

(1962) 07 BOM CK 0005

In the Bombay High Court

Case No : Special Civil Application No. 273 of 1961

Vasant Raghunath Gokhale

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-07-1962

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 152
Civil Services (Classification, Control and Appeal) Rules — Rule 55
Constitution of India, 1950 — Article 226, 309

Citation : (1963) 1 LLJ 449

Hon'ble Judges : N.L. Abhyankar, J;D.G. Palekar, J

Bench : Division Bench

Judgement

Abhyankar, J.—This is a petition under Art. 226 of the Constitution. The petitioner was appointed as a revenue inspector on 7 December, 1946, in the State of Madhya Pradesh. He was confirmed in that capacity on 7 December, 1948. Later he was confirmed as Assistant Superintendent of Land Records. He was confirmed as Assistant Superintendent of Land Records by the orders of the Government of Madhya Pradesh on 31 October, 1956. The petitioner's services were allocated to the new reorganized State of Bombay. The petitioner was at Nagpur when he received an order, dated 3 September, 1957, from the Settlement Commissioner and Director of Land Records. By that order the petitioner was suspended from service from the date of receipt of the order. The order gave certain other directions as follows :

(1) That during the period of suspension he should be paid only the subsistence and other allowances admissible under the B.C.S. Rules, i.e., Bombay Civil Services Rules.

(2) That the petitioner should not leave his headquarters without the previous permission in writing of the Deputy Commissioner, Bhandara.

(3) That the petitioner is not allowed to accept any private employment or to do any business while under suspension. If he accepts any private employment or

does any business while under suspension, he will be deemed to be guilty of misconduct and will be liable to be dealt with accordingly and he would forfeit his claim to any subsistence allowance :

2. There is a note added below the order that the Government have ordered to hold a departmental enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules against the petitioner on the charge of corruption and as ordered by the Government he is suspended from service. The departmental enquiry was to be conducted by the Deputy Commissioner, Bhandara.

3. Thereafter, the Deputy Commissioner, Bhandara, served a notice on the petitioner on 18 January 1958. By this notice, the petitioner was called upon to put in a written statement of defence in respect of the two charges mentioned in the notice. The charges were as under :

(1) That while you were working as an officiating Assistant Superintendent of Land Records (Nistar) at Bhandara you demanded Rs. 50 and accepted Rs. 25 as illegal gratification from one Bhuna alias Bapu Atmay Uka, Kumbhar of mauza kelwad, tahsil Sakoli, for a promise given by you for recording certain lands of mauza Kelwad in his name.

(2) That you demanded an illegal gratification of Rs. 100 from one Naklu Shiwa Mahar, resident of Kelwad, tahsil Sakoli, for recording lands of that mauza in his name.

4. A statement of the allegations on the basis of which the charges were framed was attached to the memorandum from the Deputy Commissioner. By a subsequent order from the Government the enquiry was entrusted to Sri B. N. Sathaye, Personal Assistant to the Collector, Bhandara. The petitioner, it is alleged, appeared before the enquiry officer. The enquiry officer held an enquiry and submitted his report on 18 February 1959. That report is to be found at pp. 14 to 31 of the paper book before us.

5. The petitioner's allegation is that the enquiry officer or the Government or the Collector did not inform him about the nature of the findings of the enquiry officer. The petitioner was not also supplied with a copy of the report of the enquiry officer. In fact the petitioner did not receive any communication from any authorities till the Government issued an order on 26 February, 1960. That order is document No. 4 at p. 32 of the record, and is in the following terms :

"On examining the report of the enquiry officer appointed under G.M.R.D. dated 24 May 1958, referred to in the preamble, Government has come to the conclusion that the charges framed against Sri V. P. Gokhale, ex-Assistant Superintendent of Land Records, Bhandara (under suspension), have not been conclusively proved. Government is therefore pleased to direct that Sri Gokhale should be reinstated in service immediately and the intervening period between suspension and reinstatement should be treated as leave due and admissible followed by extraordinary leave without pay. The Settlement Commissioner and

Director of Land Records should issue orders regarding the posting of Sri Gokhale."

