80 is hereby quashed, reserving liberty to the State Government to take further action in accordance with the observation made in the course of this order. Petitioner is entitled to all the consequential benefits flowing from the quashing of the impugned order. The petitioner is entitled to costs. Advocate's fees Rs. 500.