

Brahmananda Satpathy Vs. State of Orissa

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Court : Orissa

Decided On : Jan-27-1969

Reported in : AIR1969Ori224; 35(1969)CLT874

Judge : S. Barman, C.J. and ;B.K. Patra, J.

Acts : Civil Services (Classification, Control and Appeal) Rules, 1930 - Rules 49 and 55; [Constitution of India](#) - Article 311; Orissa Service Code - Rule 91(5)

Appeal No. : O.J.C. No. 15 of 1965

Appellant : Brahmananda Satpathy

Respondent : State of Orissa

Advocate for Def. : Government Adv.

Advocate for Pet/Ap. : S. Misra, Adv. (1)

Judgement :

Patra, J.

1. The petitioner has filed this application under Article 226 of the Constitution praying for issue of a writ in the nature of Certiorari quashing an order dated 27th November, 1961 passed by the Government of Orissa imposing certain punishments on the petitioner. The petitioner joined service as an Assistant in the

Finance Department of the Government of Bihar and Orissa in 1933 and continued in service under the Government of Orissa with effect from 1-4-1936. In due course, he was promoted as personal Assistant to the Director of Industries in the year 1943. While so working charges were framed against him by Government on 7th May, 1967 for retaining undisbursed money in his personal custody, for drawing irregularly money from the Treasury and for utilising the money drawn for a particular purpose for other purposes (Annexure-A). Before the charges were actually served upon Mm, he was put under suspension with effect from 8th December, 1956 (Annexure B). The petitioner submitted his explanation to the charges which were thereafter duly enquired into by Sri S. C. Panigrahi, the Deputy Secretary, who found him guilty of all the three charges, but considered charges nos. 2 and 3 to be not of a very serious nature, and submitted record of his enquiry to Government. On 3rd August, 1959, Government communicated to the petitioner their tentative decision, the relevant portion of which may be quoted:

'Government have tentatively decided that you will be reinstated with reduction of your pay as ex-Personal Assistant to Director of industries to Rs. 410/- per month from the date of your reinstatement in your present scale, with recovery of the difference between your normal pay and allowances and the amount of subsistence allowances and other allowances allowed to you during the period of your suspension.

You are hereby called upon to show cause within one month from the date of receipt of this letter why the punishment as noted above should not be inflicted on you.'

(Government of Orissa, Industries Department Memo No. 13550-1, Dt. 3/4th Aug. 59-Annexure E).

The petitioner showed cause in due time. But the Government on 27th November, 1961 passed the impugned order of punishment (Annexure-G) which may be quoted in extenso:

'Copy of letter No. 18984-I., dated Bhubaneswar, the 27th/28th November, 1961, from Shri J. Mohapatra, Undersecretary to Government of Orissa, Industries

Department, to the Director of Industries, Orissa.

Sub:- Proceedings against Shri B. Sat-pathy Personal Assistant to Director of Industries, Orissa--Award of Punishment.

Sir,

I am directed to invite a reference to this Department Memo No. 18490(2)I dated 27-10-59 communicating the orders of Government to reinstate Shri Brahmananda Satpathy in the post of Personal Asst. to Director of Industries, Orissa pending finalisation of the departmental proceedings instituted against him and the manner of treatment of the period of his suspension and to say that Government in consultation with the Public Service Commission have finally been pleased to decide that as the Officer is considered guilty of the first charge and is also not fully exonerated from the other two charges brought against him, he should be awarded punishment as follows:

- '1. He is awarded a censure.
2. His pay in the post of Personal Assistant to Director of Industries is reduced from Rs. 435/- to Rs. 410/- per month in the scale of Rs. 310-35-435/-for a period of one year from the date he joined his post on being reinstated therein in accordance with the G. O. under reference.
3. The period of suspension will not be treated as duty. It will be treated as suspension only. The officer will not be entitled to anything more than the subsistence allowance and other allowance sanctioned by Government from time to time for the said period under the rules.'XX XX XX

It may be stated here that even during the pendency of the proceedings against the petitioner, he was by order dated 27th October, 1959 released from suspension with effect from the next date, namely, 28th October, 1959. The petitioner resumed his duties as Personal Assistant to the Director of Industries from which post he retired in due course. The petitioner preferred an appeal against the punishment imposed upon him but Government rejected the appeal.

2. In support of his contention that the punishment imposed on him is illegal, the petitioner urges:

(1) that he was not allowed reasonable opportunity to defend himself by proving official documents to show authority under which he acted;

(2) that the order directing that the period of suspension will not be treated as period spent on duty is illegal because it was passed without giving an opportunity to the petitioner to show cause against the passing of such order; and

(3) that suspension as a substantive punishment in the circumstances amounts to reduction in rank and as such the infliction of such punishment is in violation of Article 311(2) of the Constitution:

(4) that the punishment of 'censure' not being a part of the punishment tentatively decided, the infliction thereof is illegal; and

(5) that action of the Government is otherwise mala fide.

