

(1957) 07 OHC CK 0007
In the Orissa High Court
Case No : C.J.C. No. 286 of 1955

Syam Sundar Misra

APPELLANT

Vs

The State of Orissa and Another

RESPONDENT

Date of Decision : 11-07-1957

Acts Referred:

Constitution of India, 1950 — Article 226, 311

Citation : AIR 1957 Ori 222

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

Bench : Division Bench

Advocate : N.V. Ramdas and G.K. Misra, for the Appellant; H.C. Panda and Adv-General, for the Respondent

Judgement

Narasimham, C.J.—This is a petition under Article 226 of the Constitution by the Manager of Parlakimedi Municipality against an order of dismissal from service passed by the Commissioner and Special Officer of the Municipality (hereinafter referred to as the Special Officer) Sri K.M. Das on 1-4-51 after a departmental enquiry. The petitioner filed an appeal to the State Government on 1-5-51. But it appears that no orders were passed by the Government on the appeal. It is indeed strange that an appeal of this type should have remained undisposed of by the Government for such a long period. In sheer despair the petitioner came to this Court for relief under Article 226 of the Constitution on 22-9-55 and though the learned Advocate General appeared for the State of Orissa during the hearing of this petition he has not been able to enlighten us as to what happened to the petitioners' appeal.

2. The conditions of service of the petitioner as an employee of a Municipality governed by the Madras District Boards Act, 1920, were regulated by various Rules and Orders issued by the appropriate authority from time to time. On behalf of the Municipality it was stated that the procedure to be observed in a departmental enquiry against a Municipal servant was regulated by Rule 4 of Madras Government Order No. 3600, L and M, dated the 8th September, 1932,

which is as follows :

"No order of dismissal or removal or reduction or suspension not being one pending enquiry, or withholding increments or promotion, shall be passed on an Officer or servant or a municipal council (other than an order based on facts which have led to his conviction in a criminal Court) unless he has been informed in writing of the grounds on which it is proposed to take action and has been offered an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to 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 to be heard in person. If he so desires or if the authority concerned so direct, an oral enquiry shall be held. At that enquiry oral evidence shall be heard as to such of the allegations as are not admitted and the person charged shall be entitled to cross examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the person conducting the enquiry may, for special and sufficient reason to be recorded in writing refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof : Provided that this rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him : Provided also that where there is difficulty in observing exactly the requirements of this rule all or any of the provisions thereof may, in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived with the previous sanction of the Local Government."

This Rule is practically identical with Rule 55 of the Civil Services (Classification, Control and Appeal) Rules which regulates the conditions of service of Government servants.

3. On 5-1-51 the Special Officer, after holding some sort of preliminary scrutiny framed twenty-three charges against the petitioner for negligence of duty misfeasance and malfeasance and called upon him to submit his explanation within ten days of the receipt of the charges. He immediately placed him under suspension and also asked him to state whether he desired to be heard in person. The petitioner submitted his explanation on 6-2-51 completely denying the allegations made against him.

It also appears that he expressly waived his right to a personal hearing. But in his explanation he made it absolutely clear that during the preliminary scrutiny, witnesses had been examined behind his back and that he did not get an opportunity to test their statements by cross-examination. On receipt of his explanation the Special Officer, without holding a regular enquiry as contemplated by the said Rule (examining the witnesses in the presence of the

petitioner and giving him an opportunity to cross examine them and also to adduce evidence on his behalf) proceeded to come to a finding in respect of every one of the charges on the basis of the materials collected by him during the preliminary scrutiny and the explanation submitted by the petitioner.

He then passed orders on 1-4-51 to the effect that all the charges were proved. He also observed in the last portion of his order that nine other charges of a similar nature had been framed against the petitioner by the chariman and Executive Authority of the Municipality that the explanation of the petitioner had been obtained and that they were pending for Orders. It does not appear that the Special officer came to any finding in respect of those nine charges; but he stated that he had considered those nine charges along with the present charges and then thought that in the interests of public service the petitioner should be dismissed from service. Before passing such an order of dismissal he did not issue a fresh notice on the petitioner to show cause why he may not be dismissed as required by Article 311 of the Constitution.

