D. Made Gowda Vs. the State of Mysore

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SooperKanoon Citation : sooperkanoon.com/378078

Court : Karnataka

Decided On : Feb-25-1965

Reported in : AIR1966Kant220; AIR1966Mys220; [1966(12)FLR183]

Judge : H. Hombe Gowda and ;M. Santhosh, JJ.

Acts : Constitution of India - Articles 226 and 311(2); Mysore Civil Services (Classification Control and Appeal) Rules, 1957

Appeal No. : Writ Petn. No. 293 of 1962

Appellant : D. Made Gowda

Respondent : The State of Mysore

Advocate for Pet/Ap. : Sri. Subbannachar

Judgement :

M. Santhosh, J.

(1) In this writ petition under Art. 226 of the Constitution of India, the petitioner prays for a writ of certiorari or other appropriate writ directing the quashing of the order of the respondent (Government) of Mysore) No. PWD 110 DAF 58 dated 16th September 1961.

(2) The petitioner was working as a Sub-Governor in No. 2 Sub-Division, Sugar Cane Cess Fund Division Mandya. He was placed Under suspension on 7-7-1959 and the respondent directed that disciplinary proceedings should be instituted against him under Mysore Civil Services (Classification Control and Appeal) Rules 1957(which will be hereinafter referred to as the 'Rules') A joint enquiry was directed against the petitioner by Shri S. Narayanaswamy, Executive Engineer and Sri M. Chandrasekhar Junior Engineer of the Sugar Cane Cess Fund Division Mandya. The respondent appointed the special Officer, Efficiency Enquiry Officer framed a charge against the petitioner and served the same on him. The charge against the petitioner was that while he functioning as Sub-Overseer in No. 2 Sub-Division, Sugar Cane Cess Fund Division Mandya, he willfully recorded palpably false measurements on 17-5-1958 in Measurement Book No. 1451 relating to the above works and on the basis of the false measurements so recorded he wilfully claimed Rs. 3319/- in favour of the contractors s against the sum of Rs. 1706/- being the actual cost and thus intentionally caused wrongful less tot he Government to the tune of Rs. 1613/- and rendered himself liable to a charge of grave misconduct as Government servant.

A departmental enquiry was duly conducted, witnesses were examined and the petitioner was permitted to cross examine the witnesses. The Enquiry Officer thereafter submitted his report with his finding to the respondent State Government. A show cause notice why the petitioner should not be dismissed was issued by the respondent and the petitioner furnished his explanation. Thereafter, the Public Service Commission was consulted. The respondent then passed the impugned order dated 16th September 1961, compulsorily retiring the petitioner from service and directing the recovery of Rs. 806-50 P. from the petitioner towards the loss caused by him to the Government. In this writ petition, the petitioner prays that the said order be quashed.

(3) Sri Subbannachar, learned counsel for the petitioner has urged five points before us, namely (1) the refusal of permission for a counsel to appear on his behalf in the departmental enquiry is a denial of reasonable opportunity and a violation of the mandatory provisions of Art. 311(2) of the Constitution; (2) as the enquiry against him has been held by the Special Officer. Efficiency Audit, the

petitioner has been deprived of his right of appeal to the Government and as such it is discriminatory and offends Art. 14 of the Constitution; (3) respondent had no power under R. 13 of the Rules to direct a joint enquiry against the petitioner. (4) Respondent erred in relying on the tainted evidence of Shri Narayanaswamy who was an accused along with him in the said departmental enquiry; and (5) respondent acted illegally in brushing aside the considered opinion and the recommendation of the Public Service Commission.

(4) With regard to the first contention i.e. refusal of permission for the petitioner to engage a counsel to appeal on his behalf, Shri Subbannachar contends that his is a violation of the mandatory provisions of Article 311(2) of the Constitution inasmuch as he has been denied reasonable opportunity to defend himself and the same has seriously prejudiced him. He strongly relies on the Division Bench decision of this Court in Muniswamy v State of Mysore reported in (1963) 2 Mys LJ 1: (AIR 1964 Mys 250). No doubt there are certain observations in the said decision which support the contention of Shri Subbannachar, but their Lordships did not decide the question and express any final opinion on the point. In p. 14(of Mys LJ) : (p. 258 of AIR) it is specifically stated:

'I would therefore, not express any opinion on the u whether in the exercise of the reasonable opportunity ensured by Art. 311(2) counsel can as of right be appointed in every such proceeding.'

