

(1978) 08 KL CK 0018
In the High Court Of Kerala
Case No : W.A. No. 69 of 1978

Radhakrishnan Nair

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 10-08-1978

Acts Referred:

Constitution of India, 1950 — Article 311, 311(2)
Penal Code, 1860 (IPC) — Section 409
Probation of Offenders Act, 1958 — Section 4
Railway Servants (Discipline and Appeal) Rules, 1968 — Rule 13, 14, 9
Travancore-Cochin Panchayat Rules, 1951 — Rule 17, 19, 19(1), 20, 20(2)

Citation : (1978) 08 KL CK 0018

Hon'ble Judges : Gopalan Nambiyar, C.J.;Kader, J

Bench : Division Bench

Advocate : V. Sivaraman Nair, V.M. Nayanar and M. Krishnakumar, for the Appellant; C.S. Rajan, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Gopalan Nambiyar, C.J.—This appeal is against the judgment of a learned Judge of this Court dismissing the writ petition of the Appellant directed against certain disciplinary proceedings taken against him, resulting ultimately in Ext. P-3 order terminating his services under Rule 20 of the Travancore-Cochin Panchayat Rules, 1950.

2. The Appellant was the Executive Officer Thuravoor Panchayat. He was placed under suspension pending enquiry on 21st June 1973. On 28th August 1973 a memo containing eleven heads of charges was served on him. The first of these related to charge of misappropriation in respect of a sum of Rs. 1,000. The Appellant submitted his explanation on 27th September 1973. On 27th February 1975 the Deputy Director of Panchayats proposed the imposition of certain major penalties against him in respect of charges Nos. 2 to 11. He left out charge No. 1 apparently because by that time the said charge was the subject-matter of certain criminal proceedings in C.C. No. 3 of 1974 which was then pending. A

memo of charge was served on the Appellant to which he replied and by proceedings dated 6th August 1975 a penalty of stoppage of one increment was ordered which was also recovered from the Appellant. The criminal proceedings ended in a finding of guilt u/s 409 of the Indian Penal Code. It appears from the record that he was released on probation u/s 4 of the Probation of Offenders Act (although it was not explained how the said section was applied to an offence u/s 409). On 6th August 1976 the disciplinary proceedings against the Appellant were terminated and by Ext. P-1 the Appellant was reinstated on 17th November 1976. Ext. P-2 notice dated 14th December 1976 was then issued to the Appellant, stating that the Deputy Director of Panchayats had arrived at the provisional conclusion to treat the period spent under suspension as on leave without allowance. Thereafter by Ext. P-3 proceedings of the Government, dated 7th February 1977 the services of the Appellant were terminated. Ex. P-3 referred to the termination of the criminal charge by the finding of guilt and the Appellant's release on probation, and recorded:

Government examined the case in detail with reference to relevant rules and records. As it was considered that the conduct of the accused which has led to his conviction is such as to render his further retention in the Public Service undesirable a tentative decision was taken to dismiss him from service.

It recorded the opinion and concurrence of the Public Service Commission for the dismissal and ended with an order of dismissal with effect from the date of suspension on 16th June 1973. This order was sought to be quashed in the said writ petition.

3. The learned Judge who heard the writ petition dismissed it for the reason briefly stated that Rule 20 of the Rules (under the T.C. Panchayats Act, 1950), had dispensed with the requirement of a show cause or an opportunity for explanation to the Appellant and that he cannot therefore have any cause for grievance. The learned Judge derived support for this conclusion from the decision of the Supreme Court in *The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others*, .

4. We may quote Rule 20 of the Rules:

20. Procedure for the imposition of penalties. -- (1) In every case where it is proposed to impose on a member of the service any of the penalties specified in items (i), (ii), (iv) and (v) of Rule 17, he shall be given a reasonable opportunity of making any representation that he may desire to make and such representation, if any, shall be taken into consideration before the order for imposing the penalties are passed:

Provided that the requirement of this sub-rule may, for sufficient reasons to be recorded in writing be waived when there is genuine difficulty in observing them and they can be waived without injustice to the person concerned.

(2) In every case where it is proposed to impose on a member of the service any

of the penalties specified in items (iii), (vi), (vii) and (viii) of Rule 17, the grounds on which it is proposed to take action shall be reduced in 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 an oral enquiry or only to be heard in person. If he so desires or the authority concerned so directs an enquiry shall be held.

At that enquiry documentary evidence may be adduced and oral evidence shall be heard as to such of the allegations as are not admitted provided that the officer conducting the enquiry may for special and sufficient reasons to be recorded in writing refuse to call a witness. The person charged shall be entitled to cross-examine the witnesses called. After the enquiry has been completed, the person charged shall be entitled to put in if he so desires, any further written statements of his defence.

