

indreswar Handique Vs. Union of India (Uoi) and ors.

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Court : Guwahati

Decided On : Dec-11-1958

Judge : H. Deka and G. Mehrotra, JJ.

Acts : [Constitution of India](#) - Articles 226, 311 and 311(2)

Appeal No. : Civil Rule No. 112 of 1958

Appellant : indreswar Handique

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : D.N. Medhi, Sr. Govt. Adv.

Advocate for Pet/Ap. : J.C. Choudhury and S.C. Bardoloi, Adv.

Disposition : Petition rejected

Judgement :

G. Mehrotra, J.

1. The petitioner Indreswar Handique was appointed as a Cipher Operator in 1944 in the then Bengal Assam Railway, and thereafter he was appointed a Travelling Ticket Examiner in 1949. On 4-6-1957 he was serving as a Travelling Ticket Examiner, Special Flying Squad, Pandu Region. At the Hojai station that day when on duty he saw one Sri S. Sen Gupta, Assistant Electrical Engineer, Dibrugarh

town travelling in a First Class compartment with his wife by train No. 521 UP beyond his jurisdiction namely, from Dibrugarh town to Lumding. He had with him a Metal Pass No. 206.

According to the petitioner Sri Sen Gupta was not entitled to travel beyond his territorial jurisdiction with a Metal pass with his family and consequently the petitioner demanded from him penalty and the fair for his wife. Sri Sen Gupta did not agree to his interpretation and said that the matter would be clarified, when he reached Lumding, on being referred to the District Traffic Superintendent.

The District Traffic Superintendent was contacted on phone on reaching Lumding and he directed that Sri Sen Gupta be allowed to proceed. Report of the incident was submitted by the petitioner to the District Traffic Superintendent on 5-6-1957. On 25-6-1957, however, the petitioner received a charge-sheet and a suspension order against him.

The charge against the petitioner was that he was rude and showed gross discourtesy to a Railway Officer which amounted to serious misconduct under Rule 1708 of the Railway Establishment Code, Volume I. It was alleged that he behaved in a very rude and insulting manner towards the officer Sri Sen Gupta. The petitioner was called upon to submit his explanation which he did on 1-7-1957 to the Regional Traffic Superintendent.

After the receipt of his explanation the Regional Traffic Superintendent, Pandu, fixed 24-7-1957 as the date of enquiry. He was directed to appear before the Enquiry Committee on the aforesaid date and was permitted to take along with him a railway employee or a Trade Union official to assist him in defence. He was asked to produce defence witnesses if he so desired. The enquiry at the request of the petitioner was postponed to 31st July and further to 12th August, 1957.

During the enquiry, the petitioner alleges, that he came to know that the proceedings had been started against the petitioner on a written complaint made by Sri Sen Gupta on the 5th of June, 1957. On getting this information the petitioner asked the Chairman of the Enquiry Committee to permit him to look into the said complaint; but the Chairman refused to permit him to do so.

On the date of enquiry witnesses were examined on behalf of the Department as well as the petitioner. The Enquiry Committee submitted its report to the Regional Traffic Superintendent finding the petitioner guilty of the charge and the Regional Traffic Superintendent on the 12th November, 1957, issued a notice to the petitioner to show cause against the proposed penalty. This notice was accompanied with the copy of the enquiry report.

The Enquiry Committee found that the conduct of the petitioner was unbecoming of a railway employee and he was found guilty of highly indisciplined working rendering him unfit to come in contact with travelling public as an uniformed representative of the Railway Administration. The proposed penalty was that he was to be reduced permanently from the post of Travelling Ticket Examiner on a scale of Rs. 100--185 to a post of an office clerk in the scale of Rs. 60--130.

On receipt of the notice the petitioner once again requested the Regional Traffic Superintendent to supply him with a copy of the complaint filed by Sri Sen Gupta and a copy of the D. O. letter dated 14th June, 1957, sent to one Sri J.N. Barkataki with his reply to the aforesaid letter. This prayer was refused on the ground that he is not entitled to the copy of these documents and that he had full opportunity to defend his case and that the copy of the report of the Enquiry Committee had already been sent to him.