Their Lordships did not consider the various decisions to the contra relied on by the respondents in that case as they decided the matter on another ground. The point raised by Shri Subbannachar that refusal of permission to engage a counsel to defend the delinquent is denial of reasonable opportunity as contemplated by Art. 311(2) of the Constitution has been negatived by four subsequent Bench decisions of this Court. In Vijayacharya Hosur's case W.P. No. 1463 of 1960(Mys) their Lordships negatived the said contention and dismissed the writ petition.

In Basavarajappa v. State of Mysore reported in (1964) 1 Mys LJ 314, another Division Bench of this Court held that under R. 11(5) of the Mysore Civil Services (Classification, Control and Appeal) Rules, 1957 an accused officer is not entitled as of right, to be represented in a departmental enquiry by a legal practitioner and

the question whether reasonable opportunity should be held to have been denied by the refusal to permit a legal practitioner to defend, has to be decided on consideration of the facts of the particular case before the Court. Refusal of permission to an officer accused of serious charges is not per se, violation of the reasonable opportunity guaranteed under Art. 311(2) of the Constitution. Similarly in V.R. Reikar v. State of Mysore, reported in (1964) 1 Mys LJ 333(AIR 1966 Mys 218) another Division Bench of this Court decided the point against the petitioner in that case. In paragraph 4 of the Order, their Lordships observed as follows:

'Mr. Datar in support of his contention hat in being refused the services of a lawyer the petitioner was denied a reasonable opportunity of showing cause against the action proposed to be taken in regard to him strongly relies on the decision reported in (1963) 2 Mys LJ : (AIR 1964 Mys 250). In this decision their Lordships did not express any opinion on the question whether for fully availing the reasonable opportunity ensured by Art. 311(2) of the Constitution counsel as of right should be appointed in every such proceeding. Therefore, the observation made in the aforesaid decision supporting the view that the denial of the right to a delinquent official to be represented by a Counsel would amount in denial of reasonable opportunity are obiter dicta. It also appears to us that a delinquent Government servant cannot be equated to an accused facing a criminal prosecution. A Government servant is in a responsible and privileged position. The opportunity that can be afforded to explain the charges against him need not be identical with that which is allowed to an ordinary accused. It is sufficient if the opportunity is a reasonable opportunity. A reference may be made to Art. 22 of the Constitution in which provision is made in respect of an arrested person regarding legal assistance. Under Art. 22(1) 'No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice. The right given here is an unqualified right to have the assistance of a legal practitioner of his (arrested person's) choice. But in Art. 311(2) the right secured is only a reasonable opportunity.'

'The decision in Muniswamy's case (1963) 2 Mys LJ (AIR 1964 Mys 250) is referred to in two subsequent decisions, viz., W.P. No. 1463 of 1960(Mys) and

(1964) 1 Mys LJ 314 of this Court and the observations in Muniswamy's case. (1963) 2 Mys LJ 1: (AIR 1964 Mys 250) which are obiter dicta have not been followed. On the other hand in Basavarajappa's case, (1964) 1 Mys LJ 314, their Lordships indicated that some of the propositions stated in Muniswamy's case (1963) 2 Mys LJ 1(AIR 1964 Mys 250), place a Government servant in the same position as an accused in a criminal case. With respect, we do not think that this is a correct approach.'

Again, in paragraph 6 of the said Order, their Lordships have stated :--

'The enquiry in question is a disciplinary enquiry and it does not attract the formalities attached to a proceeding in a Court of law Restrictions in regard to the right of representation as provided in Clause (5) of R. 11 of the Civil Services (Classification, Control and Appeal) Rules are not unreasonable and do not amount to a denial of fair and reasonable opportunity to the delinquent Government servant to defend himself. The Supreme Court in Kalandi v. Tata Locomotive and Engineering Co. Ltd. : (1960)IILLJ228SC has also held that the denial to a workman of his request for being represented through another person in a domestic enquiry is not opposed to the principles of natural justice.'

Again, in G.V. Srinivasiah v. State of Mysore reported in (1964) 2 Mys LJ 64, their Lordships have held that where a Government servant has been afforded opportunity at every relevant stage to offer such explanation as he may have the mere possibility that a Lawyer appearing for him may have put his case better before the Enquiry Officer cannot afford any legal ground for contending that the refusal of permission has amounted to a denial of a reasonable opportunity for the purpose of Art. 311(2) of the Constitutions.