4. Mr. Ramdas on behalf of the petitioner urged that the entire departmental enquiry was vitiated on the following three grounds :

1. There was failure to comply with the provisions of Article 311 of the Constitution.

2. The principles of natural justice were not observed in coming to a finding as regards the guilt of the petitioner inasmuch as no witness was examined in his presence nor was he given an opportunity to cross examine any of the witnesses or to adduce rebutting evidence on his behalf.

3. The Special Officer should not have taken into consideration nine other charges which had been framed by the Chairman and Executive Authority against the petitioner without independently examining everyone of those charges and coming to a separate finding in respect of each of them.

5. It was urged on behalf of the Municipality that as the petitioner was only a Municipal employee and not either a member of a civil service or the holder of a civil post under the Union or the State Government, Article 311 of the Constitution would not, in express terms, apply. The petitioner is undoubtedly a public servant. But I am not satisfied that his service is under the State of Orissa. In terms, Article 311 may not apply. But the broader question as to whether the provisions-of that Article which are based on principles of nature justice should be applied to any public servant whether serving under a State Government or any Local authority, yet remains to be decided. For the purpose of disposing of this petition, however, it is unnecessary to decide this question as we are satisfied that the petition must succeed on the other two grounds mentioned above.

6. The Special Officer has completely overlooked the fundamental principle governing all departmental proceedings. It is too elementary that before coming

to a finding as regards the guilt or otherwise of a public servant the enquiring officer should give the public servant concerned an opportunity to test the evidence collected against him by cross examining the witness and also to adduce evidence on his behalf. It will not be proper for an officer holding such a departmental enquiry on the basis of the materials collected during the preliminary scrutiny after taking into consideration the explanation given by the public servant. Such preliminary scrutiny is made for the purpose of satisfying the officer that there are prima facie grounds for framing charges against the public servant and calling upon him to explain. But once the public servant submits his explanation and therein does not admit the facts on the basis of which the charges are made it is obvious that a regular enquiry should be held in his presence. Witnesses should be examined, if necessary, and he should be given an opportunity to cross examine them and to adduce evidence on his behalf. Doubtless, if all the facts are admitted by him in his explanation the necessity of a regular enquiry may not arise and it may be open to the enquiring officer to dispose of the proceeding on the basis of the materials collected during the preliminary scrutiny and the explanation submitted by the public servant. But in the present case as already pointed out, the petitioner denied every one of the allegations made against him. He also made a grievance of the fact that during the preliminary scrutiny witnesses had been examined behind his back and that he did not get an opportunity to test their statements by cross examination. Moreover, while answering some of the charges he made statements which would necessitate the examination of some witnesses. For instance, charge No. 5 related to his omission to account for a sum of Rs. 200/- advanced for the purchase of lights. In his explanation the petitioner stated that the said sum was advanced to One D. Narayana in January 1949 in connection with the visit of His Excellency the Governor to Parlakimedi. Without examining the said D. Narayana in the presence of the petitioner and giving him an opportunity to cross examine him the Special Officer came to a hasty finding to the effect that the explanation was false. Charge No. 22 related to his receipt of a sum of Rs. 4/-/3 towards cycle licence of one T. Balakrishnamma in 1949-50 and his omission to credit the same either in Chitta or Collection Register. The petitioner's explanation was that the Warrant Officer received the money and did not credit the same. This Warrant Officer was not examined in the presence of the petitioner to disprove his explanation nor was he given an opportunity to cross examine him. Charge No. 23 related to the petitioner's omission to disburse, Rs. 14/- and Rs. 10/11/- due to one N.C. Misra Lascar, for May and April, 1950 respectively. The petitioner's explanation was that the sums were disbursed to N.C. Misra when he returned to Parlakimedi town. This N. C. Misra was not examined in the presence of the petitioner nor was he given an opportunity to cross examine him. There are innumerable instances of this type and it is unnecessary to describe them in detail. It is also clear that the petitioner was not given an opportunity to adduce evidence on his behalf.