If no enquiry is held and if he had to be heard in person a personal hearing shall be given to him.

The proceedings shall contain a reasonably sufficient record of evidence and a statement of findings and the grounds thereof. In cases where the enquiry officer comes to a conclusion that the charges have not been made out he shall in addition record a further finding as to whether in his opinion the officer is free from any blame:

Provided that this sub-rule shall not apply --

- (i) where a member of the service is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;
- (ii) where an authority empowered to dismiss or remove a member of the service or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause;
- (iii) where the Governor is satisfied that in the interest of the security of the State, it is not expedient to give to that member of the service such an opportunity.

Note: If any question arises whether it is reasonably practicable to give any person an opportunity of showing cause under Clause (ii) of this proviso, the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank as the case may be shall be final

(3) The enquiry referred to in Sub-rule (2) may be held by the concerned Deputy Director of Local Bodies or by the Director of Local Bodies or by the Government or by an Officer of the Department appointed by the Government who has

nothing to do with the subject matter of enquiry or who is not connected otherwise with the Panchayat Officer whose conduct is under enquiry or a Special Officer or Tribunal appointed by the Government for the purpose.

(4) No person who is called upon to defend himself against the charges which form the subject matter of an enquiry against him shall be allowed to engage a counsel:

Provided that if a counsel is engaged on behalf of the Panchayat or any Department of the Government the person against whom the charges are being inquired into shall be entitled to engage a counsel.

(5)(i) If the enquiry under Sub-rule (2) is held by a Tribunal or any officer other than the authorities mentioned in Rule 19(i)(a) and (b) the proceedings containing the record of evidence, the findings and the grounds therefor shall be forwarded by the Enquiring Officer or the Tribunal to the authority mentioned in Rule 19(1)(a). That authority shall, on an examination of such proceedings, record his findings on the several charges enquired into and record a further finding in cases where no charges have been made out, whether the member of the service is free from blame.

(ii) After the authority mentioned in Rule 19(i)(a) records his findings under Clause (i) of this sub-rule or under Sub-rule (2) he shall come to the provisional conclusions in regard to the penalty to be imposed. If the provisional conclusions fall within Rule 19(i)(a) he shall call upon the member of the service to show cause, within a reasonable time not exceeding one month against the particular penalty proposed to be inflicted. He shall give the member of the service a copy of the report of enquiry together with the findings thereon. The representations if any submitted by the member of the service shall be taken into consideration before the final order imposing the penalty is passed.

(iii) If the provisional conclusion in regard to penalties do not fall within Rule 19(i)(a) the authority mentioned in Rule 19(i)(a) shall forward the proceedings containing the record of evidence, the findings and the ground thereof to the authority mentioned in Rule 19(i)(b). That authority shall, on examination of such proceedings, record their findings on the several charges enquired into and record a further finding in cases where no charges have been made out, whether the member of the service is free from blame.

(iv) After the authority mentioned in Rule 19(i)(b) record its findings under Clause (iii) of this sub-rule or under Sub-rule (2), it shall come to the provisional conclusions in regard to the penalty to be imposed; and call upon the member of the service to show cause, within a reasonable time, not exceeding one month, against the particular penalty proposed to be inflicted. The said authority shall give the member of the service, a copy of the report of enquiry together with the findings thereon. The representations, if any, submitted by the member of the service shall be taken into consideration before final order imposing the penalty is passed by the authority.

(6) The pay and allowances of a person who is dismissed or removed from service shall cease from the date of such dismissal or removal but a person under suspension preliminary to the Departmental enquiry shall be granted such subsistence and other allowances as may be admissible under the Kerala Service Rules.

(7) The enquiry referred to in Sub-rule (2) shall be conducted as expeditiously as the circumstances of the case may permit particularly one against an officer under suspension.

Rule 19 provides that the minor penalties listed therein could be imposed by the Deputy Director of Panchayats (Local Bodies), and that the major penalties of compulsory retirement, removal from service and dismissal shall be imposed by the Government. Attention is to be concentrated on the provision in Sub-rule (2) of Rule 20. This is reminiscent of the proviso to Article 311(2) of the Constitution which for the sake of convenience and comparison we may extract:

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 except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

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:

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry; or

(c) where the President or the Governor as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in Clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