On the 26th November, 1957, the petitioner in response to the aforesaid notice showed cause and requested that he should be given a personal hearing along with Sri K.P. Das, General Secretary, N. E. Railway Employees' Union at Lumding. The personal hearing was granted on the 26th of December, 1957; but the prayer that he was to be allowed to take Sri K.P. Das with him was rejected.

On the consideration of his explanation the Deputy Chief Traffic Superintendent by his order dated 1st February, 1958 reduced him to the rank of an office clerk in the scale of Rs. 60-130. An appeal was filed to the Chief Traffic Superintendent, Pandu, against this order and in the appeal the petitioner further prayed for a personal hearing and permission to take Sri K.P. Das with him to assist him.

The appeal was rejected without affording him any such opportunity. Thereafter the petitioner preferred an appeal against the above order before the General Manager, N. E. Railway, Pandu, which was summarily rejected with the observation that no such appeal lay. On these facts the present petition under Article 226 of the Constitution was filed in this Court on the 14th of August, 1958.

Before coming to the merits of the points raised by the petitioner, it is necessary to point out that the petition does not appear to be properly framed. The prayer made in the petition is in the following terms : 'It is therefore prayed that this Court may be graciously pleased to issue a rule on the opposite parties to show cause why the writ applied for should not be granted.' What actually the writ applied for, is not mentioned in any of the paragraphs of the petition.

What is the right of the petitioner which has been infringed and for the enforcement of which the petitioner moves this Court under Article 226 of the Constitution has got to be clearly stated in the petition. It is further necessary to clearly specify the nature of the direction which the petitioner desires this Court to issue so as to give an opportunity to the opposite party to meet the contentions of the petitioner.

The duty to my mind of the petitioner is not discharged by simply asking this Court to issue some sort of direction which this Court thinks proper under Article 226 of the Constitution. If the intention of the petitioner was to pray for a writ in the nature of certiorari quashing the orders passed by the different authorities reducing him in rank, that prayer should have been specifically mentioned.

The petitioner, however, in the course of the argument challenged the validity of the order passed by the Deputy Chief Traffic Superintendent, Pandu, reducing him in rank. Shortly put, the contention of the petitioner is that the petitioner is entitled to a reasonable opportunity to show cause against the order of reduction in rank under Article 311(2) of the Constitution which was denied to him. Further, it is urged that the provisions of paragraphs 1707, 1708 and 1709 of the Railway Establishment Code have been violated and thus the petitioner is entitled to relief quashing the order, reducing him in rank.

Two broad points have been urged on which the petitioner assailed the validity of the order. His contention first in short is that he was entitled to get a copy of the report made by Sri Sen Gupta and the D. O. letter sent to Sri Barkataki and his reply, both at the time of the earlier enquiry and before submitting his explanation to the notice to show cause against the proposed punishment.

The failure to do so according to him prejudiced his defence and consequently it cannot be said that he had a reasonable opportunity to show cause against the order passed against him. It is further contended that he should have been also allowed to take Sri K.P. Das, his nominee, along with him when he was granted personal hearing by the Regional Traffic Superintendent at the stage when he was asked to show cause against the proposed penalty.

It is not denied that the petitioner had full opportunity to offer his explanation to the charges against him and to produce his evidence. It is also not disputed that the petitioner had opportunity to cross-examine the witnesses produced on behalf of the department. It is also not disputed that the petitioner fully knew before entering into his defence the charges against him.

Sri Sen Gupta, on whose report it is alleged that the proceedings had started was examined by the Enquiry Committee in the presence of the petitioner. It cannot, therefore, be said that the refusal to permit the petitioner to look into the letter of Sri Sen Gupta which may have led to the initiation of the proceedings against the petitioner in any manner prejudiced his defence and that the failure to do so constitutes a failure to give him a reasonable opportunity to show cause against the order of reduction in rank.

Whatever materials were in possession of the Department concerned initially to make up its mind to proceed against the petitioner, will not be relevant in connection with the enquiry which was held in the presence of the petitioner and after giving him full opportunity to defend himself. The same argument is enough to repel the contention of the petitioner as regards the correspondence which passed between the Department and Sri Barkataki.

