

Baidhar Das Vs. the State and ors.

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Court : Orissa

Decided On : Aug-13-1969

Reported in : AIR1970Ori220

Judge : G.K. Misra, C.J. and ;R.N. Misra, J.

Acts : Orissa Civil Service (Classification, Control and Appeal) Rules, 1930 - Rule 15; [Constitution of India](#) - Article 311(2)

Appeal No. : O.J.C. No. 63 of 1968

Appellant : Baidhar Das

Respondent : The State and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : S. Misra (2), Adv.

Disposition : Petition allowed

Judgement :

R.N. Misra, J.

1. This is a writ application under Articles 226 and 311 of the Constitution at the instance of the petitioner who was an organiser of the Craft School, Cuttack. He came to be appointed to such post in 1955, and while he was serving in such

capacity, on 6-5-67 he was subjected to a departmental proceeding. Twelve charges were framed against him by the appointing authority and he was called upon to submit his explanation in respect of such charges. On 11-5-57, he applied for copies of statements of facts on which the charges were based and of documents referred to in the charges in order to be in a position to offer his explanation against the charges. As the copies were not supplied ultimately on 9-8-57 he offered his explanation mentioning therein that he had been handicapped in placing his explanation against the charges on account of the non-supply of the statements of facts and the documents which he had asked for. One Sri L. S. Panda, the Assistant Director of Industries, was appointed the enquiring officer. The enquiry continued for over three years. Two more enquiring officers in succession were appointed, and ultimately the last enquiring officer, Shri L. Dandapat submitted his report on 28-12-60. At the enquiry, 28 witnesses in support of the charges and 9 in support of the petitioners' defence were examined. 193 documents were exhibited. The disciplinary authority had nominated an Anti-corruption Inspector to present the case in support of the charges before him. The petitioner had, therefore, raised an objection to the conduct of the case by a Prosecuting Inspector. The disciplinary authority by his order dated 17-7-58 rejected the application. Thereafter the petitioner came up with an application for permission to have legal assistance in support of his defence, but the enquiring officer refused such request by his order dated 18-8-1958.

After the enquiry was over, the petitioner was called upon to offer a second explanation against the charges, obviously on account of the fact that the documents had not been given to him and he might not have given a complete explanation on the earlier occasion. That explanation he gave on 9-2-61. On 5-5-62 the petitioner was called upon to show cause against the proposed punishment, and on 7-5-63 the Director of Industries passed the order of discharge from service. Of the twelve charges framed against the petitioner, the enquiring officer had found him guilty in respect of ten. The punishing authority found that two more charges had not been proved against the petitioner, and the punishment ultimately rested on the eight remaining charges framed against the petitioner. Aggrieved by the said order of discharge from service, the petitioner has come before this Court.

2. The opposite parties have filed a counter-affidavit wherein it has been contended that the petitioner had inspected some records and was allowed to have copies from them, and some other records were produced before the enquiring officer at the time of enquiry and the petitioner was given sufficient opportunity to examine and cross-examine witnesses on the basis of the documents. Therefore, the petitioner was not prejudiced in raising a proper defence. It was further asserted that the charges were not at all intricate or complicated, and the petitioner had not made out any special facts and circumstances for allowing the assistance of a legal practitioner.

3. Two contentions were raised by Mr. Misra appearing for the petitioner. They are-

(1) The petitioner has been substantially prejudiced on account of the omission on the part of the authorities to provide the delinquent with the statements of facts on the basis whereof the charges were framed, and on account of the non-supply of the documents material and relevant for the enquiry; and

(2) Denial of legal assistance in the facts of the present case has denied the reasonable opportunity guaranteed under Article 311(2) of the Constitution to the petitioner in defending himself.

4. The first contention of Mr. Misra that reasonable opportunity has been denied on account of the non-supply of material papers and documents is sought to be made on the basis of Rule 15 of the Orissa Civil Service (Classification, Control and Appeal), Rules, 1962 (hereinafter referred to as the Rules). The petitioner lost sight of the fact that the enquiry was concluded at a time when the Rules of 1962 were not in force. The present enquiry was being undertaken under the old Civil Services (Classification, Control and Appeal) Rules. The material provisions of the aforesaid Rules are absolutely similar to those contained in the Rules of 1962. The counter-affidavit however did not question the assertion made by the petitioner that there was non-compliance of the provisions of the Rules of 1962. To examine the first contention of Mr. Misra, reference has however to be made to the Civil Services (Classification, Control and Appeal) Rules, 1930, and not to the Rules framed in 1962. The requirement for supply of a statement of the allegations, on

which the charges are based, was also prescribed in such Rules. The procedure prescribed for enquiry against delinquent public servants, as contained in the aforesaid Rule provides for 'reasonable opportunity' as contemplated under Article 311(2) of the Constitution, and, therefore, compliance with each of the requirements laid down by the rule in question should normally be insisted upon, as otherwise reasonable opportunity, which is guaranteed to the public servant under Article 311(2) of the Constitution, may not be ensured to the delinquent whose conduct is under enquiry. On examination of the charges in the instant case, it is clear that the statement of facts is not included therein. The allegation in the counter-affidavit that the charges included the statement cannot be accepted.