3. In answer to the averments, the State of Orissa in their counter contended inter alia that the enquiry conducted against the petitioner was full and fair and that he had been afforded all reasonable and necessary facilities to defend himself. Regarding the petitioner's complaint that penalties not mentioned in the tentative decision of Government had been imposed upon him, it is contended by the State that those additional penalties, namely, 'censure' and 'suspension' being penalties other than dismissal, removal or reduction in rank, it was not obligatory on the part of Government to afford an opportunity to the petitioner to show cause why those punishments should not be imposed on him and all that was necessary before imposing such penalties was to afford him an opportunity to make a representation which has been given in this case and that therefore, imposition of such penalties would not be illegal. It is further contended that suspension does not in the eye of law amount to reduction in rank. It was further stated that the Public Service Commission was duly consulted before the punishments were finally decided upon and that Government's action was not mala fide.

4. At the hearing of this application, Mr. S. Misra, learned Advocate for the petitioner did not, and in our opinion rightly, press his contention that the enquiry conducted against the petitioner was not full and fair and the Government acted mala fide in imposing the several punishments on the petitioner. We are also satisfied on perusing the report of enquiry that all reasonable facilities had been afforded to the petitioner and that the Enquiring Officer considered the case from all points of view in arriving at the conclusion that he did. It is also seen from the records that Government before finally deciding on the penalties they wanted to impose on the petitioner, consulted the Public Service Commission as they were bound to do under the rules and it is after such consultation that final orders were passed. There is nothing on record to indicate that Government acted mala fide in imposing these punishments.

5. There then remains for consideration the three other objections pressed by the petitioner. By the time the proceedings were instituted against the petitioner and also when they were finalised, the Civil Services (Classification, Control and Appeal) Rules, 1930 were in force. Rule 49 thereof enumerated the several penalties which could be imposed upon members of the service, 'Censure' and 'suspension' being two of such penalties. Rule 55 of the Rules provided for the procedure to be adopted in enquiries where the major penalties of dismissal, removal or reduction in rank were intended to be imposed and the procedure prescribed was similar to the one prescribed in Rule 15 of the 1962 Rules for imposition of what are called major penalties, namely, reduction, compulsory retirement, removal and dismissal from service. The procedure also provided for giving an opportunity to the delinquent to show cause against the proposed punishment. Where, however, the punishment inflicted was one other than the major penalties, enumerated above, no such elaborate procedure was necessary and it was also not necessary to ask the delinquent to show cause against the proposed penalty. That being the position, the petitioner cannot legitimately complain that the penalties of 'Censure' and 'suspension' were imposed upon him without affording him an opportunity to show cause against the imposition of such penalties.

6. It is then contended by Sri Misra that since in the instant case, Government had ordered that the period of suspension could not be treated as duty, this amounted to reduction in rank and as such both under the C. C. A. Rules of 1930 and Article 311 of the Constitution, he was entitled to get an opportunity to show cause against the imposition of such penalties. This grievance of the petitioner would be well founded if he is correct in his submission that the penalty of suspension in the circumstances amounted to penalty of reduction in rank. But there is no authority to substantiate such contention that the punishment of suspension in any case would amount to reduction in rank within the meaning of Article 311 of the Constitution. We, therefore, do not find anything illegal in imposition of this penalty on the Petitioner.

7. The only other contention that remains for consideration is whether Government were bound to give an opportunity to the petitioner to show cause why the period of suspension should not be treated as period not spent on duty and whether such an order passed without giving opportunity to the petitioner is illegal, Rule 91 of the Orissa Service Code under which apparently Government has passed this order may be quoted.

'91. (1) When a Government servant who has been dismissed, removed, compulsorily retired or suspended is reinstated or would have been reinstated but for his retirement on superannuation, while under suspension 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 or for the period of suspension ending with the date of his retirement or superannuation as the case may be, and

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

(2) Where such competent authority holds 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 to which he would have been entitled had he not been dismissed, removed, compulsorily retired or suspended, as the case may be, together with any allowances of which he was in receipt prior

to his dismissal, removal or suspension.

(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 Clause (3) shall be subject to all other conditions under which such allowances are admissible;

Provided further that such proportion of such pay and allowances shall not be less than the subsistence and other allowances admissible under Rule 90.

(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 so treated for any specified purpose:

Provided that if the Government servant so desires, such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant.'