Admittedly, according to the petitioner's own statement when this incident took place he brought Sri Barkataki, who is another officer to witness the whole occurrence, naturally, therefore, the Department before proceeding against the petitioner wanted to know Sri Barkataki's version of the incident and any correspondence between Sri Barkataki and the Department prior to the proceedings before the Enquiry Committee can have therefore no relevance, to the enquiry, particularly when Sri Barkataki was also examined.

The failure therefore to supply him with a copy of the D. O. letter sent by the Department to Shri Barkataki cannot be said to amount to failure to give a reasonable opportunity to the petitioner to defend his case within the meaning of Article 311 of the Constitution.

2. The next point urged was that he was entitled to claim the presence, of Sri K.P. Das along with him before the Deputy Traffic Superintendent when he was asked to show cause against the proposed punishment and was given personal hearing. It is not denied that before the Enquiry Committee he was allowed on his request to take the assistance of Sri K.P. Das.

That being so, the fact that he was not allowed to take Sri K.P. Das with him at a later stage when he showed cause against the proposed punishment cannot amount to failure to give him a reasonable opportunity to show cause against the order. On the plain language of Article 311, it may be that the petitioner may be entitled to a second opportunity to show cause against the punishment proposed, but it cannot be regarded as a reasonable request on the part of the person to ask for a second trial even though he had full opportunity to defend himself at the earlier stage when enquiry was held against him.

The argument of the petitioner in effect is that notwithstanding that he may have had full opportunity at the stage of the earlier enquiry to show cause, he has a vested right to claim repetition of the same when at a later stage he has been given notice to show cause against the proposed punishment. Reliance was placed on the case of *Dadarao Shegoji v. State of Madhya Pradesh*, AIR 1958 Bom 204. That case to our mind is distinguishable from the facts of the present case.

This case does not lay down that even though the petitioner may have had full and reasonable opportunity to defend himself at an earlier stage of enquiry, he is entitled to the repetition of the same when he is called upon to show cause against the order proposed. In that case the petitioner was not present at the time of the enquiry, he had no opportunity to cross-examine the witnesses and was not supplied copies of certain documents. Under those circumstances when a notice was issued calling upon him to show cause against the proposed punishment he was held entitled to claim such an opportunity.

His request at a later stage to show cause was repelled by the single Judge On the ground that he was not entitled to do so after the preliminary enquiry was over and under those circumstances it was rightly held that the petitioner had no reasonable opportunity to defend himself as contemplated under Article 311 of the Constitution. The following observation will make it perfectly clear that the learned Judge did not lay down that in cases where it can be said that the petitioner had full opportunity at the earlier stage, still he will be entitled to the repetition of the same at a later stage:

'A departmental enquiry under the Civil Service Rules is essentially of a preliminary nature and is intended to satisfy* the Government that the case is of a kind which calls for a disciplinary action. No doubt even during such enquiry it is open to the person against whom such enquiry is held to have a full say and to make a statement with regard to all the charges which are made against him and also to examine any witnesses in his defence. But it does not mean that if he fails to take part in that enquiry or to give his defence, he is necessarily precluded from putting forward his defence or from examining witnesses or cross-examining such witnesses as may have been examined during the enquiry of the enquiring officer.'

3. Reference in this connection may be made to the case of Md. Umar v. Inspector General of Police, U. P., (S) AIR 1957 All 767. We, therefore, see no substance in the petitioner's contention that the order passed by the Deputy Chief Traffic Superintendent, Pandu, is violative of Article 311 of the Constitution. The validity has been further challenged on the ground that the procedure provided under paragraph 1707 of the Railway Establishment Code was not followed. Paragraph

1702 lays down the penalties which may be imposed upon any Railway servant for good and sufficient reasons and the penalty of reduction to a lower post is one of such penalties.

