

(1962) 01 AHC CK 0012
In the Allahabad High Court
Case No : Special Appeal No. 532 of 1960

State of Uttar Pradesh

APPELLANT

Vs

Akbar Ali Khan

RESPONDENT

Date of Decision : 23-01-1962

Acts Referred:

Civil Services (Classification, Control and Appeal) Rules — Rule 55, 55(3)
Constitution of India, 1950 — Article 311, 311(2)
Subordinate Revenue Executive (Tahsildars) Rules, 1944 — Rule 14

Citation : AIR 1963 All 377 : (1963) 1 LLJ 466

Hon'ble Judges : V. Bhargava, J; M. Lal, J

Bench : Division Bench

Advocate : N.D. Pant, for the Appellant; Sadiq Ali and S.H. Abdi, for the Respondent

Final Decision : Dismissed

Judgement

Bhargava, J.—This is an appeal by the State of Uttar Pradesh against a judgment of a learned Single Judge of this Court allowing a petition under Article 226 of the Constitution and quashing two orders of the Government dated 13th August, 1957, and 1st December, 1958.

2. The respondent was in the service of the appellant as a permanent Naib Tahsildar. On 30th April, 1951, he was placed on probation as a Tahsildar in accordance with the rules governing the appointment etc. of Tahsildars. Under Rule 12 of the said rules he had to be placed on probation for a period of two years. This period of two years expired on 29th April, 1953. The rules also laid down that a probationer could actually be confirmed at the end of the period of probation if he passed the departmental examination for tahsildars completely, had been reported by his Commissioners to be fit for confirmation and his integrity was Unquestionable.

There was also a rule laying down the conditions under which he could be reverted to his substantive appointment. This rule was to the effect that, if it

appeared at any time, during or at the end of the period of probation, that a person appointed on probation had not made sufficient use of his opportunities or had failed to pass the departmental examination completely or if he had otherwise failed to give satisfaction, he could be reverted to his substantive appointment.

It appears that early in May 1953, the Accountant General, U. P. reported to the Government that the respondent had drawn double travelling allowance in respect of certain journeys. The Government, by a letter dated 24th June, 1953, directed the Deputy Commissioner, Hardoi, to make an inquiry into the matter after taking an explanation from the petitioner-respondent. This inquiry was made and a report was sent to the Government through the Board of Revenue. Thereafter the Government issued a letter dated 3rd September, 1956, in which the Government took notice of the result of the inquiry which showed that the respondent had drawn travelling allowance to which he was not entitled. The direction in that letter addressed to the Land Reforms Commissioner, U. P., Lucknow, was that the respondent (probationary Tahsildar) should be apprised of these grounds and should be given an opportunity to show cause why his probation should not be terminated forthwith. It was slated that his explanation so obtained may be sent at a very early date for the perusal of the Government together with his comments. It appears that, in pursuance of this letter, the respondent was given an opportunity to submit his explanation. That explanation with the comments of the Deputy Commissioner, the Commissioner of the Division and the Board of Revenue was for-Warded to the Government with the letter dated 2nd July, 1957, addressed by the Deputy Land Reforms Commissioner (C), Board of Revenue, U.P., to the Secretary to Government, U. P., Revenue (B) Department.

In this letter, it was stated that the Board were not satisfied with the explanation that the respondent had actually performed the journeys for which a second travelling allowance bill was made out, although "not on the "dates mentioned in the bill. Reasons were given for this view. Ultimately, the conclusion recorded was that it was the easiest thing for the respondent to say that the bill had been incorrectly prepared by the Ahalmad but, surely, the Ahalmad must have been given the dates, timings, routes and distances by the respondent himself, and, in any case, the respondent must take the entire responsibility for having pocketed, in the first instance, the excess travelling allowance until he was found out by the Accountant General. The letter went on to say that the Board did not agree with the Commissioner that no one in his senses would risk his service for such a small amount. They cited an example where a British Superintending Engineer, who gave a false T. A. Bill for Rs. 18/-, was either dismissed from service or forced to retire prematurely on the same account,