(5) It may also be mentioned that the Supreme Court in Brooke Bond India (Private) Ltd. v. Subba Raman, reported in (1961) 2 Lah LJ 417(SC), has held that a workman against whom an inquiry is being held by the management has no right to be represented at such enquiry by a representative of his Union, though the employer in his discretion can and may allow him to be so represented and it cannot be said that in any enquiry against a workman natural justice demands that he should be represented by a representative of his Union. Following this, they

have held that the refusal by the enquiring officer to the workman being represented at the domestic enquiry by a lawyer or by a outsider would not vitiate the enquiry. We are, therefore, of opinion, in view of this catena decisions, that there is no substance in the first point raised by Shri Subbannachar

(6)The petitioner in this case has been given every reasonable opportunity to defend himself. He has been permitted to cross-examine all the witnesses. He has been furnished with copies of the Enquiry Officer's report and the findings thereon. The respondent has given opportunity to show cause against the action proposed to be taken against him. The petitioner, apart from urging that he has been prejudiced by the refusal of permission to engage a lawyer has not stated before us specifically how he has been prejudiced. It may also be mentioned that in the original affidavit filed by him in this writ petition, though he has raised a number of grounds why the impugned order should be struck down significantly this particular ground does not find a place therein. The petitioner filed an additional affidavit and for the first time raised this ground in the said additional affidavit.

(7) Taking the second contention that because the Government directed an enquiry by the Special Officer, Efficiency Audit Bangalore and not by the Chief Engineer, the petitioner has been deprived of the right of appeal to the Government which he would otherwise have, and as such it would be discriminatory and hit by Art. 14 of the Constitution this point has again been concluded by the decision of this Court in W.P. No. 606 of 1961(Mys) v. Keshaviah v. State of Mysore Dealing with this point My Lord the Chief Justice who was a member of that bench at p. 6 of the said order has observed as follows:

'The first two contentions Mr. Venkataranga Iyengar, the learned counsel for the petitioner can conveniently he considered together as they relate to the legality of the enquiry conducted by the Special Officer, Anti Corruption Department which resulted in the dismissal of the petitioner it is contended that the proper and appropriate authority to conduct an enquiry into the alleged charge of misconduct against the petitioner is the Director of Sericulture, who is the 'Disciplinary Authority' and that the enquiry held by the Gazetted Assistant attached to the Government against the action taken by the Disciplinary Authority was taken away

as the enquiry was held by the Gazetted Assistant to the Special officer at the instance of the Special officer Efficiency Audit and it amounts to a denial of fair and reasonable opportunity and that it is discriminatory and is, therefore, liable to be quashed. The Mysore Civil Services (Classification Control and Appeal) Rules 1957 are framed by the Governor of Mysore in exercise of the powers conferred on him by the proviso to Art. 309 of the Constitution of India Rule 11 of the said Rules prescribed the procedure to be adopted by the Disciplinary Authority for imposing major penalties. The Disciplinary Authority in the instant case is the Director of Sericulture, R. 11 prescribes that the Disciplinary Authority may himself held an enquiry or specify any authority to hold an enquiry or specify any authority to hold the enquiry after framing definite charges on the basis of the allegations on which the enquiry is proposed to be held. The rule further prescribes that if the Disciplinary Authority is not the enquiring authority record his own findings on the charges and then communicate the same to the officer and serve a notice to show cause as to why the punishment tentatively proposed in the notice should not be inflicted on him. Under the Rules the delinquent officer on whom one of the major penalties inflicted is entitled to file an appeal against the finding and the punishment to the Government Rule 14-A prescribes specific procedure in certain cases of misconduct of a Government servant. The said rule prescribes that the Director of Anti-Corruption and Technical Audit Public Works Department (he was being called as the Special Officer. Efficiency Audit) may either suo motu or on a reference made by the Government take up any investigation and conduct the enquiry himself or authorise any officer of the Directorate of Anti Corruption and Technical Audit Public Works Department to conduct such an enquiry it is urged by Mr. Venkataranga Iyengar that in the absence of any specification on the basis of a reasonable classification of the nature or class of offence or class of persons who should be subjected to the Special Enquiry under R. 14-A the investigation conducted by the Special Officer is arbitrary and offends Art. 14 of the Constitution of India. We are unable to subscribe to this contention. It is not disputed that the procedure prescribed for holding an enquiry under R. 141-A of the Mysore Civil Services (Classification Control and Appeal) Rules 1957 is not different from the procedure prescribed under R. 11 of these Rules Sub-Rule (1)(d) of R. 14A states 'The Officer authorised to conduct the inquiry in accordance with the provisions of