7. It was, however, urged on behalf of the Municipality that when the petitioner

stated that he did not wish to be heard in person the enquiring officer was justified in assuming that he did not want to cross examine any of the witnesses or to adduce evidence on his behalf. Such an inference is not justified. The departmental rule quoted above gives three distinct rights to a public servant: (i) right to be heard in person if he so desires; (ii) right to cross examine the witnesses in respect of those allegations which are not admitted by him in his explanation; (iii) right to adduce rebutting evidence on his behalf. Merely because the petitioner waived his right to be heard in person by his superior authority it does not necessarily follow that all other rights had been waived. Hence, on receipt of his explanation the Special Officer should have conducted a regular enquiry after giving due notice to the petitioner and giving him an opportunity to exercise the right of cross examination and also to adduce rebutting evidence on his behalf.

8. The learned Advocate General, however raised an interesting argument to the effect that under the said Rule a regular enquiry is required to be held only when (i) the delinquent public servant so desires; or (ii) the superior authority so directs. He therefore, urged that if the delinquent servant does not desire an enquiry it is entirely within the discretion of the superior authority to hold an enquiry or not and if he decides on not holding an enquiry and on disposing of the departmental proceeding on the basis of the materials already collected his order cannot be challenged in a petition under Article 226 of the Constitution, I am, however, unable to accept this argument. It is true that the relevant portion of the said Rule is follows:

"If he so desires or if the authority concerned so directs, an oral enquiry shall be held,"

But the very next sentence is to the following effect:

"At that enquiry oral evidence shall be heard as to such of the allegations as are not admitted and the person charged shall be entitled to cross examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the person conducting the enquiry may for special and sufficient reason to be recorded in writing, refuse to call a witness."

If both the sentences are read together it is obvious that where the allegations contained in the charges are not admitted an enquiry is mandatory even though the delinquent public servant does not expressly state that he desires such an enquiry. Any other view would render infructuous the right to cross examine the witnesses and the right to adduce rebutting evidence conferred by the said Rule. In the present case, such an enquiry was absolutely necessary mainly because in the petitioner's explanation he made a grievance of the fact that he did not get an opportunity of cross examining the witnesses on whose statements the charges were framed. He had also (while answering many of the charges) expressly referred to certain person whose evidence was very material for the purpose of proving the charges. The Special Officer acted in contravention of all

principles of natural justice in brushing aside his explanation and coming to a finding on the basis of materials collected behind his back.

9. The Special Officer has also committed a serious irregularity in taking into consideration nine other charges which had been framed by the Chairman and Executive Authority of the Municipality on a previous occasion against the petitioner. If he wanted to use those charges also in the present enquiry he should have included them in the charges that were sent to the petitioner and after giving him an opportunity to cross examine the witnesses and also to adduce rebutting evidence should have come to his independent finding in respect of every one of the nine charges. It is highly improper to take into consideration some other charges against a public servant which were not included in the charges that he was called upon to meet and then to use those charges as an aggravating circumstance for passing the maximum punishment.

10. I would, therefore, set aside the order of dismissal dated 1-4-51 passed by the Special Officer. Parlakimedi Municipality. The petitioner is entitled to costs. Hearing fee is assessed at Rs. 100/-.

11. It is open to the authority concerned to continue the departmental enquiry by framing fresh charges against the petitioner and terminating the same after giving him due opportunity to cross-examine the witnesses in respect of those allegations which are not admitted and also giving him an opportunity to adduce rebutting evidence. Government may also examine the circumstances under which the appeal filed by the petitioner on 1-5-51 against the decision of the Special Officer to the Secretary to the Government of Orissa, Local Self Government has yet remained undisposed of and take effective measures to avoid such delays in future.

Das, J.

12. I agree.