

(1990) 11 RAJ CK 0029

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1599 of 1980

Roop Chand Shah

APPELLANT

Vs

The State of Rajasthan and Others

RESPONDENT

Date of Decision : 21-11-1990

Acts Referred:

Citation : (1990) WLN 292

Hon'ble Judges : M.C. Jain, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.C. Jain, J.—This petition is directed against the order of dismissal dated 11-11-75 (Ex.21) and maintained in appeal by the Government on 7-2-80 (Ex. 23). The petitioner was posted as Excise Inspector, Bilara in the Excise Department of the Government of Rajasthan. He was served with a memorandum dated 3-1-75 and enquiry Under Rule 16 of the Rajasthan Civil Services (Classification, Control & Appeal) Rules, 1958 was conducted against him. After enquiry finding the petitioner was found guilty of charges No. 1,2 partially 3 and 5. A show cause notice dated 18-10-75 (Ex. 18) against the proposed penalty of dismissal was served on the petitioner. The petitioner submitted reply to the show cause notice on 20-10-75 (Ex. 20). The Disciplinary Authority, however, passed the order of dismissal agreeing with the findings of the Enquiry Officer and the petitioner was dismissed from service. The petitioner preferred an appeal before the Government but the same was dismissed vide communication dated 7-2-80. The disciplinary proceedings resulting in the petitioner's dismissal, have been challenged on various grounds. The principal ground of challenge is that the petitioner was not permitted to engage the services of an Advocate or any other departmental nominee to assist him to conduct the enquiry. According to the petitioner, after initiation of the enquiry by the Enquiry Officer, the petitioner submitted a representation dated 4-8-75 (Annx. 5), application dated 6-8-75 (Annx. 6) and representation dated 8-8-75

(Annx. 7). The petitioner submitted his reply to the charge sheet dated 8-8-75 (Annx. 9). But before submission of reply, the petitioner had made a request for permitting him to engage the services of an Advocate or representative. It may be stated that the petitioner's request for engaging the services of an Advocate was not considered by the Enquiry Officer as well as by the disciplinary authority. From the order-sheet of the disciplinary proceedings, it was pointed out that the matter was referred to the Government and it has also been pointed out that the Government had not taken any decision and nothing was communicated to the petitioner. It may be mentioned that the petitioner even made a request for providing , assistance of a defence nominee. Even that request was not considered on 6-8-75 (Annx. 6) The petitioner stated that in case permission to engage the services of an Advocate is not given pointing out the reason, that the request was made for providing him a defence nominee. On 8-8-75 a request was again made for allowing the petitioner to avail the services of an Advocate or representative. In reply to the charge-sheet as well, it was reiterated by the petitioner at the end of the reply that he has not so far been permitted to avail the services of an Advocate or representative

2. Learned Deputy Government Advocate, in this connection, submitted that the petitioner participated in the enquiry proceedings. He never insisted for availing the services of an Advocate or a departmental nominee So, from the conduct of the petitioner, it would appear that he didn't want to avail the services of an Advocate or a departmental nominee and besides that, the petitioner himself conducted by lengthy cross- examination of the witnesses and as such, no prejudice has been caused to the petitioner.

3. It may be mentioned that in the disciplinary enquiry, the department was represented by an officer of the rank of Assistant District Excise Officer as would appear from Annx. 4. Thus, the department was properly represented by a competent officer. As against such an officer, a proper opportunity should have been given to the petitioner to defend himself by availing the services of an Advocate or any departmental nominee. Simply because, the petitioner has participated in the disciplinary proceedings, it cannot be taken that no prejudice has been caused to the petitioner and that, he has been able to defend himself properly. It is significant to note that the charges involved sufficient record and proper scrutiny of the record that could have been done only if legal assistance would have been permitted to the petitioner. It is true that the petitioner himself cross- examined the witnesses at length with reference to some documents but that does not mean that the cross-examination was done in a manner, it would have been done if the legal assistance or assistance of departmental nominee has been provided. It is difficult for the delinquent officer to cross-examine the witnesses coolly and calmly without leaving any material and relevant questions. It is also noteworthy that in the reply to the show cause notice, this contention was raised by the petitioner but from the order (Annx. 21), it appears that no contention have been dealt with by the disciplinary authority, but he simply agreed with the findings arrived at by the Enquiry Officer. The disciplinary

authority simply recorded that reply to the show cause notice is not satisfactory. It was the duty of the disciplinary authority to have dealt with the contentions advanced by the petitioner in reply to the show cause notice. In *Bhagat Ram Vs. State of Himachal Pradesh and Others*, their Lordships of the Supreme Court referred to a decision in *C.L. Subramaniam Vs. Collector of Customs, Cochin, and Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others*, observed that:-

The principle deducible from the provision contained in Sub-rule (5) of Rule 15 upon its true construction is that where the department is represented by a Presenting Officer, it would be the duty of the delinquent Officer, more particularly where he is a Class IV Government servant whose educational equipment is such as would lead to an inference that he may not be aware of technical rules prescribed for holding inquiry, that he is entitled to be defended by another Government servant of his choice. If the Government servant declined to avail of the opportunity, the inquiry would proceed. But if the delinquent officer is not informed of his right and an over-all view of the inquiry shows that the delinquent Government servant was at a comparative disadvantage compared to the disciplinary authority represented by the Presenting Officer and as in the present case, a superior officer, co-delinquent, is also represented by an officer of his choice to defend him the absence of anyone to assist such a Government servant belonging to the lower echelons of service would unless , it is shown that he had not suffered any prejudice, vitiate the Inquiry.