6. According to the petitioner, the Government came to the conclusion that the charges against him had not been conclusively proved and the Government was therefore pleased to direct that the petitioner should be reinstated in service immediately. The order also contained a direction, as would be apparent, regarding the manner in which the period of the petitioner's suspension should be dealt with as regards pay and allowances admissible for that period. That period was from 3 September, 1957 to 23 March, 1960, that is, a period of approximately 2 years, 6 months and 3 weeks. The petitioner was actually reinstated in service with effect from 23 March, 1960. The direction regarding pay and allowances payable to the petitioner during the period from the date of his suspension to the date of his reinstatement resulted in a substantial loss being caused to the petitioner. The petitioner, therefore, preferred an appeal to the Governor of the State on 22 April, 1960. It is alleged that he also made subsequent representations besides this appeal. The petitioner ultimately received a memorandum from the Government dated 30 June, 1961, intimating to him that his request for treating the period of his suspension as on duty is not granted by the Government. The petitioner, therefore, filed this petition in this Court on 14 August, 1961, challenging the legality of the order of the State Government dated 26 February 1960.

7. The petitioner's contention is that the order of the Government is illegal because the petitioner was not given any opportunity to make a representation against the order passed by the Government. It is further alleged that the order does not indicate under what provision of law the Government purported to act. He has also complained that the Government was bound both under the provisions of the rules as well as on the principles of natural justice to afford a real and adequate opportunity to the petitioner to make his submission regarding the findings of the enquiry officer and the action the Government proposed to take on the basis of the findings of the enquiry officer. It is specifically alleged that the petitioner was bound to be heard in support of his contention that he was entitled to be fully exonerated and was, therefore entitled to all the benefits flowing out of such finding in respect of the period of his suspension. The petitioner has also alleged that the findings of the State Government involve a stigma on the petitioner that he has not been honourably acquitted. The decision regarding the treatment of the period of suspension as period not on duty affected the right of the petitioner in respect of pension and further affected the right of the petitioner to promotions and other benefits which flow from the length of service. The petitioner also stated that the order of the Government entailed a monetary loss to him to the extent of Rs. 4,000 which is a heavy penalty to a person in the position of the petitioner. The petitioner draws a net salary of Rs. 125 per mensem and can ill afford to bear this heavy penalty. It is further contended that the petitioner was liable to be dealt with according to the Civil Services (Classification, Control and Appeal) Rules applicable to the

employees of the Madhya Pradesh Government and in force in that region up to 31 October, 1956. Under rule 49 of the rules which prescribes different punishments there is no mention of a punishment by way of suspension. The petitioner characterized the order dated 26 February, 1960, as in law and in substance, a penalty by way of suspension which the Government was not authorized to impose. It is further alleged that keeping the petitioner compulsorily under suspension, that is, on leave without pay, is itself a penalty which is not authorized as one of the penalties permissible under the rules in disciplinary proceedings. According to the petitioner, the Government was bound to treat the period of suspension as a period on duty in view of its conclusion that the charges were not conclusively established against the petitioner. It is also complained that the Government was not entitled to take action with penal consequences like the order passed by the Government in this case, in ostensible exercise of the power to determine leave, pay and allowances payable to the petitioner in respect of the period of his suspension. In effect and in law this amounts to a punishment which is not permissible under the rules and, therefore, it is alleged that the government is trying to do indirectly what it could not do directly by way of imposition of penalty in disciplinary proceedings. On all these grounds the order is impugned as illegal and unauthorized and vitiated by the denial of the principles of natural justice.

8. The respondents have filed a detailed written statement in answer to the petition. It is admitted that the report of the enquiry officer was not sent to the petitioner and he was not given any opportunity as complained by the petitioner. It is, however, urged that at the enquiry the conduct of the petitioner was held not to be above suspicion and, therefore, his suspension was considered as wholly not unjustified. It is also stated in Para. 2 of the return that the conduct of the petitioner was not free from doubt. Benefit of doubt was given to the petitioner but he was not honourably exonerated. In view of this, it is submitted by the respondents that the period of suspension was ordered to be treated as leave due followed by extraordinary leave without pay. The respondents' case is that no punishment was imposed on the petitioner and he was not served that a show-cause notice because it was not necessary to follow the procedure for inflicting punishment permissible in a departmental enquiry. The petitioner was reinstated in service with effect from 23 March, 1960 and his appeals and memorials were duly considered. The respondents denied that the petitioner was not governed by the Bombay Civil Services Rules. It was stated that the petitioner had not exercised the option regarding the applicability of such rules even in respect of pension and leave rules. So far as the conditions of service and other rights are concerned, the respondents stated that the petitioner was governed by the Bombay Civil Services Rules, which was applicable to the petitioner's case, action had been taken against the petitioner and the impugned order was passed in exercise of the powers conferred under that rule. As regards the departmental enquiry held against the petitioner, it was stated that the enquiry was held according to the General Book Circular I-13 and the rules