5. Annexure 8 to the writ application is an application of the petitioner dated 14-12-1959 to the Joint Registrar of Co-operative Societies, Orissa, for supply of records and documents. Therein the petitioner has referred to seven of his earlier applications between 11-5-57 and 11-11-59. The petitioner clearly indicated in the said application that no action had been taken on all his previous applications for the documents and he was handicapped in his defence. He, therefore submitted a list of records and documents which he wanted and prayed that authenticated copies of the said documents should be made available to him. The authorities seem to have taken a callous attitude and did not dispose of his representations either contemporaneously or within a reasonable time. The enquiry continued and witnesses after witnesses before different enquiring officers were being examined. Voluminous documents were being placed in support of the charges. The petitioner did not have any opportunity of knowing the contents of the documents which were going to be utilised against him. As he was not being represented by a counsel at the enquiry, it was incumbent upon the enquiring officer to ensure that the petitioner had been provided with copies of the documents or at least inspection thereof before the documents were being exhibited by different witnesses who were being examined in support of the charges. Realising this infirmity, the authorities called upon the petitioner to offer another explanation against the charges after the enquiry was over. It may be that by that time the petitioner had acquainted himself with the materials that were used against him but the enquiry was over and the witnesses had already been examined and cross-examined and the documents had been exhibited. While the petitioner was

called upon to give another explanation against the charges, the enquiry was not reopened and, therefore, the petitioner cannot be said to have had the benefit which he could otherwise have had if the documents or copies thereof had been provided to him before the witnesses were examined. It is settled law that a delinquent can establish his defence by cross-examining the witnesses in support of the charge. That right had been denied to the petitioner in the present case.

In paragraphs 4 and 5 of the counter affi-davit it is stated,

'4..... it is submitted that some of the records were inspected by the petitioner and the petitioner was allowed to take copies therefrom and other records were produced before the enquiring officer at the time of enquiry and the petitioner was given sufficient opportunity to examine and cross-examine the witnesses on the basis of the documents.

5. That as regards the statement in paragraph 7 of the writ application it is submitted that as the petitioner could not get adequate opportunity of going through the records on which charges were based, he was given a second chance to submit the written statement basing on facts alleged in course of enquiry and the petitioner submitted this statement on 9th February, 1961.'

It is interesting to find that the punishing authority noticed this aspect in his final order. He stated,

'As the delinquent officer could not get adequate opportunity of going through the records on which charges were based, he was given a second chance to submit a written statement basing on facts allowed in course of enquiry and Sri Baidhar Das gave his statement on 9-2-61.'

On the accepted position that reasonable opportunity was not given to the petitioner before or at the enquiry and he was prejudiced in raising his defence properly, the proceedings are liable to be quashed. Article 311(2) of the Constitution which guarantees a reasonable opportunity to a public servant ensures (a) an opportunity to deny his guilt and establish his innocence which he can only do if he is told what the charges levelled against him are and the

allegations on which such charges are based; fb) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and (c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him. This rule laid down in AIR 1958 SC 300 (Khem Chand v. Union of India) has been accepted as laying down the real purport and scope of the guarantee under Article 311(2) of the Constitution. In the facts of the present case, there can be no doubt that the said reasonable opportunity has been denied to the petitioner and an infirmity has crept into the proceedings. The first contention of Mr. Misra, therefore, is bound to succeed.

