
(1956) 08 OHC CK 0015
In the Orissa High Court
Case No : O.J.C. No. 41 of 1956

Narayan Das

APPELLANT

Vs

Member Board of Revenue and Another

RESPONDENT

Date of Decision : 02-08-1956

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : AIR 1956 Ori 219

Hon'ble Judges : Narasimham, C.J; Rao, J

Bench : Division Bench

Advocate : G.C. Das, for the Appellant; A.G., for the Respondent

Final Decision : Allowed

Judgement

Rao, J.—The petitioner files this application under Arts. 226 and 311 of the Constitution of India for issue of a writ in the nature of mandamus or any other appropriate writ on the Member, Board of Revenue, Orissa, Sambalpur and the State of Orissa, setting aside the order of dismissal passed on him and directing that he should be deemed to be in service.

2. The petitioner Narayan Das was appointed on 20-4-49 as a lower division assistant in the office of the Chief Administrator and Special Commissioner, Orissa, which was renamed as the office of the Commissioner for Northern Division and shifted to Sambalpur where it formed a part of the Board of Revenue.

On 3-8-50, he took admission in Gangadhar Meher College, Sambalpur in the First Year Commerce Class and passed the I. Com. examination of the Utkal University in 1952. He filed a petition for permission to continue his studies on 28-4. 61, on being asked to file one and the said permission was refused on 24-7-51, but nevertheless he continued his studies. Since a large number of assistants in the various departments of the Government were prosecuting their studies without obtaining necessary permission from the department or authority

concerned, the State Government issued a Government order dated 18-8-51 regarding grant of permission for continuing further studies in Colleges by Government servants.

It was stated therein that it may be explained that if they had taken admission in the College without permission and if they would apply for special permission and would undertake to abide by the orders of Government, no disciplinary action would be taken against them. On 4-2-52, the petitioner was called upon to submit a declaration and in the Government order, it was stated:

"In case no clean statement is made and no undertaking is given as above, the assistants found to have taken admission without obtaining permission of the Board, will be put to disciplinary proceedings."

On 6-2-52 the petitioner submitted a declaration making a clean breast of everything and prayed for special permission. But no orders were passed nor communicated to the petitioner on the same. On 1-3-52, the petitioner applied for permission to appear at the final I. Com. examination which was granted. On 4-10-52, another Government order was issued in which it was clearly stated that:

"Government have now decided that such of the employees who had made clear statement that they had taken admission in the College before 18-8-1951 without permission should be allowed to complete their course."

3. The petitioner again made an application on 7-7-52, to attend the 3rd Year Commerce Class and complete the same and in anticipation of the Government "order took admission on 14-7-52, But on 13-8-53 permission was refused to him to join the 3rd Year Commerce Class. On 12-11-58, the petitioner was asked to make a statement and on 16-11-52 he made a clear breast of everything and wanted to be excused.

A charge was framed against the petitioner on 23-4-53 for prosecuting His studies without prior permission and the petitioner was put under orders of suspension pending the enquiry into the said charge. In communicating the charge, the petitioner was asked to state if he desired to be heard in person. The petitioner showed cause on 6-5-53 and prayed for an opportunity of being heard in person.

After that, an additional charge was framed on 19-6-53 wherein also he was asked to state if he wanted to have any personal hearing. To that he showed cause on 20-7-53 and also prayed for a personal hearing. No opportunity was given to him for a personal hearing, but on 11-12-53 a second notice was served on him as contemplated under Article 311 of the Constitution to show cause why he should not be dismissed from service. In this notice also it was stated that the petitioner, if so desires, the enquiring officer would give him a personal interview of which a notice would be given to him.

As a copy of the report of the enquiring officer was not given to him, the

petitioner on 1-1-54 requested the Deputy Secretary to supply a copy of the said report to him which was complied with on 11-1-54. In the forwarding letter giving the the petitioner a copy of the enquiry report dated 11-1-54 the petitioner was again asked to state if he wanted a personal hearing.

The petitioner submitted his explanation on 23-1-54 and also prayed for a personal hearing, but he was not granted an opportunity of personally having his say. On 6-2-54 the petitioner was dismissed from service with effect from 24-4-53. On 27-3-54 the petitioner filed an application before the Member, Board of Revenue, which was rejected on 22-4-54. He preferred an appeal to the Revenue Minister which was also dismissed and the petitioner, was informed of the same on 16-9-55.

4. On these facts, the petitioner complains that the order of dismissal is contrary to the provisions of Article 311 inasmuch as he was denied the opportunity of a personal hearing and consequently the said order is invalid and inoperative.