On receipt of this letter, the Government issued an order contained in the letter dated 13th August, 1957, which is one of the orders impugned in the writ petition. In that letter issued from the Revenue Department of the Government,

reference was made to the letter of the Board of Revenue dated 2nd July, 1957, mentioned above and it was stated that the Governor, agreeing with the Board, had been pleased to order that the probation of Shri. Akbar Ali Khan, probationary Tahsildar, may be terminated and he may be reverted to the post of Naib Tahsildar. The Board was requested to take action accordingly. In the second paragraph, it was added that Shri. Akbar AH Khan should not be considered for promotion for a period of seven years from the date of reversion. This order passed by the Government was communicated to the respondent under an endorsement dated 28th August, 1957, signed on behalf of the Deputy Commissioner¹ of Rae Bareilly.

Thereupon the (respondent made another representation addressed to the Secretary to Government, U.P., Revenue (B) Department Lucknow, which is contained in the letter dated 1st December, 1958, saying that, after careful consideration of the representation of Shri. Akbar Ali Khan, Naib Tahsildar, the Governor had been pleased to accept it in part and cancel the part of the order dated 13th August, 1957, mentioned above, relating to the stopping of promotion, contained in para 2 of that letter. The other part of the order in that G.O., which related to the termination of the probation of Shri. Akbar Ali Khan, was directed to stand because, during the period of probation, he had not made sufficient use of his opportunities and had failed to give satisfaction. The letter also contained a direction that he might be informed accordingly. This order was communicated to the respondent under the endorsement of the Deputy Commissioner, Hardoi, dated 9th December, 1958. This is the second order which was impugned in the writ petition. The orders contained in the letters dated 13th August, 1957 and 1st December, 1958 are the two orders which were impugned in the writ petition before the learned Single Judge who allowed the writ petition, quashing these orders.

3. The main ground on which these orders were quashed by the learned Single Judge was that when, on the expiry of the period of probation, the respondent was not reverted nor was his period of probation extended, it had to be deemed that he had become a confirmed Tahsildar and, in the case of a confirmed Tahsildar, the order passed would not amount to mere reversion under the conditions of service but would amount to reduction in rank which, again could not have been done by the Government without complying with the requirements of Article 311 of the Constitution. The present appeal was filed on behalf of the State Government, challenging this view taken by the learned Single Judge.

4. By the time this appeal came up for hearing before us, a Full Bench of this Court in *The Chief Conservator of Forests, U.P., Nainital and Others Vs. D.A. Lyall*, had occasion to consider the question of law that was considered by the learned Single Judge, Viz., as to whether a Government Servant on probation is to be deemed to be confirmed, if, on the expiry of the period of probation, no order of confirmation, extension of probationary period or of reversion is passed by the competent authority. The Full Bench held that an officer placed on probation

could not be deemed to be confirmed unless and until an express order of confirmation was passed. The mere expiry of the period of probation did not have the effect of automatically bringing about the confirmation, The Full Bench further took notice of the fact that the period of probation "could also be extended but, from the very nature of the proceedings there had to be some lapse of time between the expiry of the period of probation and an order being passed confirming the officer or extending the period of his probation. It follows, naturally, that there would also be a similar lapse of time even when the competent authority intended to pass an order terminating the probation and reverting the officer. The Full Bench did not go into the question as to the capacity in which such an officer would be deemed during this period to be holding the post which he was holding during the period of probation as a probationer, (sic) an order for extending the period of probation can be passed even so as to have retrospective effect. It appears to us that the Bench remained silent on the question as to the actual capacity in which the officer would continue to hold the post as that was not a question which was referred to the Full Bench and was not covered by the question referred. In the case before us, the position of the respondent at the time when the first impugned order dated the 13th of August, 1957, was passed, was that of an officer who had been appointed on probation as Tahsildar, whose period of probation had expired and had not been extended and in whose case, actually on that date, no order had been passed reverting him. The position of the respondent immediately preceding the passing of that order dated 13th August, 1957, therefore, remains uncertain. On these facts it is clear that the view taken by the learned Single Judge, on the basis of which the writ petition was allowed, can no longer be held to be correct. That view is directly against the decision given by the Full Bench cited above. In these circumstances, we have had to consider the point as to whether we should express our opinion in this case as to the status in which the respondent was working as Tahsildar just before the order dated 13-7-1957, was passed. It had appeared to us that, since the operative order made by the learned Single Judge quashing the impugned orders of the Government dated 13-7-1957 and 1-12-1958 has to be upheld for other reasons, it is not at all necessary for us to go into the question of the status of the respondent at that time. We, consequently, proceed to consider that alternative point on which we think that the writ petition should have been allowed, so that the operative order made by the learned Single Judge must be upheld.