It is well settled by judicial decisions that under Article 311, a Government

servant proceeded against by way of disciplinary action is entitled to show cause not only against the finding of guilt but also against the imposition of penalty or punishment; so that he should be afforded two effective opportunities of showing cause in the course of the disciplinary proceedings. The same principle has been substantially and faithfully copied in almost all the service rules, and Rule 20, properly analysed and understood, embodies the two requirements. Sub-rule (2) provides for the requirement of an enquiry to assess the guilt of the person proceeded against; and Sub-rule (5) Clauses (iii) and (iv) provide for the determination of the punishment to be imposed. Understood in this light, it is easy to define the scope and the function of the proviso at the end of Sub-rule (2). That proviso excludes only "this sub-rule" and nothing else; i.e., it gets rid of only Sub-rule (2) and no other sub-rule. Therefore, in our view, Sub-rule (5) and the various clauses thereof, including the important Clauses (iii) and (iv) of the said sub-rule are in no way got rid of. These important sub-rules provide for an opportunity to be afforded before the punishment is imposed and decided upon. In this particular case, as the decision regarding the imposition of punishment of dismissal was come to by the Government without notice to the Appellant and affording him an opportunity to show cause, we are of the opinion that the proceedings are vitiated.

5. Our conclusion seems to be fortified by what we consider to be a correct understanding of the Supreme Court's pronouncement in *The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others*, The learned Judge has also considered the said decision. On the basis of the said decision, as the learned Judge has come to a contrary conclusion, we shall examine the matter somewhat in detail. The rule with which the Supreme Court was there concerned, was Rule 14 of the Railway Servants Disciplinary and Appeal Rules, 1968 which was as follows:

Notwithstanding anything contained in Rule 9 to 13:

(i) where any penalty is imposed on a railway servant on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit.

With respect to this rule, the Supreme Court observed in paragraphs 21 and 22 as follows:

21. We now come to the third point that is involved in this case, namely, the extent and ambit of the last part of Rule 14 of the Rules of 1968. The concerned portion runs thus:

.... the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deem fit:

In this connection it was contended by the learned Counsel for the Appellants that this provision does not contemplate a full-dress or a fresh inquiry after

hearing the accused but only requires the disciplinary authority to impose a suitable penalty once it is proved that the delinquent employee has been convicted on a criminal charge. The Rajasthan High Court in Civil Writ Petition No. 352 of 1971 concerning Civil Appeal No. 891 of 1975 has given a very wide connotation to the word "consider" as appearing in Rule 14 and has held that the word "consider" is wide enough to require the disciplinary authority to hold a detailed determination of the matter. We feel that we are not in a position to go to the extreme limit to which the Rajasthan High Court has gone. The word "consider" has been used in contradistinction to the word "determine". The rule making authority deliberately used the word "consider" and not "determine" because the word "determine" has a much wider scope. The word "consider" merely connotes that there should be active application of the mind by the disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge. This matter can be objectively determined only if the delinquent employee is heard and is given a chance to satisfy the authority regarding the final orders that may be passed by the said authority. In other words, the term "consider" postulates consideration of all the aspects, the pros and cons of the matter after hearing the aggrieved person. Such an inquiry would be a summary inquiry to be held by the disciplinary authority after hearing the delinquent employee. It is not at all necessary for the disciplinary authority to order a fresh departmental inquiry which is dispensed with under Rule 14 of the Rules of 1968 which incorporates the principle contained in Article 311(2) proviso (a). This provision confers power on the disciplinary authority to decide whether in the facts and circumstances of a particular case what penalty if at all, should be imposed on the delinquent employee. It is obvious that in considering this matter the disciplinary authority will have to take into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features if any present in the case and so on and so forth. It may be that the conviction of an accused may be for a trivial offence as in the case of the Respondent T.R. Chellappan in Civil Appeal No. 1664 of 1974 where a stern warning or a fine would have been sufficient to meet the exigencies of service. It is possible that the delinquent employee may be found guilty of some technical offence, for instance, violation of the transport rules or the rules under the Motor Vehicles Act and so on, where no major penalty may be attracted. It is difficult to lay down any hard and fast rules as to the factors which the disciplinary authority would have to consider, but I have mentioned some of these factors by way of instances which are merely illustrative and not exhaustive. In other words, the position is that the conviction of the delinquent employee would be taken as sufficient proof of misconduct and then the authority will have to embark upon a summary inquiry as to the nature and extent of the penalty to be imposed on the delinquent employee and in the course of the inquiry if the authority is of the opinion that the offence is too trivial or of a technical nature it may refuse to

impose any penalty in spite of the conviction. This is a very salutary provision which has been enshrined in these rules and one of the purposes for conferring this power is that in cases where the disciplinary authority is satisfied that the delinquent employee is a youthful offender who is not convicted of any serious offence and shows poignant penitence or real repentance he may be dealt with as lightly as possible. This appears to us to be the scope and ambit of this provision. We must, however, hasten to add that we should not be understood as laying down that the last part of Rule 14 of the Rules of 1968 contains a licence to employees convicted of serious offences to insist on reinstatement. The statutory provision referred to above merely imports a rule of natural justice in enjoining that before taking final action in the matter the delinquent employee should be heard and the circumstances of the case may be objectively considered. This is in keeping with the sense of justice and fair-play. The disciplinary authority has the undoubted power after hearing the delinquent employee and considering the circumstances of the case to inflict any major penalty on the delinquent employee without any further departmental inquiry if the authority is of the opinion that the employee has been guilty of a serious offence involving moral turpitude and, therefore, it is not desirable or conducive in the interests of administration to retain such a person in service.