5. The Deputy Secretary Shri B.G. Patnaik on behalf of the opposite parties filed a counter affidavit showing cause why the application should not be granted. He stated therein inter alia that the petitioner was also given a chance to represent his case to the enquiring officer, that is, the Deputy Secretary and he verbally represented his case to the Deputy Secretary He also stated :

"As the explanation of the petitioner showing cause was considered unsatisfactory, he was asked on 11-12-53 to show cause by 20-12-53 why he should not be dismissed. The petitioner was also asked to state whether he wanted again to be heard in person by the enquiring officer, that is, the Deputy Secretary..... in his explanation dated 23-1-54, he made a clean breast of everything throughout. He did not however avail of the opportunity for personal hearing before the enquiring officer.

On the other hand he wanted an interview with the Member (C.T.) and prayed that his explanation previously submitted may be further considered and mercy shown to him. As the petitioner verbally represented his case to the enquiring officer before he submitted his explanation and no new point was added in his explanation it was considered that no useful purpose would be served by an interview with the Member. His explanation having been carefully considered, he was ordered to be dismissed on 4-2-54. This is therefore "a case where charges framed against the delinquent officer are admitted and a reasonable opportunity was afforded to him to show cause against dismissal."

The Deputy Secretary also stated in his counter affidavit that as the petitioner was given a chance to represent his case verbally to the enquiring officer and actually availed of the chance, the failure to give a personal hearing is not correct. He contends that the mandatory requirements of Article 311(2) were fulfilled and that there was no defect in procedure and consequently the dismissal was valid.

6. The learned counsel for the petitioner Mr. G. C. Das contends that there is a violation of the constitutional provision contained in Article 311(2) as the petitioner was not given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, in that the petitioner was not given an opportunity of a personal representation to be made to the dismissing authority, namely, the Member, Board of Revenue.

It is stated in the counter affidavit filed by the Deputy Secretary on behalf of the opposite parties that the petitioner wanted a personal Interview with the Member in-charge, but that an opportunity should be given only by the enquiring officer or some other on behalf of the person entitled to pass the final order of dismissal.

In support of his contention, the learned counsel for the petitioner relied upon a decision of this Court in the case of Mohammad Shamsul Haque v. Member, Board of Revenue Sambalpur and State of Orissa reported in ILR 1956 Cut 247 : AIR 1956 Ori 103 (A), in that case it was held by Panigrahi C.J. and Mohapatra J., relying on Rule 55-A of the C.S.D. and Conduct Rules that when a Government servant, after filing a written representation, desired to be personally heard, the dismissing authority" should not have passed the final order of dismissal without giving him the opportunity of making his representation, personally before that authority.

The learned Advocate-General contends on behalf of the opposite parties that it is not necessary that the opportunity to a personal hearing should be given by the dismissing authority and that it is enough if an opportunity is given for a personal hearing before the enquiring officer or an officer on behalf of the dismissing authority and that would constitute a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. He further contends that Rule 55-A of the Rules and Orders relating to conduct, discipline and other conditions of service-applicable to Government servants does not apply to cases of dismissal, but that it is only Rule 55 that applies.

In my opinion, Rule 55 applies only up to the stage of an enquiry and a finding with regard to the charges framed against the public servant. It does not deal with the subsequent stage which is obligatory under Article 311(2) which requires that the delinquent should be given a reasonable opportunity of showing cause against the action proposed to be taken. Of course, as contended by the learned Advocate-General, Rule 55-A does not apply" to the cases of dismissal, reduction to a lower post, suspension or removal. Rule 55-A runs as follows:

"Without prejudice to the provisions of Rule 65, no order imposing the penalty specified in Clause (1), (ii) or (iv) of Rule 49 (other than an order based on facts which have led to his conviction in a criminal Court or by a Court Martial or an order superseding him for promotion to a higher post on the ground of his unfitness for that post) on any Government servant to whom these rules are applicable shall be passed unless he has been given an adequate opportunity of making any representation that he may desire to make and such representation,

if any, has been taken into consideration before the order is passed;

Provided that the requirements of this rule may, for sufficient reasons to be recorded in writing, be waived when there is difficulty in observing them and where they can be waived without injustice to the officer concerned."

Clause (i), (ii) or (iv) of Rule 49 are instances of censure, withholding of increments or promotion and recovery from pay of the whole or part of any pecuniary loss caused to the Government by negligence or breach of orders. This rule contemplates an adequate opportunity to be given to make any representation before the order is passed.

But it may be noted that this rule in cases of Clause (i), (ii) or (iv) of Rule 49 does not prescribe any charge or enquiry but only insists upon an opportunity of making a representation before the order is passed. It also provides for dispensing with this for sufficient reasons to be recorded in writing when there is difficulty in observing them or when they can be waived without injustice to the officer concerned.