5. One of the grounds, on which these two orders were impugned by the respondent in the writ petition, was that those orders amounted to reducing the respondent in rank and, having been passed without the respondent being given an opportunity to show cause against that proposed reduction in rank, the orders are void as violating the constitutional safeguards contained in Art 311 of the Constitution.

That the respondent was given no opportunity to show cause has been conceded on behalf of the State Government. In this connection, our attention was drawn

to the letter of the Government dated 3rd September, 1956, in which directions were made by the Government that the respondent be apprised of the grounds mentioned in that letter and he be given an opportunity to show cause why his probation should not be terminated forthwith. In that letter, though in the earlier part the direction of the Government was to give an opportunity to the respondent to show cause why his probation should not be terminated, a further sentence was added that his explanation so obtained was to be Sent, at a very early date, for the perusal of the Government together with the comments of the Land Reforms Commissioner, U. P., Lucknow, to whom that letter was addressed. This second sentence in that letter immediately following the earlier sentence had the effect of curtailing the scope of the words "show cause" contained in the earlier sentence. The Government themselves, by the latter sentence, made it clear that the respondent was to be given an opportunity only to submit his explanation. An opportunity to show cause gives a right which is much wider than the right of merely submitting an explanation.

When this letter was being discussed by learned counsel for the appellant during the course of his submissions, we had occasion to ask learned counsel whether the Government, in that letter, had intended that the respondent should be given an opportunity to show cause in such a manner as to comply with the full requirements of such an opportunity being given and it was at this stage that learned counsel for the State conceded that, even by the use of the expression "show cause" the Government had intended that only an explanation should be obtained from the respondent.

An opportunity to show cause would have entitled the respondent not only to give an explanation but to cross-examine any witnesses whose evidence might be relied upon against him and to further give whatever evidence he considered necessary in his own defence. It was clear from the language of this order that there never was any intention to afford such an opportunity to the respondent. Subsequent events also show that, in fact, all that was done was that the grounds, on which action was sought to be taken against the respondent, were communicated to him by endorsing a copy of that letter to him and he was asked to submit his explanation which was sent on to the Government with the comments of the various senior officers including the Board of Revenue. No question arose of recording evidence which the respondent might have desired to give. In fact, he was not even asked whether he wanted to give any evidence in his defence. It appears to us that, Very likely, this course was adopted by the Government in view of the provision contained in Sub-rule (3) of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules. This Sub-rule makes special provisions for cases of probationers and is to the following effect:

"Rule 55(1) * * * *

(2) * * * " *

(3) This rule shall also not apply where it is proposed to terminate the

employment of a probationer whether during or at the end of the period of probation, or to dismiss, remove or reduce in rank a temporary government servant, for any specific fault or on account of his unsuitability for the service. In such cases, the probationer or temporary government servant concerned shall be apprised of the grounds of such proposal, given an opportunity to show cause against the action to be taken against him, and his explanation in this behalf, if any, shall be duly considered before orders are passed by the competent authority."