The penalty of removal from service and dismissal can also be passed against an employee. Paragraph 1707 lays down the procedure in cases where the penalty of dismissal is imposed, and paragraph 1709 provides the procedure when the penalty of removal is imposed. Paragraph 1712 then provides the procedure for imposing other penalties. The contention is that the procedure provided under paragraph 1707 was not followed. Sub-paragraphs (c) and (e) of paragraph 1707 are as follows:

'(c) If the railway servant asks to be heard in person or if the officer competent to pass an order of dismissal considers that the railway servant should be examined in person, he shall cause a departmental inquiry to be held. The railway servant, if he so desires, may be accompanied by another railway servant or by a Trade Union Official (who is not a professional lawyer) and the officer or the committee of inquiry shall give the railway servant all reasonable facilities for the conduct of his defence including the cross-examination of witnesses.

(e) The result of the departmental inquiry, with the recommendation of the officer or the committee holding the inquiry, shall be placed before the officer competent under the rules in this section to pass an order of dismissal, who shall thereupon pass such orders as he thinks fit.'

4. Relying upon these two sub-paragraphs it is contended that an employee has got a further right to claim an opportunity to defend himself before the officer who ultimately passes the order of dismissal or removal. The contention in substance is that by virtue of the provisions of these sub-sections, the petitioner is entitled to a second opportunity to produce evidence and to claim a personal hearing and the copies of the documents at a later stage.

In this connection further argument has been advanced that although the punishment awarded was one of reduction in rank, because the proceedings in this case were taken under paragraph 1708, that is for the removal from service,

the petitioner under paragraph 1709 was entitled to the observance of the same procedure as laid down under paragraph 1707. Now, there are three-fold answers to this contention.

Firstly, the mere fact that in the charge-sheet, paragraph 1708 is mentioned, it is not necessary that the procedure should be one where the penalty imposed is one of removal from service. In order to test whether the enquiry is valid or not, it will be enough to see what was the actual penalty imposed. If the penalty imposed was one other than that of removal or dismissal, in order to uphold the validity of the enquiry it will be sufficient if the procedure provided under paragraph 1712 is followed.

The second objection to the acceptance of the petitioner's contention is that the provisions of paragraph 1707 and sub-paragraphs (c) and (e) do not contemplate a repetition of the enquiry before the officer before whom the applicant is called upon to show cause against the proposed punishment and who is authorised ultimately to pass the order of reduction in rank.

It is not disputed that the enquiry was ordered by the Deputy Chief Traffic Superintendent and that the constitution of the enquiry committee was valid. Under those circumstances, if the petitioner had full opportunity to defend himself before the enquiry committee, there is nothing in the provisions of paragraph 1707 entitling the petitioner to claim a fresh opportunity when he is called upon to show cause against a proposed punishment.

The argument, if accepted, will mean that when the Deputy Chief Traffic Superintendent issued notice to the petitioner to show cause against the proposed

punishment, it is at this stage that he directed enquiry and the earlier enquiry made by the committee at the instance of the Deputy Chief Traffic Superintendent was of no consequence. The last objection is that if the failure to supply the petitioner with a copy of the documents cannot constitute a failure to give a reasonable opportunity to the petitioner to defend himself before the enquiry committee, it cannot constitute so when it is done by the officer who ultimately passed the final order.

He had therefore shown cause against the proposed punishment. We do not therefore see any substance in the contention of the petitioner that the enquiry and the order passed by the Deputy Chief Traffic Superintendent, Pandu, reducing him in rank is in any manner vitiated by failure either to give him a reasonable opportunity as contemplated by Article 311(2) of the Constitution or by failure to comply with the provisions of the Railway Establishment Code in that behalf.

5. It was further contended that the finding of the Enquiry Committee should not be accepted as it is against the charges framed against the petitioner. It is said that the enquiry report does not set out the actual words used by the petitioner which is said to constitute a rude behaviour towards an officer and further it is pointed out that though the charge against the petitioner was that on the 4th of June, 1957 he behaved in a very rude and insulting manner towards Sri Sen Gupta, the finding of the Enquiry Committee is that the charge of highly indisciplined working has been proved against him and he is unfit to come in contact with travelling public as a uniformed representative of the Railway Administration. On the perusal of the report of the Enquiry Committee we do not see any inconsistency with the charge and the findings.