It was contended on behalf of the State that Rule 91 does not expressly lay down a duty on Government to give an opportunity to show cause to the Government employee concerned before passing an order under that rule. It is also contended that the rule cannot be said to lay down any such duty by implication inasmuch as the impugned order is only a consequential order following a departmental enquiry held against the petitioner in the course of which full opportunity had been afforded to him to show cause. In this case after duly considering the cause shown by the petitioner, Government found him guilty of some of the charges and imposed upon him the necessary penalty. In view of the fact that the petitioner had not been fully exonerated, the Government were right under Sub-rule (5) of Rule 91 to decide that the period of absence from duty shall not be treated as period spent on duty. An order passed under Rule 91 would affect the Government servant adversely if it is one made under Clauses (3) and (5). Consideration under this rule depending as it does on facts and circumstances in, their entirety, passing

an order on the basis of factual finding arrived at from such facts and circumstances and such an order resulting in pecuniary loss to the Government servant must be held to be an objective rather than a subjective function. The very nature of the word 'function' implies the duty to act judicially. In such a case, if an opportunity to show cause against the proposed action is not afforded, as admittedly it has not been done in this case, the order is liable to be struck down as invalid on the ground that it is one in breach of principles of natural justice. A similar view was taken by a Division Bench of the Bombay High Court in Vasant Raghunath v. State of Maharashtra, AIR 1963 Bom 137. There, proceedings were started against a Revenue Inspector on charges of corruption and he was placed under suspension. In due course, an inquiry was held and the Government on considering the inquiry report came to the conclusion that the charge was not proved. He was therefore directed to be reinstated in service and Government passed an order that the intervening period between suspension and reinstatement should be treated as leave due and admissible followed by extraordinary leave without pay. Such an order admittedly resulted in substantial loss being caused to the petitioner and he complained that such an order passed against him without affording him any opportunity to show cause against the passing of such an order was illegal. The Bombay High Court held that the Government servant should have been given reasonable opportunity 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 and that such an opportunity is a prerequisite 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 which more or less corresponds to Rule 91 of the Orissa Service Code. True it is that in the Bombay case, the Government servant was exonerated of the charge framed against him pending enquiry into which the suspension had been ordered but the decision of that case does not appear to have been influenced by this circumstance. This decision of the Bombay High Court was quoted with approval by their Lordships of the Supreme Court in Gopalakrishna Nayudu v. State of Madhya Pradesh, 1968-2 Lab LJ 125 : (AIR 1968 SC 240). In that case, an Overseer was suspended from service and was prosecuted under Section 161 I. P. C. The trial resulted in his conviction but that

was set aside in appeal on the ground that no proper sanction for prosecution was obtained. He was again prosecuted on the same charge but the charge sheet was quashed on the ground that the investigation was not carried out by proper authorities. In revision, the High Court held that the Special Judge was in error in so holding, but recommended that the prosecution should not be proceeded with as nearly ten years had elapsed since it was first launched. The prosecution was therefore dropped and a departmental enquiry was held on the same charges. The Inquiry Officer found the petitioner not guilty but the Government in disregard of the said finding issued a notice to show cause why he should not be dismissed. Ultimately, the Government held that the charges against the petitioner were not proved beyond reasonable doubt but at the same time held that the suspension and departmental enquiry were not fully unjustified. He was therefore directed to be reinstated in service with effect from the date of order and retired him from the same date as he had already attained the age of superannuation and further ordered that the period of absence from duty should be treated as period spent on duty under Fundamental Rule 54 (5) for purpose of pension only but that he should not be allowed any pay beyond what he had actually received or what was allowed to him by way of subsistence allowance during the period of his suspension. Fundamental Rule 54 is exactly similar to Rule 91 of the Orissa Service Code. It may be noticed that in this case, the petitioner had ample opportunity to have his say in answer to the charge framed against him and Government had before them the materials to enable them to pass an order required under Fundamental Rule 54. Nonetheless, their Lordships held that the petitioner was entitled to an opportunity to show cause why the proposed order under Sub-rule (5) should not be passed against him and not having given him such opportunity the order passed under Sub-rule (5) was liable to be quashed. The fact that on the main charge Government held that it was not established beyond any reasonable doubt, does not appear to have in any way influenced the decision at which their Lordships had arrived.

8. In the present case, there is one other important circumstance which deserves to be noticed. As already indicated, Government after considering the report of the Inquiry Officer arrived at the tentative conclusion to reinstate the petitioner after reducing him to a lower stage of the time scale and indicated therein that for the

period of suspension the petitioner would be entitled to full pay and allowance thereby implying that the period of suspension would be treated as period spent on duty. At any rate, no indication was given in that tentative decision of the Government that the period of suspension was proposed to be treated as period not spent on duty for any purpose whatsoever. This is a circumstance which must have led the petitioner to believe that the period of his suspension would be treated as period spent on duty for all purposes and that therefore there was no occasion for him to make any representation on this point. When ultimately Government decided not to treat this period as period spent on duty, it was incumbent on them having regard to the principles of natural justice to give an opportunity to the petitioner to make his representation against the proposed order which admittedly has not been done.

9. In the result, the petitioner is entitled to partial relief in this case. While upholding the order passed by Government against items 1 and 2 of their letter No. 18984-I dated 24/27th November, 1961 (Annexure G), we would quash that part of the order mentioned against item no. 3 of the said letter. In the circumstances of the case, there would be no order for costs.

S. Barman, C.J.

10. I agree.