The language used in this sub-rule thus shows that the rule first prescribes that the probationer must be given an opportunity to show cause against the action to be taken against him and then proceeds " to say that his explanation in this behalf, if any, shall be duly considered before orders are passed by the competent authority. The rule itself, there-fore, first purports to comply with the requirements of Article 311 of the Constitution by laying down that the probationer must be given an opportunity to show cause against the proposed action but later mentions that his explanation is to be duly considered. It seems to us that the language of the Rule itself violates the principles of Article 311 of the "Constitution. The rule contemplates action including action of dismissal, removal or reduction in rank in the case of a temporary Government j "servant. It also contemplates the termination of the employment of a probationer, whether during" or at the end of the period of probation, for any specific fault or on account of his unsuitability for, the service. It has been held clearly that, if action, is sought to be taken as a punishment for a specific "fault and the proof of that specific fault, implying imputation against an officer is made the basis of the order of dismissal, removal or reduction in rank, the provisions of Article 311 of the Constitution are" attracted.

These principles w6re clearly laid down by the Supreme Court in the case of Parshotam Lal Dhingra Vs. Union of India (UOI), The principles were further summarised by the Supreme Court in the case of the The State of Bihar Vs. Gopi Kishore Prasad, They were further followed and explained in the case of Dalip Singh Vs. The State of Punjab, In all these cases, it was explained that the action of termination of service of a Government Officer or his reversion to a junior post can be taken under two alternative circumstances. Under one circumstance, the termination of service or reversion to a junior post may be under the conditions of service or the rules applicable to the service and the order to that effect may be made without basing it on any charge or imputation against the Government servant. This may be the result of an inquiry, of even without any inquiry there may be material before the Government which would furnish the background for the Government choosing to act under the conditions of service or the rules applicable thereto but, in such a case, the order passed should not, on the face of it, show that the order was being made on the basis that the Government was satisfied that some charge or imputation against the officer had been established.

In the second alternative type of cases where the order of termination of service

or reversion to a junior, post is made on the basis of a charge or imputation against the officer, the order would amount to an order of punishment covered by Article 311 of the Constitution and the mere fact that the action proposed to be taken is described as termination of service or reversion to a junior post will not mean that the actual action would not be a removal or reduction in rank. Whenever a service is terminated or a person is reverted on the basis of a charge or imputation as a punishment, that would be an order of removal from service or reduction in rank and such an order to have validity can only be passed after the officer concerned has been given an opportunity to show cause. This being the state of law, in considering the case of respondent we are only required to see whether the Government passed the two impugned orders terminating the probation of the respondent as a punishment on the basis of a charge or imputation established against him, or whether they merely acted under the conditions of service or the rules applicable to the respondent as a Tahsildar.

6. We have already given the facts and circumstances which led to the passing of the order dated 13th August 1957 by the Government. It appears that the respondent's period of probation, as originally fixed, expired on 29th April, 1953, and upto that time there were no adverse reports against him. Adverse reports were received about Wrong drawl of travelling allowance some time in May 1953, and then inquiries were started. When the inquiries were started, it seems that the initiation of the Inquiries took place under some directions issued by the Government but the latter, which was issued by the Government in this respect, has not been produced before us. The affidavit filed by the respondent and the counter-affidavit filed on behalf of the State, however, show that that inquiry was confined to the question that was raised by the Accountant General, viz., that the respondent had drawn travelling allowance to which he was not entitled by giving incorrect information. The result of that inquiry was communicated to the Government and thereupon the Government formed a tentative opinion that it was a suitable- case where the probation of the respondent should be terminated forthwith. That is why the Government issued the G. O. dated 3rd September, 1956, but, as we have mentioned earlier, in that G. O. though it was first said that the respondent was to be given an opportunity to show cause, there was a further qualification that his explanation so obtained was to be sent to the Government with comments.

In pursuance of this letter, the respondent's explanation was taken but he was not given an adequate opportunity to show cause in the manner which we have indicated above. His explanation with comments was received by the Government and thereupon the Government proceeded to pass the-first impugned order dated 13th August, 1957. In this order, it was clearly stated that the Governor, agreeing with the Board, had been pleased to order that the probation of Shri. Akbar AH Khan, probationary Tahsildar, may be terminated and he may be reverted to the post of Naib Tahsildar. This sentence clearly shows that the Government, in passing the order for termination of the probation of the respondent and directing his reversion to the post of Naib Tahsildar, passed the

order on their agreement with the views of the Board contained in the letter of the Board dated 2nd July, 1957.