22. Mr. S.N. Prasad appearing for the Appellants submitted that it may not be necessary for the disciplinary authority to hear the accused and consider the matter where no provision like Rule 14 exists, because, in such cases the Government can, in the exercise of its executive powers, dismiss, remove or reduce in rank any employee who has been convicted of a criminal charge by force of proviso (a) to Article 311(2) of the Constitution. In other words, the argument was that to cases where proviso (a) to Article 311(2) applies a departmental inquiry is completely dispensed with and the disciplinary authority can on the doctrine of pleasure terminate the services of the delinquent employee. We however, refrain from expressing any opinion on this aspect of the matter because the cases of all the three Respondents before us are cases which clearly fall within Rule 14 of the Rules of 1968 where they have been removed from service without complying with the last part of Rule 14 of the rules of 1968 as indicated above. In none of the cases has the disciplinary authority either considered the circumstances or heard the delinquent employees on the limited point as to the nature and extent of the penalty to be imposed if at all. On the other hand in all these cases the disciplinary authority has proceeded to pass the order of removal from service straightway on the basis of the conviction of the delinquent employees by the criminal courts.

These passages were strongly relied on by Counsel for the Appellant. But as against these, the learned Government Pleader relied on paragraph 9 of the judgment, where the court stated:

.... An analysis of the provisions of Article 311(2) extracted above would clearly show that this constitutional guarantee contemplates three stages of

departmental inquiry before an order of dismissal, removal or reduction can be passed, namely, (i) that on receipt of a complaint against a delinquent employee charges should be framed against him and a departmental inquiry should be held against him in his presence; (ii) that after the report of the departmental inquiry is received, the appointing authority must come to a tentative conclusion regarding the penalty to be imposed on the delinquent employee; and (iii) that before actually imposing the penalty a final notice to the delinquent employee should be given to show cause why the penalty proposed against him be not imposed on him. Proviso (a) to Article 311(2), however, completely dispenses with all the three stages of departmental inquiry when an employee is convicted on a criminal charge.

Analysing the different passages highlighted before us, of in the light of the facts disclosed in the Supreme Court decision, we entertain little doubt that all the stages can undoubtedly be dispensed with under the amplitude of the proviso to Article 311(2) of the Constitution. We have also little doubt that the same can be achieved by a proviso of the same amplitude and width under a statutory rule of the type we are concerned with in the instant case. But on the terms and the language of the proviso to Clause (2) of Rule 20 of the rules in question, we are of the opinion that such a total dispensation with the two stages has not been made, and that the function of the proviso is only to dispense with the requirement for notice and opportunity as regards the assessment of guilt, and not as regards the imposition of the penalty. It is here that we stress the language of the dispensation clause, viz., the proviso to Clause (2) of Rule 20, which dispensed with the requirements of "this sub rule" and no more. It was submitted by the Government Pleader that an enquiry under Rule 5 and the sub clauses therein are all inextricably linked with the enquiry under Sub-rule (2), and really based on the said enquiry; so that a dispensation with the enquiry under Sub-rule (2) would automatically involve a dispensation of the provisions of Sub-rule (5) and the sub-clauses therein. We cannot agree. A dispensation of Sub-rule (2) has this effect; that the guilt of the delinquent proceeded against need not be assessed separately or independently by an enquiry, but may be taken to have been proved by the conviction by the criminal court. But after that finding, there must be an assessment of the punishment to be imposed under Sub-rule (5), which marks the second stage of notice under Article 311. While this can also be undoubtedly dispensed with under the proviso to Article 311(2), as ruled by the Supreme Court or under a rule of similar width and amplitude, Rule 20 is inadequate for the purpose, as it dispenses with the requirement of notice for only one of the stages and not the other. In this view, we are unable to sustain the reasoning and the conclusion of the learned Judge.

We allow this appeal and set aside the judgment under appeal and direct that O.P. will stand allowed and Ext.P-3 will stand quashed. We make it clear that it will be open to the authority concerned to take action against the Appellant in accordance with law after affording him a reasonable opportunity to show cause against the punishment proposed. No costs.