contained therein which was applicable to this case. According to the respondents, it was not necessary to mention the provisions of law under which the order regarding the treatment of the period of suspension was passed in the order communicated to the petitioner. The order, according to the respondents, was passed in exercise of the powers conferred on the Government under rule 152 of the Bombay Civil Services Rules. In Sub-para. (ii) Para. 4 of the return as regards giving of reasonable opportunity, the respondents state as follows :

"..... it is submitted that an adequate opportunity was afforded to the petitioner and the enquiry was not opposed to any rules or principles of natural justice. As no punishment was imposed on the petitioner, it was not necessary to give him further opportunity for making any submission in regard to the findings of the enquiry officer. The petitioner has in no way been prejudiced by the non-supply of the findings or report of the enquiry officer."

9. According to the respondents, the question whether the report of the enquiry officer would lead to the conclusion whether the petitioner was liable to be considered as fully exonerated or not was not a question which was justiciable and he was not entitled to be heard in support of such a contention. The respondents admitted that the action taken against the petitioner was not in the nature of a penalty prescribed in the rules. They also denied that action taken against the petitioner, in fact, amounted to a penalty. As regards justification for the order regarding the treatment of the period of suspension, it is stated in the return that the conduct of the petitioner was not free from doubt, and benefit of doubt having been given to the petitioner, he was considered as not fully exonerated. The consequential order flowing from such view taken by the authorities was the order passed in the case of the petitioner. The loss which naturally resulted to the petitioner would be consequential to the order issued. The respondents supported the order regarding pay and allowances during the period of suspension on the ground that the petitioner not having been fully exonerated, the period of suspension was correctly treated as leave due followed by extraordinary leave. The respondents denied that the action taken was contrary to any rules or regulations or that the action of the Government amounted to punishment. According to the respondents, the alleged monetary loss or loss of promotion, pension and prospects, if any, was merely a consequence of the order passed at the enquiry and, therefore, the petitioner was not entitled to any reliefs claimed by him.

10. Certain positions which were not clear from the return are no longer in dispute. The respondents have filed before in dispute. The respondents have filed before us a copy of a resolution No. INT 1056-S. 8, dated 7 January, 1957, framed by the Government. That resolution states that the Government was pleased to direct that, except as regards the amount of leave and pension, in all other matters, the Government servants allocated to the new State from the former States of Saurashtra, Kutch, Madhya Pradesh and Hyderabad, will be governed with effect from 1 November, 1956, by the Bombay Civil Services

Rules. As regards the amount of leave and pension, in the second paragraph of the resolution, option was given to the allocated Government servants coming from these areas to exercise the same on or before 31 December, 1957; those who failed to exercise the option were to be deemed to have opted for the Bombay Civil Services Rules. Even as regards the amount of leave and pension, it is stated before us that the petitioner did not exercise any such option, and we will assume for the purpose of this case that that statement is correct. The position, therefore, that is taken by the State is that the petitioner is governed by rule 152 of Chap. VIII of the Bombay Civil Services Rules with which we are principally concerned in this case.