6. The second contention raised by Mr. Misra is equally forceful. The charges in this case were of falsification of accounts, misappropriation of Government money, acceptance of illegal gratification etc. As many as 28 witnesses in support of the charges, 9 in support of the defence were examined. As has already been indicated 193 documents were exhibited. The enquiry began in the year 1957 and ended in 1961. Three enquiring officers in succession to one another were appointed. The punishing authority noticed this aspect of the matter also and in his final order he stated,

'The case is pending with me for a few months, but as depositions of 37 witnesses had to be read and as the report of the Enquiring Officer and the explanations given by Sri Baidhar Dash, Ex-Organiser of the Crafts school on different occasions had also to be studied, I never found time enough to go through all these materials. In the meantime Sri Baidhar Dash had seen me several times. At first the enquiry was taken up by the Asst. Director of Industries (General) who examined 3 prosecution witnesses and later Joint Registrar of Co-op. Societies (General) Sri A. B. Panda took up the enquiry and examined 27 prosecution witnesses including those re-examined. Sri L. Danda-pat, Joint Registrar of Co-op. Societies (General) completed the enquiry and examined 9 defence witnesses. In all 28 prosecution witnesses, 9 defence witnesses and 193 exhibits were examined and produced.'

From the materials on record we gather that the petitioner does not have much of educational attainment and nothing is placed on record to show that he has the working knowledge of the procedures obtaining in courts relating to examination and cross-examination of witnesses. There is no doubt that the charges are of very serious nature. The documents are bulky and many. The witnesses examined in support of the charges are also too many.

7. The contention raised by Mr. Misra has to be examined from two aspects. Firstly, if the person nominated by the disciplinary authority to present the case in support of the charges is a legal practitioner, the delinquent officer is entitled, as of right, to be represented by a legal practitioner at the enquiry. If however the officer nominated to present the case 'in support of the charges is not a legal practitioner, the delinquent officer is not entitled to such representation by a lawyer unless the disciplinary authority, having regard to the circumstances of the case, permits such representation. This aspect of the matter had been the subject matter of examination in this Court on several occasions. A Division Bench of this Court examined the matter in AIR 1959 Orissa 152 (James Bushi v. Collector of Ganjam) and stated thus :--

'In departmental proceedings against delinquent public servants they are not entitled, as of right, to be represented by a lawyer; and it is left to the discretion of the Officer holding the enquiry to allow, or refuse to allow, a lawyer to represent the delinquent officer. Hence, the mere denial of such legal help will not necessarily involve failure to observe the rules of natural justice in all cases. In considering the question of prejudice other factors such as the nature of the charges made against the public servant and his own educational and other attainments which have a bearing on his ability to defend himself without legal help, should also be considered.'

On the next occasion when the same point came up for examination in AIR 1962 Orissa 78 (Nitya Ranjan v. State) Chief Justice Narasimham on behalf of the Division Bench stated :--

'Though in a departmental enquiry the delinquent public servant may not be entitled as of right to legal assistance to defend himself, nevertheless, there may

be special circumstances connected with the case, such as, complexity of facts, volume of evidence, the educational attainments and experience of the public servant etc. which may show that without legal assistance he will not be able to adequately cross-examine the witnesses or to establish his innocence. In such circumstances denial of legal assistance may be equivalent to denial of 'reasonable opportunity' within the meaning of Article 311(2) and the entire proceeding is liable to be quashed.'

In both the cases, the principle that in proper cases legal assistance would be required to be provided as a part of 'reasonable opportunity' was accepted. But in the first case the Court came to hold that the petitioner therein was used to the process prevalent in court and as a fact had been able to cross-examine the witnesses sufficiently. Therefore they did not entertain the contention that denial of legal assistance had vitiated the ultimate order of punishment. In the second case, however, their Lordships stated as follows :--

'Judged in the light of the aforesaid principle the petitioner's contention must succeed. This case is of unusual complexity. The total number of witnesses crammed on the side of the prosecution and defence and Court was 91. The total number of documents exhibited was 166. The deposition of witnesses alone runs into 437 pages. The charges deal with criminal breach of trust, falsification of accounts and forgery which, as is well known, are some of the most difficult offences in the Penal Code.

The petitioner is comparatively a junior officer of the Forest Department who entered service in 1951 and has absolutely no knowledge of law. It is true that as an Assistant Conservator of Forests he might have detected and tried a few minor forest offences, but his intellectual attainments and experience cannot be said to be of that standard as to enable him adequately to cross-examine witnesses in a case of this type. In the peculiar circumstances of this case, therefore, the petitioner should have been permitted to be represented by a lawyer as prayed for by him.'

The punishment in the second case was vacated on the aforesaid finding. The facts of the present case are almost comparable to the facts of AIR 1962 Orissa

78 referred to above. The gravity of the charges, the nature of evidence led, and the extent of documents exhibited clearly go to show that the petitioner could not have cross-examined the witnesses and supported his defence without representation by a lawyer. This aspect of the matter came up for examination by a Division Bench of this Court consisting of my Lord the Chief Justice and myself very recently in O. J. C. No. 1678 of 1968 (Orissa) (Puma Chandra Sethi v. Supdt., Proof and Experiments, Chandipur) disposed of on 30-7-1969, wherein my Lord the Chief Justice examined the legal aspects at length and laid down the law applicable to such cases.