Therefore the contention of the learned Advocate-General that this Rule 55-A cannot be relied upon in support of the contention of the petitioner that he must be given a personal hearing by the dismissing authority before the order of punishment is passed is correct. Consequently, the decision in *Mohammad Shamsul Haque v. Member, Board of Revenue, Sambalpur and State of Orissa (A)* was based upon a wrong rule placed before their Lordships which did not apply to the facts of that case.

7. Consequently, though in my opinion it is not necessary that an opportunity for a personal hearing should be given by the dismissing authority to constitute a reasonable opportunity required under Article 311(2) yet it may be desirable in some cases that the dismissing authority should afford an opportunity to the civil servant concerned of a personal hearing.

In certain cases, no doubt, for example, in the case of gazetted officers where the dismissal order is either by the Minister in charge or by the Governor or the Minister concerned and is generally before the secretary to the Government. In many cases, the delinquent in showing cause against the proposed punishment may appeal to mercy and plead that the punishment proposed is severe in which case the dismissing authority would be in a better position to consider the case than the enquiring officer on his behalf.

I do not, for a moment, say that this is obligatory to constitute a reasonable opportunity under Article 311(2), but I only observe that, it may be desirable in certain cases that an opportunity may be given by the dismissing authority in cases where there is no difficulty in doing so.

8. The learned counsel for the petitioner then Urges that in this case there is no reasonable opportunity afforded to the petitioner to show cause against the proposed punishment also on the ground that even the enquiring officer -- the

Deputy Secretary -- did not give him an opportunity of a personal hearing. In this case, admittedly the petitioner was asked to state if he required a personal hearing on more than one occasion.

The petitioner stated that he wanted a personal hearing, but he was not given a notice fixing the date when he could have a personal hearing. In reply to the forwarding letter dated 11-1-54 accompanying the report of the enquiring officer asked for by the petitioner, the petitioner, as already stated above, submitted his explanation showing cause against the proposed punishment and also sent along with the same another letter to the Deputy Secretary (annexure M) in which he stated:

"Most respectfully I beg to state that if the Member (C.T.) and the Enquiring Officer will be pleased to kindly allow me opportunity of being heard by them in person, I will be able to submit to them extenuating circumstances in connection with the charges framed against me.

I request you to kindly obtain orders of the Member (C.T.), in the matter, i.e., granting me an Opportunity, before a final decision is taken."

A copy of this letter along with the explanation showing cause against the proposed punishment is an enclosure to the petition filed in this Court and a copy of the same is served on the opposite parties. There is no categorical denial by the Deputy Secretary in his affidavit of this letter. The letter requested an opportunity for personal hearing by the Member (C.T.) and by the Deputy Secretary. No date was fixed for such a hearing.

Even the Deputy Secretary did not give him a personal hearing fixed a date against the proposed punishment. In a case decided by the Court in the case of *Bamdeb Misra v. State of Orissa* reported in ILR 1956 Cut 305 I observed in my judgment, sitting with Hon^{ble} Panigrahi C.J. with which he agreed, at p. 314 as follows:

"To constitute reasonable opportunity, he must be served with a copy of the result of the enquiry together with the reasons for arriving at a finding of his guilt and must again be heard. Then he can plead that the charges are not proved, that he is innocent, that the finding of guilt is wrong or that the proposed punishment is severe.

No doubt, if the civil servant adduces any evidence which was already placed by him in showing cause against the charges, it may not be received, but this does not do away with the constitutional requirement that he should be given reasonable opportunity to show cause against the proposed punishment which includes giving him a copy of the result of the enquiry and the reasons therefor, hearing him and allowing him even to adduce evidence to show that he is innocent or the punishment is severe. If this is not done, the purpose of the necessity for the second notice is not served, and Article 311(2) of the Constitution becomes nugatory. If Article 311(2) is not complied with according

to its terms, the dismissal or reduction is invalid."

Under these circumstances, I am of opinion that there was no reasonable opportunity given to the petitioner of showing cause against the proposed punishment. If he was given an opportunity, he could have appealed for the mercy of the Member of the Board of Revenue -- the dismissing all authority or of the Deputy Secretary that the proposed punishment of dismissal was severe in view of the fact that he was an assistant serving in the office for 5 years and his fault consisted only in prosecuting higher studies though it may be contrary to the rules.

The verbal discussions with the Deputy Secretary, even if true, cannot constitute reasonable opportunity required under Article 311(2). In my view, therefore, the order of dismissal passed against the petitioner violates the requirement of the Constitution and is consequently invalid. A writ will issue against the opposite parties that the petitioner continues to be in service, his dismissal being invalid and contrary to the Constitution. The petition is therefore allowed with costs. 3 Hearing fee Rs. 100/-.

Narasimham, C.J.

9. I agree.