11. Now, it is true that the disciplinary action which was taken against the petitioner was admittedly taken according to the rules applicable to the employees in Madhya Pradesh, that is, the Madhya Pradesh Rules, regarding disciplinary action to be taken. Under rule 49 of those rules, suspension is not one of the punishments which can be inflicted for misconduct or for dereliction of duty on the part of a Government servant in an enquiry held by the disciplinary authority. On the other hand, under rule 33 of the rules framed by the State of Bombay, suspension is one of the punishments which can be inflicted for misconduct. The State, however, has not taken its stand as regards the action taken in this case as one of the imposition of punishment of suspension. It is not the case of the State that the period during which the petitioner was suspended, that is, from 30 September, 1957 to 23 March, 1960, when he was reinstated actually in his post, was a period of his suspension as a measure of penalty. As suspension is not inflicted as a penalty as a result of the departmental proceedings in this case, we do not think that the contention of the petitioner that he was dealt with under the disciplinary rules applicable to the employees in Madhya Pradesh falls for consideration. The State has supported its action solely on the basis of rule 152 of the Bombay Civil Services Rules. That rule is one of the rules framed or continued under the proviso to Art. 309 of the Constitution of India and is therefore, a statutory rule. Rule 152 finds place in Chap. VIII of the Bombay Civil Services Rules. Chapter VIII is headed as "Dismissal, removal and suspension." Rules 150 and 159 are to be found in this chapter. Apparently, the chapter deals with determination of pay and allowances payable to Government servants who are either dismissed or removed from service or who are suspended. Rule 151 provides for payment to a Government servant, while under suspension, pay and allowances and detailed provisions is made as to how much of pay and allowances is payable and how it is to be calculated. Then follows rule 152 which is as follows :-

"(1) When a Government servant who has been dismissed, removed or suspended is reinstated, the authority competent to order the reinstatement shall consider and make a specific order -

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority mentioned in sub-rule (1) is of opinion that the Government servant has been fully exonerated or, in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay and allowances to which he would have been entitled had he not been dismissed, removed or suspended, as the case may be.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe :

Provided that the payment of allowances under Clause (2) or (3) shall be subject to all other conditions under which such allowances are admissible.

Provided further that in case of Clause (3) such proportion of such pay and allowances shall not be less than the subsistence and other allowances admissible under rule 151.

(4) In a case falling under Clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under Clause (3) the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be treated for any specified purposes."

12. Sub-clause (1) of rule 152 constitutes competent authority as an authority which has to consider and make a specific order regarding.

(a) the pay and allowances to be paid to the Government servant for the period of his absence from duty, and

(b) whether or not the said period shall be treated as a period spent on duty.

13. The rules also define who a competent authority is. In sub-clause (13) of rule 9, competent authority, in relation to the exercise of any power, means Government, or any authority to which the powers is delegated by or under these rules. In the instant case, order dated 26 November, 1960 is apparently passed by the Government itself and not by another delegated authority. A close scrutiny of sub-rule (1) of rule 152 will show that an order has to be passed in each of the three cases where reinstatement is ordered if there is the prior order of a Government servant being dismissed, removed or suspended. As far as we can see, this necessarily postulates a period during which a Government servant is absent from duty either because he is dismissed or removed or suspended. Now, it is not disputed that the period during which a person is absent from duty is not necessarily tantamount to a period as spent not on duty. There is power in the authority to treat either the whole or part of such period of absence from duty as a period spent on duty or not spent on duty.

14. The follows sub-rule (2) of rule 152. Under this sub-rule the authority which is competent to order reinstatement is enjoined by this sub-rule to come to a

conclusion as to whether the Government servant.

(1) is fully exonerated or not in a given case, and

(2) whether the suspension was wholly unjustified.

15. If the Government servant can be considered to be fully exonerated or the suspension can be considered to be wholly unjustified, there is a right in the Government servant concerned to be paid full pay and allowances to which he would have been entitled had he not been dismissed, removed or suspended, as the case may be. In our opinion, the competent authority is thus required to apply its mind to the facts of each case and all materials on record and to come to a definite conclusion as to whether or not it could come to an opinion that the Government servant is fully exonerated or whether the period of his suspension was not wholly justified. In this connexion it is necessary to remember that there may be a period of suspension even when the ultimate order that might have been passed against the Government servant concerned by way of punishment either of dismissal or removal or even of suspension for specific period as a measure of punishment. It is important to notice this fact because, in our opinion, the competent authority has to apply its mind and to come to the conclusion regarding two independent facts. One of the facts is whether it can or cannot be considered that the Government servant is fully exonerated and independently of this finding the competent authority has also to come to an independent conclusion whether or not the suspension of the Government servant was or was not fully justified. In considering this latter question there are two aspects of the action of suspension. The first aspect that the competent authority is to consider is whether the decision to suspend was or was not fully justified and secondly the authority will have to decide whether or not the suspension of the Government servant concerned for the duration to which it extends was or was not wholly justified. We shall have occasion to refer to this aspect of the question later on. Here we only notice what sub-rule (2) of rule 152 requires the competent authority to do.