Rule 16(5) of the Rajasthan Civil Services (Classification, Control & Appeal) Rules, 1958 provides that the Government servant may present his case with the assistance of any other Government servant approved by the Disciplinary Authority, but may not engage a legal practitioner for the purpose unless the person nominated by the Disciplinary Authority is a legal practitioner or unless the Disciplinary Authority having regard to the circumstances of the case, so permits. It would appear that the Government servant may make a request for permitting him to engage a legal practitioner but in the present case, the petitioner did make a request and repeated the same from time to time, and the matter was referred to the Government. It appears that the petitioner's prayer was not considered. As already stated above, looking to the charge and number of documents of which references have been made during the course of arguments by the learned Counsel for the petitioner that the record was bulky to be considered during enquiry, the facility of providing legal practitioner was a must in the absence of which serious prejudice has been caused to the petitioner.

4. Reference in this connection may well be made to a decision of this Court in *Deokinandan Kulshrcshtha v. State of Rajasthan* 1985 WLN(UC) 103 after quoting Sub-rule (5) of Rule 16 of the CCA Rules in para 7, it has been stated that the delinquent Government servant in his reply to the charge may mention the name of Government Servant of which he wants assistance as defence

nominee but no order was passed by the Disciplinary Authority with regard to the appointment of defence nominee and a defence was taken that the consent of Government servant was not submitted and so, the Disciplinary Authority could not have appointed the defence nominee and a defence nominee and a plea was also raised that no prejudice has been caused to the petitioner in the absence of defence nominee. The learned Judge did not agree with the aforesaid submission made on behalf of the Government. The learned Single Judge observed as under:

The provisions of Sub-rule (5) of Rule 16 with regard to appointment of the defence nominee are intended for the protection of the Government servant during the course of the inquiry because a Government servant may not be fully familiar with the procedure and the defence nominee may give proper assistance to him in the proper conduct of the enquiry. It is not an obligation of the Government servant to submit the letter of consent of the employee whom he wishes to be appointed as the defence nominee. The Government servant is only required to indicate the name of the employee whom he wishes to be appointed as defence nominee and the disciplinary authority may give its approval to the appointment of said person as defence nominee and while doing so the Disciplinary Authority may inquire from the Government servant so named as to whether he was agreeable to act as the defence nominee. There is nothing on the record to show that the Government servants whose names were mentioned by the petitioner in his reply (Ex. 7) were not agreeable to act as the defence nominee for the petitioner. It is also not possible to held that the failure to appoint a defence nominee in the present case has not resulted in any prejudice to the petitioner. If the defence nominee has been duly appointed by the Disciplinary Authority in accordance with the CCA Rules Before the commencement of the inquiry, the petitioner could have sought advice of the defence nominee before making his statement before the Enquiry Officer and the petitioner might not have made a statement before the Enquiry Officer before other evidence in support of the charge has been produced before the Enquiry Officer. In the circumstances, I am of the opinion, that the failure to appoint the defence nominee by the Disciplinary Authority has resulted in denial of reasonable opportunity to the petitioner.

As the petitioner was not provided a reasonable opportunity to defend himself in the enquiry either by engaging a legal practitioner or by availing the services of the departmental nominee. The Disciplinary Authority ought to have considered the petitioner's prayer in this regard, The Disciplinary Authority has failed to consider the petitioner's prayer resulting into serious prejudice to the petitioner.

5. Learned Counsel for the petitioner, also submitted that after closure of the prosecution evidence, the enquiry was fixed for defence evidence. The petitioner had requested that the enquiry may not be fixed in October and November, 1985 as he would be busy in connection with the case pending in the High Court. The petitioner submitted a list of witnesses. The departmental evidence was closed on 23-9-75 and it was fixed for recording of evidence of defence on 26-9-75. On

that date, four witnesses were present in defence but the petitioner could not present himself. The petitioner had already moved an application for a long date but the petitioner's evidence was closed on 26-9-75 and the enquiry was fixed for argument on 29-9-75. Thereafter the Enquiry Report was made on 3-10-75. The proceedings at the stage of defence were conducted in a hot haste without providing a reasonable opportunity to produce defence evidence. The petitioner, in my opinion, should have been provided a longer adjournment for production of defence evidence or in any case a reasonable time should have been provided to the petitioner and a short date of three resulted into denial of reasonable opportunity to the petitioner. This contention too was not dealt with by the disciplinary authority although the same was raised in reply to the show cause notice as contended by the learned Counsel for the petitioner. Besides, that it has already been stated above that the disciplinary authority as well as the appellate authority didn't deal with the petitioner's submissions and contentions. It is, therefore, clear that there has been no application of mind by the disciplinary authority as well as the appellate authority, so, on this ground as well, both orders deserve to be quashed and set aside.

6. In the result, this writ petition is allowed. The order of dismissal passed by the disciplinary authority and maintained by the appellate authority is quashed and set aside. The enquiry proceedings are quashed. However, it would be open to the disciplinary authority to conduct fresh enquiry after permitting the petitioner to avail the service of a legal practitioner.

Parties shall bear their own costs.