Sub-rr. (2), (3), (4), (5), (6) and (7) of R. 11 and for the purpose of such inquiry shall have the powers of the specially empowered authority referred to in the said rule;' The main grievance of the petitioner is that the right of appeal to the Government which was available to him if an enquiry had been conducted under R.11 is curtailed by virtue of the enquiry under R. 14A and therefore, amounts to a denial of a fair and reasonable opportunity and is also discriminatory Rule 14-A prescribes that after the enquiry is conducted by the Director of Anti-Corruption and Technical Audit Public Works Department or by any authority specially empowered by him the officer should submit his finding to the Government who will pass necessary orders. There is no provision made for an appeal against the order so passed. The only point for consideration is whether the mere fact that the right of the petitioner to prefer an appeal which he would have if the enquiry is conducted under R. 11 of the Mysore Civil Services (Classification Control and Appeal) Rules 1957 is taken away by virtue of the enquiry being held under R. 14-A is discriminatory and contravenes Art. 14 of the Constitution. This question is no longer res integra. The Supreme Court has in a recent decision in state of Orissa v. Bidya Bhushan Mahopatra, : (1963)ILLJ239SC held that such a procedure does not offend mere fact that under the Classification Rules there is a right of appeal against the order passed by the Government imposing penalty upon a public servant under a separate set of Rules in the Classification Rules cannot be regarded as a ground sustaining a plea of unlawful discrimination. Their Lordships rejected a contention similar to the one advanced before us with the following observations:

'The plea that there was discrimination because there was a right of appeal against an order imposing penalty under one set of rules and no such right under one set of rules and no such right under the other was rejected in AIR 1964 SC 1245. It must therefore be held that the existence of a right of appeal against the order of an administrative head imposing penalty and absence of such a right of appeal against the order of Governor under the Tribunal Rules does not result in discrimination contrary in Art. 14 of the Constitution.

In the light of the above, the first two contentions of Mr. Venkataranga Iyengar should be rejected.'

The same point has also been considered in W.P. No. 1463 of 1960(Mys) at p. 27 of the said orders their Lordships have observed as follows:

'Now, the right of appeal claimed by Charapani and Qamruddin is the right which they would have had if the disciplinary authority had been an authority inferior to the Government against whose order provision is made order the rules for an appeal to a higher authority. What is appealable is an order of a particular authority. A delinquent's right to appeal arises only if an order is passed by such authority and not otherwise. The delinquent has no indefeasible right to have misconduct of his enquired into only by particular authority. If therefore by property exercise of the power under R. 13 the Government declares itself to be a disciplinary authority, testator delinquent cannot successfully contend that the enquiry should have been held by an inferior authority so that he may have a right of appeal. The position may be compared to the well known situation under the C.P.C. under the 24th Section of which the High Court or the District Court may at any time withdraw a suit or appeal to its own file and dispose of it which may involve the deprivation of at least one appeal which would otherwise have been available to a party. It has never been suggested that the deprivation of the right of appeal which is involved in the power of transfer under S. 24 of the C.P.C. vitiates the exercise of the said power of transfer by the High Court or the District Court. This argument therefore on behalf of Chakrapani and Qamruddin has to be rejected.'

(8) Taking the 3rd and 4th points together i.e. holding of joint enquiry and relying on the evidence of Naraynswamy these points again are covered by the Division Bench decision of this Court in W.P. No. 1463 of 1960(Mys) At p. 20 of the order therein their Lordships have observed as follows:

'The third argument on this point is that the petitioner have been prejudiced by common enquiry having been conducted in respect of several people and by the statements of other co-delinquents having been made use of against them. Further emphasis is placed on the second point by pointing out that the said co-delinquents who made these statements have been dealt with very leniently and awarded lighter punishment.