16. Then follows sub-rule (3). Sub-rule (3) *prima facie* refers to residuary cases which are not governed by sub-rule (2). In other cases, it is stated under this sub-rule, that the Government servant shall be given such proportion of pay and allowances as such competent authority may prescribe. Here again, certain amount of discretion is vested in the competent authority to decide what proportion of the pay and allowances shall be given to the Government servants whose case does not come within the preview of sub-rule (2). In our opinion, even in exercising discretion under sub-rule (3) of rule 152 the yard-stick by which discretion is capable of being exercised would be the same matters, namely, the extent of exoneration or justification or otherwise of the order of suspension and its period. If there is full exoneration or the suspension is wholly unjustified, then as a matter of right and as a matter of course the Government servant concerned is entitled to full pay and allowances during the period of suspension under sub-rule (2). But when the action is purported to be taken under sub-rule

(3) of rule 152, in our opinion, a greater duty is cast on the competent authority to apply its mind to the facts of the case and to come to a definite conclusion as to the extent to which it holds the delinquent Government servant exonerated or not exonerated and justification of the order of suspension and the period to which it extended. We do not think that in exercise of the power under sub-rule (3) of rule 152, the competent authority is relieved on this obligation the moment it is found that the case of the Government servant may not possibly be covered by sub-rule (2) of rule 152. This would be further clear from sub-rule (5). Sub-rule (5) provides that in a case falling under Clause (3) the period of absence from duty shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose. This postulates that it is quite possible for the competent authority, in exercise of its discretion under sub-rules (3) and (5) of rule 152 to divide the period of suspension and treat portion of the period as a period spent on duty and treat the rest of it as the period not spent on duty. Different consequence in the matter of pay and allowances would flow if the period of absence of a Government servant is treated as a period of spent on duty or as a period not spent on duty. If the period is treated as a period not spent on duty, then the Government servant concerned necessarily suffers more by way of deduction necessarily suffers more by way of deduction in the pay and allowances which are admissible to him than if the period is treated as a period spent on duty.

17. Thus, in our opinion, the action which is required to be taken by the competent authority is after consideration of all the circumstances of the case and the authority would be acting in quasi-judicial capacity in taking such action under rule 152 of the Bombay Civil Services Rules. The rule itself enjoins that the authority shall "consider" and then make a specific order. What is meant by this is that the authority shall pass a considered order in respect of pay and allowances and the treatment of the period as on duty or not on duty as the case may be. It is not enough for the competent authority merely to indicate, as has been done in this case, that the period of suspension should be treated as leave due and admissible followed by extraordinary leave without pay. In order to give effect to this decision it must be founded on consideration of the facts of the case and the decision of the authority based on the facts found and material available in the departmental enquiry.

18. In view of the interpretation which we feel must be put on the requirement for due compliance with the provisions of rule 152 of the Bombay Civil Services Rules, it follows as a matter of course that the decision whether the Government servant concerned is or is not fully exonerated or whether the suspension order is justified or unjustified in whole or part is a matter of serious consequence to the Government servant concerned. If the matter is to be decided after due consideration one of the parties who must be given an opportunity to have his say in the matter will undoubtedly be the Government servant concerned. As the facts in this case disclose, the petitioner was not even given a copy of the report