The act alleged against him was that he behaved rudely in presence of other passengers and the ladies towards Sri Sen Gupta. This act of his can legitimately be characterised as working in a highly indisciplined manner and thus unfit to come in contact with the travelling public. Whether his behaviour towards Sri Sen Gupta was rude or not is a question of fact which was within the exclusive competence of the Enquiry Committee to investigate and find out. We cannot go into that question in a proceeding under Article 226 of the Constitution and the

counsel for the petitioner has not rightly pressed that contention.

If that is so, there does not appear to be any inconsistency between the charge and the finding so that it can be said that the petitioner has been prejudiced in his defence. It was also strenuously contended that what the petitioner did was only to enforce the provisions of Rule 16 and he only acted in a bona fide manner in discharge of his duty. Whether on the correct interpretation of Rule 16, Sri Sen Gupta was entitled to travel on a Metal pass with his family in a First Class compartment or not is a matter which is not relevant for the present proceeding.

The Inquiry Committee could have taken into consideration this aspect of the matter in proposing the punishment. It may be that conduct of Sri Sen Gupta in violating Rule 16 may have justified a lighter punishment, but on the finding that the petitioner behaved rudely towards Sri Sen Gupta the Enquiry Committee was fully empowered to find him guilty. It was also urged that the enquiry itself was as a result of 'class complex'. It is not necessary to consider this question in detail. The petitioner has not attacked the enquiry and the order on the ground that they were mala fide.

No clear allegations of mala fide have been made in the petition, nor has the counsel for the petitioner seriously attacked the validity of the order on that ground. There is thus only a bare statement in the petition and need not be considered. The last point urged is that in any view of the matter the petitioner is entitled to a direction that his appeal should be heard or re-heard by the Chief Traffic Superintendent as it was disposed of without giving him a personal hearing though he had asked for it. This was in contravention of the provisions of the Railway Establishment Code.

It has not been disputed and in fact it has been conceded by the counsel for the Railway Administration that these rules have got statutory force and any violation of the provisions of that rule will render the proceedings invalid and that the petitioner is entitled to claim relief in case he succeeds in establishing the violation of any of the provisions of the Railway Establishment Code.

In this view of the matter, the only point which we have to consider is whether it was obligatory on the part of the appellate authority to grant the petitioner a personal hearing and the failure to do so makes the order itself invalid. Paragraph 1721 which lays down the duties of appellate authorities is as follows;

'The appellate authority shall consider--

(a) whether the facts on which the order was based have been established;

(b) whether the facts established afford sufficient ground for taking action; and

(c) whether the penalty imposed is adequate, inadequate or excessive.

6. Whether the penalty of dismissal, removal from service, reduction or stoppage of increment has been imposed, the appellate authority may give the employee either at his discretion or if so requested by the latter a personal hearing before disposing of the appeal. At this personal hearing the employee may be accompanied, if he so chooses, by any railway official or a trade union official who is not a professional lawyer. This last part of the paragraph was added to paragraph 1721, vide Railway Board letter dated 14-4-1952.

The contention of the petitioner is that the word 'may' used in this paragraph should be interpreted as 'must'. Power has been given to the appellate authority in its discretion to allow personal hearing to the appellant and a right has been conferred on the appellant to claim such personal hearing. This right imposes a corresponding duty on the appellate authority to give a personal hearing to the appellant when asked for.

On the contrary, it is contended by the counsel for the Railway Administration that the word 'may' will govern both the discretion of the appellate authority as well as the right of the appellant to claim personal hearing and having regard to the context of the paragraph and the nature of the right, the word 'may' cannot be given the meaning 'shall'. In this connection it is emphasised that in the opening part the word used is 'shall'.

It is obligatory for the appellate authority to apply its mind to the matters enumerated in the sub-clauses of paragraph 1721 and when the framers of the rule did not use the word shall when the right to personal hearing is given, they did it deliberately and it cannot be said that they intended to confer an absolute right on the petitioner to claim a personal hearing. Secondly, it was urged that this was only an executive instruction issued by the Railway Board and the rules of interpretation applicable to the provisions of enactment cannot be applied to such executive instructions.