'It is not sought to be controverted that the nature of defalcation and the manner in which it was effected were such as to comprehend the activities of several persons. It is also clear that the nature of the evidence was common and relevant to the case of almost every delinquent Sub-rule (1) of rule 13 of the Classification Control and Appeal rules also provides that where two or more co-delinquents are concerned in any case, the Government may make an order directing that disciplinary action against all of them may be taken in a common enquiry. In this case the Government appears to have applied their mind to the situation and actually decided to direct a single or common enquiry. Prima facie therefore the mere fact that a common enquiry was conducted cannot by itself lead to any prejudice.

'It is true that the statements of the co-delinquents have been relied upon. But it appears from the record of the enquiry as well as from the written statements of Vijayacharya Hosur that the petitioners were not denied an opportunity to cross-examine them Nor is there any complaint made in that regard in any of the affidavits filed in support of the petitions. The award of lighter punishment to such of the delinquents as had made certain statements useful to support the charges is a matter of discretion with the punishing authority. Indeed actual tender of pardon in criminal cases to one of the several accused who agrees to depose as an approver is a well known procedure in criminal law and it has never been held that such procedure vitiates a criminal trial though of courts the approver's evidence is accepted with caution. There is also no evidence in the present case that the co-delinquents who made the statements in support of the charges, had made them under any inducement or threat or other circumstances making them unworthy of acceptance.

'We do not think therefore, that either of these circumstances viz., the holding of a joint enquiry or the reliance placed by the Enquiry Officer on the statements of the co-delinquents has prejudiced the case of the petitioners.'

(9) With regard to point No. 4, i.e. examination of Shri Narayanaswamy, reported in (1964) 1 Mys LJ 314, adverting to this point their Lordships have held that an Enquiry Officer is not bound by technical rules of evidence, the proceedings before

him are not governed by the provisions of the Evidence Act, technical rules relating to the sufficiency of evidence do not apply to departmental enquiry, the Enquiry Officers, if they so choose can act on the basis of uncorroborated testimony of accomplices or partisan witnesses. It may also be mentioned that the petitioner has not objected to the joint enquiry held by the Special Officer Efficiency Audit nor to the evidence given by Narayanaswamy. Even in his reply to the show-cause notice, he was not raised this point. It is only in the Writ petition, he has, for the first time, taken these points.

(10) Coming to the 5th and the last point that the respondent acted illegally in bruising aside the opinion of the Public Service Commission. It may be mentioned that it is well settled that even consultation with the Public Service Commission as laid down by Art. 320(3)(c) of the Constitution is not mandatory and non-compliance with the said provision does not vitiate the order passed against Government servant. The Supreme Court in State of U.P. v. Manbodhan Lal Srivastava, reported in : (1958)IILLJ273SC , has held that Art. 320(3)(c) of the Constitution does not confer any right on a public servant so that the absence of consultation or any irregularity in consultation, should not afford him a cause of action in a court of law, or entitle him to relief under the specific powers of a High Court under Art. 226 of the Constitution or of the Supreme Court under Art. 32.

It is not a right which could be recognised and enforced by a Writ. The Supreme Court has further held that it is clear that the requirements of the consultation with the Commission does not extend to making the advice of the Commission on those matters, binding on the Government. In the absence of such binding character, it is difficult to see how non-compliance with the provisions of Art. 320(3)(c) could have the effect of nullifying the final order passed by the Government. In this case, there is no dispute that the Mysore Public Service Commission was consulted before the respondent passed the impugned order. It is no doubt, a fact that the Mysore Public Service Commission expressed the opinion that the punishment of dismissal proposed by the Government is too heavy and not commensurate with the gravity of the offence committed by the petitioner.

The Commissioner also recommended that the ends of justice would be met by reducing the petitioner to Rs. 70, the minimum of the present grade, with a warning and recovering half the amount of the loss caused to the Government, i.e. Rs. 806.50 p. The Government did not agree with the lenient punishment proposed by the Mysore Public Service Commission and gave reasons why it did not agree with the Commission. It may also be mentioned that the Government did not actually impose the punishment of dismissal on the petitioner which had been contemplated when it asked the petitioner to show cause, but altered it to one of compulsory retirement. Whether the punishment given is adequate or not a matter to be decided by this court. Government is not bound to accept the advice given by the Commission about the quantum of punishment. We are, therefore, of opinion that there is no merit in this contention also.

(11) In the result, for the reasons stated above, there is no merit in any of the contention is dismissed. In the circumstances of the case, there will be no order as to costs.

(12) Petition dismissed.