of the enquiry officer before the order was passed. The Government, as competent authority, in its order dated 26 February, 1960, has come to the conclusion on examining the report of the enquiry officer that the charges have not been conclusively proved. The learned Assistant Government Pleader appearing for the State urges that this finding should be interpreted as tantamount to a finding that the petitioner has not been fully exonerated. We do not think that this interpretation can be put on the finding, cryptic as it is, recorded by the Government in the order dated 26 February, 1960. But even assuming that the opinion of the Government that the charges have not been conclusively proved is tantamount to a finding that the petitioner has not been fully exonerated, in our opinion, before coming to such a conclusion, the competent authority is bound to give an opportunity to the Government servant concerned to show as to why such a finding should not be recorded against him or even to show that he is entitled to be considered as fully exonerated. If the decision is based on the finding of the enquiry officer, then the competent authority ought to have made available to the petitioner a copy of the report of the enquiry officer. If there is any other material which the competent authority has to take into consideration in arriving at its decision under sub-rule (2) or (3) of rule 152, then even that material ought to be made available to the Government servant concerned before a decision is arrived at. Not only the material and report of the enquiry officer ought to be made available but a reasonable opportunity must be given to the Government servant concerned to make a representation as to the conclusion that should be drawn regarding his right to be considered as fully exonerated on the strength of the report of the enquiry officer. Such an opportunity would seem to be essential and pre-requisite to any adverse action intended to be taken against the Government servant in exercise of the power under rule 152 of the Bombay Civil Services Rules especially when the report of the enquiry officer indicated that there was no cause for any departmental punishment being inflicted on the petitioner in respect of the charges which were held as not conclusively proved. In effect, the report of the enquiry officer and the finding of the competent authority also seem to be that the charges were not proved. If the competent authority, however, considered that there was some suspicion lurking in its mind regarding the innocence of the Government servant, then in fairness the Government servant ought to be given an opportunity inasmuch as such a conclusion entertained by the competent authority itself in effect amounts to a stigma on his character as a servant of the State. It is bound to be placed on the record of his service and such a verdict on his acts or conduct cannot possibly be obliterated from consideration in further dealing with the Government servant whenever his claim for promotions or any other matters in his service are required to be considered. Apart from this consideration, we find, as already stated, that the question of justification of suspension and its duration has to be independently considered by the competent authority. In the instant case, we do not find that this aspect has been kept in view by the respondents at all. There is no reference whatever in the order of the State passed on 26 February, 1960 to the suspension being

justified or not justified. Mr. Padhye, learned Assistant Government Pleader, appearing for the State, has contended that the finding of the competent authority that the charges have not been conclusively proved against the petitioner itself implies a further finding that the suspension was not unjustified. We fail to see how that conclusion follows or could possibly follow from such finding as is recorded by the competent authority. Even in respect of the petitioner's exoneration from guilt we do not think that the competent authority has addressed itself at all to the consideration of the question whether suspension was justified apart from its view that the petitioner was not liable to be considered as exonerated from the charges.

19. A note is added in this very chapter to rule 154. That note is in the following terms :-

"Note 2. - Departmental enquiries in disciplinary matters are generally not completed expeditiously and that at times they drag on for a considerably long time. Such enquiries should be held and completed as quickly as possible and that in any case the period should not exceed three months from the date a decision has been taken to hold a departmental enquiry. If for any special reasons the enquiry is likely to take a longer time, the enquiry officer, unless he is himself the head of a department, should submit a report to the head of his department giving reasons for the delay and the latter should obtain the sanction of Government for allowing the enquiry officer an extension of time to complete his enquiry if he is satisfied that there is case for such extension. In case the enquiry officer is himself the head of department he should report the reasons for delay, if any, to Government and obtain an extension of time for completing the enquiry."

20. It is obvious in the instant case that the period of suspension was inordinately long. The petitioner was suspended with effect from 3 September, 1957 and was ultimately reinstated on 23 March, 1960. This covers a period of 2 years and 6 months and 3 weeks. It was necessary for the competent authority to find in the first instance whether the original order of suspension of the petitioner was itself justified. It was still more incumbent on the authority to find out whether such a long period of suspension was at all justified in view of the express instructions given to the enquiry officers in note 2 to rule 154 that ordinarily enquiries should be completed within a period of three months. If the competent authority were to address itself to this aspect of the question which it is required to decide judicially, it would have been noticed that though the petitioner was suspended as far back as 3 September, 1957, charges were not framed till 18 January, 1958. We have no means of knowing as to when the enquiry actually commenced. But the enquiry seems have been going on for nearly a period of one year and the enquiry officer submitted his report on 18 February, 1959. We do not know what happened thereafter with the enquiry against the petitioner. But the matter seems to have been dealt with at Government level when the impugned order dated 26 February, 1960 was passed