We have already had occasion to mention the contents of that letter. In that letter, the Board had come to the view that the guilt lay on the respondent for the incorrect preparation of the T. A. Bills by the Ahalmad because it was the respondent who must have given the dates, timings, routes and distances on the basis of which travelling allowance bills were prepared. Further, the Board of Revenue had clearly expressed its opinion that the respondent must take the entire responsibility for having pocketed", in the first instance, the excess travelling allowance until he was found out by the Accountant-General.

These findings, which were recorded by the Board of Revenue, were thus made the basis of the action which was ordered to be taken in the letter dated 13th August, 1957. In that letter, apart from the direction for terminating the period of probation and reverting the respondent to the post of Naib Tahsildar, there was a further direction that the respondent should not be considered for promotion for a period of seven years from the date of reversion. All these directions and the manner, in which this order was made, clearly lead to the conclusion that the action directed to be taken against the respondent was a measure of punishment to be awarded to him for the misconduct found by the Board of Revenue to be established in their letter dated 2nd July 1957 with which the Government agreed.

7. Learned counsel appearing on behalf of the State urged before us that, in interpreting this order dated 13th August, 1957, we should dissociate the two parts of the order from each other. The part of the order directing termination of the period of probation and reversion to the post of Naib Tahsildar should be treated as one and should be considered to have been made by the Governor in exercise of the powers under Rule 14 of the Subordinate Revenue Executive Service (Tahsildars) Rule 1944, under which, as we have mentioned earlier, a person appointed on probation can be reverted to his substantive appointment if it is found that he has not made sufficient use of his opportunities or has failed to pass the departmental examination completely or has otherwise failed to give satisfaction. The further submission was that the second part should be treated as the only part of the order awarding punishment and should not be connected with the first part of the order.

We are unable to accept his submissions. We do not think that the first part of the order relating to termination of the period of probation and reversion to the post of Naib Tahsildar can be dissociated from the second part of the order that the respondent was not to be considered for promotion for a period of seven years from the date of reversion. Both these parts of "the order were passed on the agreement of the Governor with the contents of the Board's letter dated 2nd July, 1957. In that letter, as we have indicated above, there was a finding about certain misconduct by the respondent expressed in the language which has been reproduced above. That finding was the basis for both parts of the order and

both parts of the order should, therefore, be treated as one single order. Both parts of the order were passed on the basis of one single inquiry in which only one single report was submitted to the Government by the Board of Revenue and we are, in these circumstances, unable to see how it can be said that one part of the order was passed in exercise of one power and the other part of the order in exercise of a different power. The two parts of the order having to be dealt with as one single order passed on the same one finding recorded in the letter of the Board of Revenue, there in our opinion, remains no doubt that the entire order was an order of punishment and even the first part of the order could not possibly be an order under Rule 14 mentioned above.

Had there been any intention of the Governor to act under Rule 14 for the purpose of terminating the probation and reverting the respondent to the post of Naib Tahsildar under Rule 14, the first part of the order would have itself made it clear that that part of the order was being made in exercise of the powers granted by that rule so as to leave no doubt that it was not a punishment. When both parts of the order followed the view of the Governor which was in agreement with the findings recorded by the Board, both parts must be held to be one single order consequential to and based on that view and can, therefore, be nothing else than an order of punishment. Learned counsel has attempted to dissociate the two parts of the order because it was not possible to contend, at least so far as the second part of the order was concerned, that it was not an order of punishment. It is also to be noticed that, from the very initiation of the proceedings right upto the stage when this order was passed, there was, at no stage, any mention in any correspondence that the Governor was proposing to proceed under Rule 14 mentioned above. On the other hand, as we have indicated earlier, the letter of the Government issued on 3rd September, 1956, indicated that the Governor was intending to proceed in accordance with Rule 55(3) of the Civil Services (Classification, Control and Appeal) Rules and it was under those rules that the Governor was intending to take action against the respondent. It was for this reason that, in that letter, the directions contained were in the same language as used in Rule 55(3) of the Civil Services (Classification, Control and Appeal) Rules. Those rules are not the rules applicable when the Government proposes to proceed under Rule 14 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944. In fact, the proceedings- under Rule 14 appear to be quite different from the proceedings to be taken in cases where Rule 55(3) of the Civil Services (Classification, Control and Appeal) Rules applies. Under this Rule 14, no finding need be recorded showing that any charge of any type has been established against a probationer nor can such a finding be made the basis of the order. All that is required is that there may be material in the background on the basis of which the Government can form the opinion that the probationer has not made sufficient use of his opportunities or has failed to pass the departmental examination completely or has otherwise failed to give satisfaction. If that material is kept in the background and an order is made, that order, in such circumstances, would not