In the present case the obligation, if at all, is imposed by executive instructions and therefore failure to carry out such an instruction cannot result in the vitiation of the entire proceeding. In this case it is further contended that the guarantee afforded to an employee is to be found in Article 311 of the Constitution and the provisions of the Establishment Code only elaborately lay down the procedure which will ensure observance of the guarantee embodied in Article 311 of the Constitution.

The proceedings before the appellate authority are continuation of the proceedings before the enquiry officer and both these proceedings taken together point to the conclusion that the guarantee under Article 311 has been satisfied and the failure to give a personal hearing to the petitioner in appeal by itself will not render the proceedings illegal. This aspect is also relevant in interpreting the words of this paragraph.

7. Reliance was placed by the counsel for the petitioner on the following passage in Maxwell's Interpretation of the Statutes, 10th Edition at page 243:

'So, whenever a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises and its exercise is duly applied for by a party interested and having a right to make the application, and the exercise depends, not on the discretion of the Courts or Judges, but upon proof of the particular case out of which the power arises.'

8. In the case of *Delhi and London Bank Ltd. v. A. D. Orchard*, ILR 3 Cal 47, it was held by the Privy Council that the words 'must' and 'shall' may in some cases be

substituted for the word 'may' but only for the purpose of giving effect to the intention of legislature. In the absence of the proof of such intention the word 'may' shall be taken as used in its natural i.e. permissive and not in an obligatory sense. In the leading case in *F. G. Julius v. Lord Bishop of Oxford*, (1880) 5 AC 214, in construing Section 3, Church Discipline Act, the House of Lords held that the Bishops had complete discretion to issue or decline to issue commission. Earl Cairns Lord Chancellor said this which has now become 'locus classicus',

'they confer a faculty or power and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised which may couple the power with duty and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. The words 'it shall be lawful' being according to their natural meaning permissive it lies upon those, who contend that an obligation exists to exercise this power to show in the circumstances of the case something which creates this obligation.'

Lord Selborne in the same case observed that the question whether a Judge, or a public officer to whom the power is given by such words is bound to use it upon a particular occasion or in any particular manner, must be solved aliunde. In the case of *In re Baker; Nichols v. Baker*, (1890) 44 Ch D 262, 'interpreting Bankruptcy Act Lord Justice Cotton observed as follows :

'I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must' so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word 'may', it becomes his duty to exercise it.'

The principle of law is therefore not in doubt but the question of difficulty is its application.

9. The question thus to be considered is whether this confers any right on the applicant and a corresponding duty on the officer hearing the appeal; in other words does it confer an authority on the officer hearing the appeal to the benefit of third party or it is only a privilege conferred on the applicant the exercise of which is left to the discretion of the authority hearing the appeal.

When this paragraph is viewed in the light of the earlier part of the said paragraph, it is clear that the matter has been left to the discretion of the authority. The opening words of the paragraph which I have already quoted uses the word 'shall' and imposes certain duties on the appellate authority. But in the latter part of the rule the framers of the rule have deliberately used the word 'may'.

The other circumstance which points to the same conclusion is that the discretion has been given to the authority which acts on its own motion to permit personal hearing or not, and the word 'may' governs both when the permission is granted by the authority itself or when such permission is granted on being, asked for. If in one case the power is discretionary it cannot be said that the word 'may' will have a different connotation when read in the other context.

The other fact and circumstance which may be considered is that these are only executive instructions issued by the Railway Board and unless it can be found that the refusal to give a personal hearing amounts to failure to give reasonable opportunity to show cause within the meaning of Article 311(2) no relief can be granted to the petitioner under Article 226 of the Constitution merely for the enforcement of the violation of such instructions. We are, therefore, of opinion that having regard to the context the word 'may' cannot be given any different meaning from its natural meaning.

10. In the result, therefore, we see no force in this petition and it is rejected but without cost.

H. Deka, J.

11. I agree.