nearly a year after the report of the enquiry officer was submitted. We do not find that this aspect of the question has at all been considered by the competent authority. Ordinarily we should consider that the competent authority which ought to take a decision by quasi-judicial process may well have to consider whether the Government servant concerned is responsible to any extent for protracting the period of the enquiry which necessarily prolonged the period of his suspension. On the other hand if it is found that the petitioner is in no way responsible for the delay in the enquiry and certainly could not have contributed to the delay in the ultimate action which was taken by the competent authority, in deciding the action to be taken in respect of the petitioner, we fail to see how the competent authority could have decided the question required to be decided under sub-rule (5) of rule 152 without giving a reasonable opportunity to the petitioner to show why the whole period of suspension should not be treated as a period not on duty. It is elementary that the order which was passed regarding pay and allowances payable to the petitioner for his period of suspension has penal consequences. It deprives the petitioner of a substantial amount of money in the shape of pay and allowances payable to him. It is contended on behalf of the State that this is not a penalty within the meaning of the disciplinary rules which prescribe certain categories of penalties. Whether an action is or is not penal is not to be determined by the label given to it. If the result of the action leads to penal consequences for the Government servant and makes him suffer pecuniary loss, then in our opinion such act must amount to punishment. Pecuniary loss suffered by the petitioner in the instant case is according to him to the tune of Rs. 4,000. This specific allegation is not denied in the return filed by the State. In our opinion, the principle on which we must judge the nature of the action taken and its effect must be determined on the test laid down by their lordships of the Supreme Court in *Parshotam Lal Dhingra Vs. Union of India* (UOI), . The test is laid down in the following terms at p. 562 of the report :

". . . The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty."

21. In the case before their lordships the question was whether by recourse to the terms of the contract of employment, services of a servant can be terminated by taking action in pursuance of one of the terms of contract. In the case before us it is no doubt true that the action is taken in exercise of the power under rule 152 which invests the competent authority with powers to take action which may have consequences of depriving a Government servant of his pay and allowances

during the period of his suspension. If the action proposed to be taken results in pecuniary loss, we must hold that it is penalty that is imposed on the petitioner. Now, before a penalty is imposed on any person, apart from the fact that the competent authority is required to record a specific finding on interpretation of the rules that the suspension and its duration were or were not justified, it cannot proceed merely on suspicion. It is contended on behalf of the respondents that the charges were found not to be conclusively proved. It, therefore, followed that there was lurking suspicion in the mind of the competent authority that the petitioner was in fact guilty of some dereliction. If that be the basis on which the action is taken against the petitioner in the matter of fixation of pay and allowances for the period of suspension, then in our opinion it is all the more incumbent on the competent authority to give to the petitioner adequate and reasonable opportunity to show cause why such suspicion should not be entertained or that it is not well-founded. In the absence of such opportunity being given we hold that the competent authority has not exercised its powers under rule 152 of the Bombay Civil Services Rules in the manner in which it is required to exercise. The order, dated 26 February, 1960, that the period of suspension of the petitioner (between the date of suspension and the date of reinstatement) should be treated as one of leave due and admissible followed by extraordinary leave without pay, cannot be sustained and is liable to be quashed.

22. The petitioner has attacked the legality of the order from another angle. He has contended that this manner of treating his period of suspension as on leave due and admissible followed by extraordinary leave without pay is in effect a species of punishment imposed on the petitioner. It is not one of the punishments which the disciplinary authority or the competent authority can impose on the petitioner. What cannot be done directly according to the petitioner cannot be done indirectly in exercise of the power under rule 152 of the Bombay Civil Services Rules. In our opinion, there is considerable force in this contention. But we do not think it necessary finally to pronounce on the validity of this contention as in our opinion under rule 152 what is required is that the competent authority must act judicially in exercise of its power under that rule. This itself postulates that before any action adverse to the interest of the Government servant is taken, he must be given a reasonable and adequate opportunity to show cause against the action to be taken against him. That not having been done, we have come to the conclusion that the order passed in the instant case cannot be sustained and is liable to be set aside.

23. The result is that the petition is allowed. The order, dated 26 February 1960, passed by respondent 1 directing the intervening period between suspension and reinstatement should be treated as leave due and admissible followed by extraordinary leave without pay, is hereby quashed. The petitioner shall be entitled to his costs.