cast any imputation on the conduct, character or merit of the officer except to the limited extent that he was found unfit for confirmation because of the reasons mentioned in Rule 14.

On the other hand, if there is a clear imputation or charge against an officer and a finding is sought to be made the basis of the punishment, we think that Rule 55(3) of the Civil Services (Classification, Control and Appeal) Rules comes into play and, in the present case, it is clear that the proceedings taken against the respondent were of this nature. Of course, in taking these proceedings, an error was committed, probably induced by the incorrectness of the rules, that an adequate opportunity to show cause was not given to the respondent, so that the order made against him violated the provisions of Article 311 of the Constitution.

8. Then we come to the last impugned order dated 1-12-1958. This order again it is to be noticed, was made by the Governor on a further representation that was sent up by the respondent. It was not an order made suo motu in order to clarify or correct the earlier order dated 13-7-1957. In fact, the order itself mentions that the Governor has been pleased to accept the representation in part and to cancel the part of the order contained in para 2 (relating to the stoppage of promotion. After this order had been made, the letter issued on behalf of the Government proceeds further to say that the other part of the order in that earlier G. O. dated 13-7-1957, relating to the termination" of the probation of Shri. Akbar Ali Khan would stand and the reason for this was sought to be indicated in that letter. The reason given was that, during the period of probation, he had not made sufficient use of his opportunities and had failed to give satisfaction. By this letter, therefore, the Government, for the first time, made an attempt to convert that order of punishment contained in the letter dated 13th August, 1957, into an order under Rule 14 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944.

We do not think that, by putting down this view in this subsequent letter dated 1-12-1958 the character of the original order passed on 13-7-1957, could be retrospectively altered. When that order was passed on. 13-7-1957, it was, as we have indicated earlier, an order of punishment. It seems that, by the time this subsequent representation of the respondent Could be considered and this order dated 1-12-1958, could be passed, the decision of the Supreme Court in the case of Parshotam Lal Dhingra Vs. Union of India (UOI), had been reported and had come to the notice of the Government. The respondent had already challenged the validity of this order in his representation on various grounds including the ground that the order dated 13th August, 1957, had been passed without giving him an adequate opportunity to show cause. The representation of the respondent being there and the decision of the Supreme Court being available, the Government, by this letter dated 1-12-1958, attempted to convert their earlier order of punishment into an order under Rule 14 of the Subordinate Revenue Executive Service (Tahsildars), Rules, 1944. The attempt, in our opinion, was futile. What was not" an order under that rule could not become so,

simply because the Governor later purported to say that the order would stand because of the existence of facts justifying the applicability of that rule. The Governor had no such power to convert an order of punishment retrospectively into an order under Rule 14, nor could he appropriate to himself the function of subsequently interpreting the earlier order and laying down that the order was an order under the rule and not an order of punishment. The order dated 1-12-1958 to the extent that it maintained the order dated 13-7-1957 relating to termination of probation of the respondent, was, therefore, ineffective and could not validate that earlier order. This order has also, therefore, to be vacated.

9. In these circumstances, the order, which was made by the learned Single Judge, was fully justified and the two orders of the Governor dated 13-7-1957 and 1-12-1958 were rightly quashed, though we have come to the view on reasons different from those which appealed to the learned Judge. The appeal fails and is dismissed with costs.

10. The interim stay order passed for the pendency of this appeal is vacated.