8. The person nominated to present the case in support of the charges in this case was an Anti-corruption Inspector. The petitioner raised an objection to the engagement of such a person at the enquiry. On 14-7-1958 the disciplinary authority informed the petitioner the decision on his objection. Annexure 6 is the said decision which is extracted below :--

'With reference to your letter No. 15 dated 18-2-1958 raising an objection to the presence of Sri G. N. Brahma, Inspector, Anti-corruption in course of the hearing, I am to inform you that there is no harm in having an investigating officer to assist the enquiring Officer. The enquiring officer can take any reasonable assistance in the matter, as such. Your objection to Shri G. N. Brahma assisting the investigating officer in course of the enquiry is not acceptable.

It may be true that the Anti-corruption Inspector was not a legal practitioner. But we cannot shut our eyes to the fact that the said Inspector is an experienced prosecutor and for the petitioner to be pitted against such a person at the enquiry definitely puts the delinquent petitioner at a disadvantage. Such a contention was raised before this Court in AIR 1962 Orissa 78 referred to above. His Lordship the Chief Justice in disposing of this matter in that case stated :-- 'The petitioner and the Prosecuting Inspector were not placed on the same footing as far as the applicability of Rule 6 (2) of the Disciplinary Proceeding (Administrative Tribunal) Rules were concerned. He further contended that the word 'counsel' occurring in Rule 6 (2) should not be given a narrow meaning. so as to restrict it to legal practitioners practising in law courts but that it should be construed in a liberal

sense to include all those persons who by virtue of their experience and attainments are in no way inferior to legal practitioners.'

The Court however did not dispose of the said aspect.

9. This point came up for examination before a Division Bench of Mysore High Court in AIR 1964 Mys 250 (T. Muniswamy v. State of Mysore). Iyer, J., delivering the judgment of the Division Bench said,--

'But the two rules made by the Governor assist the impeachment in every possible way and cripple the defence in an equal measure. If one of these rules permits the impeachment to be entrusted to any agency selected by the disciplinary authority, and empowers him to do so in any case, there can be small reason for the refusal of that right to the government servant or for the prescription of the permission of the disciplinary authority to engage counsel. The bestowal of power on the disciplinary authority to decide whether the case is one for the grant or refusal of such permission without placing any such restriction on the power of the disciplinary authority to arrange for the conduct of the impeachment, is as unreasonable and discriminatory as the prohibition against the engagement of any one other than an approved government servant for the conduct of the defence without any corresponding restraint on the selection by the disciplinary authority. Further, although a disciplinary authority is a tribunal to whom the power to pronounce on the guilt or innocence of the government servant is confided, Rule 11 (5) very strangely makes it his duty to arrange for the presentation of the case in support of the charge, which is not known to be the concern of a quasi-judicial tribunal which the disciplinary authority is. If the exercise of the power to nominate a person to conduct the impeachment involves the application of the mind of the disciplinary authority to the selection of a suitable person for that purpose, the disciplinary authority does not when making such selection function as a tribunal but as a statutory authority entrusted with, the duty to arrange for the establishment of the accusation, and in that role, it occupies a position similar to that of the government servant both of whom should therefore be treated alike and afforded equal opportunities in their respective pursuits which Rule 11 (5) does not, and is therefore susceptible to the criticism that its provisions are not in

consonance with the spirit of Clause (2) of Article 311.'

There is much force in what has been stated and it is indeed a matter for serious consideration of the authorities framing rules under Article 311(2) of the Constitution connected with disciplinary proceedings to examine this aspect of the matter and provide sufficient protection for the guarantee of reasonable opportunity to the delinquent public servant. In this view of the matter, the second contention of Mr. Misra also succeeds. In the facts and circumstances of this case, the disciplinary authority acted contrary to the spirit of Article 311(2) of the Constitution in denying the representation of the petitioner by a lawyer at the enquiry, and thus deprived him of the reasonable opportunity guaranteed to the petitioner as a public servant under the said provisions of the Constitution. The enquiry is thus vitiated.

10. We, therefore, issue a writ of certio-rari and quash the order of discharge from service of the petitioner dated 7-5-1963 and direct that the petitioner be taken as continuing in service. We however make it clear that it is open to the disciplinary authority to continue the proceedings on the basis of the charges framed in accordance with law. This writ application is allowed with costs. Hearing fee of Rs. 100/- (Rupees one hundred).

G.K. Misra, C.J.

11. I agree.

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