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Court : Orissa

Decided On : Nov-12-1957

Reported in : (1958)IILLJ433Ori

Judge : Narasimham, C.J. and ;Das, J.

Appellant : Hemanta Kumar Bose

Respondent : State of Orissa

Judgement :

Narasimham, C.J.

1. This is a petition under Article 226 of the Constitution against the order of the Government of Orissa in the Revenue Department No. 603 Con., dated 1 October 1953, dismissing the petitioner from service with effect from 20 August 1953.

2. The petitioner, after serving in various subordinate capacities, was subsequently confirmed as superintendent of excise with effect from 14 April 1945. During the year 1949 when he was working as superintendent of excise in Dhenkanal district, there were some allegations of corruption against him which were investigated confidentially by the then Additional District Magistrate of Dhenkanal Sri S.N. Misra. He was placed under suspension on 19 August 1949 and the preliminary investigation was continued under Government orders by the subsequent Additional District Magistrate of Dhonkanal, Sri S.S. Patro. During that investigation, however, the petitioner was permitted to be present while the

witnesses were being examined and he was also given an opportunity to cross-examine some of them. Sri Patro's investigation was completed in due course and submitted to Government who on the basis of the same framed three charges against the petitioner on 17 August 1950 (annexure F). The petitioner was called upon to answer the charges and Sri R.C. Ratho, the then Commissioner of Excise, was directed to hold a regular departmental enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules. The third charge (with which alone we are concerned) related to the payment from April 1949 to August 1949 of various sums of money as illegal gratification to the petitioner, by one Sheikh Khefayatullah, agent of one Mohammed Yusuf, who was a joint renter of a liquor shop in Dhenkanal town. It appears that during the preliminary investigation by Sri S.S. Patro, the said Khefayatullah spoke about the actual payment by him of the various sums noted in the charge to the petitioner as illegal gratification and also produced certain entries in the liquor shop account books to corroborate his statement about those payments. Along with a copy of the charges the Government enclosed a list of documents and witnesses by whom the charges were to be proved against the petitioner, and in that list it was clearly stated that so far as charge 3 was concerned Khefayatullah and one Baidyanath Das, excise peon, would be examined as witnesses against the petitioner.

3. In the departmental enquiry before Sri R.C. Ratho, the excise peon Baidyanath Das turned hostile and completely resiled from his previous statement. Similarly, Khefayatullah denied having himself made any payments to the petitioner as illegal gratification. When called upon to explain the entries in his account books showing payment of various sums of money to the petitioner, he stated that he made these entries on the basis of information supplied to him by some other persons who were not examined as witnesses, either in the departmental enquiry or even in the preliminary investigation prior to that enquiry. The only payment about which Khefayatullah claimed personal knowledge was the payment of a sum of Rs. 26 as stated by him, to one Sharat Babu (P. W. 2) who, however, denied having received any such payment. The Commissioner of Excise, Sri R.C. Ratho, therefore, observed in his report dated 9 June 1951 (annexure J) that this charge was not proved. The only evidence to support the charge was that afforded by the uncorroborated entries in the shop account books maintained by Khefayatullah

which undoubtedly show that the sums were paid to the petitioner; but when Khefayatullah denied any personal knowledge of the payment and stated that he made the entries on the basis of information supplied to him by some other person (who was not examined), the enquiring officer rightly held that on the basis of such uncorroborated entries it would not be proper to hold that the charge was established. On receipt of the report, Government consulted Mr. N. Senapati who was then President, Board of Revenue, and who subsequently became ex officio Secretary to Government in the Revenue Department. Mr. Senapati as Secretary to Government, wrote out a lengthy order dated 10 November 1951 (annexure I), in which he scrutinized the entire evidence collected by Sri R.C. Ratho during the departmental enquiry, but in disagreement with him held that charge 3 was proved. In coming to this conclusion, he relied mainly on the statement of Sheikh Khefayatullah during the preliminary investigation by Sri S.S. Patro, Additional District Magistrate, Dhenkanal, in which he had categorically asserted that the sums noted in the account books were paid by him to the petitioner. Mr. Senapati observed that Khefayatullah, in the subsequent departmental enquiry before Sri Ratho, had undoubtedly gone back on his previous statement, but that his earlier statement should be preferred to his subsequent one, especially when the account book entries corroborated the earlier statement. He also discussed certain other probabilities of the case, and held that charge 3 was proved. This order of Mr. Senapati, dated 10 November 1951, was signed by him as Secretary to Government in the Revenue Department and it may therefore be taken as the decision of the Government in respect of this charge. In fact, at the end of that order it is stated.

The only proper punishment for receiving illegal gratification is dismissal from Government service. Government accordingly propose to inflict this punishment on Sri Bose. Sri Bose is hereby directed to show cause, within one month from the date of receipt of this order, why this punishment should not be inflicted on him.

This notice was issued in pursuance of Article 311(2) of the Constitution. The subsequent cause shown by Sri Bose was considered unsatisfactory, and after consulting the Public Service Commission, Government passed orders on 1 October 1953 to the effect that the petitioner was guilty of charge 3 and that he

should be dismissed from service with effect from 20 August 1953.

4. The petitioner, however, had attained the age of superannuation as early as the 1 November 1952 while the departmental proceeding was pending against him. Government, therefore, in exercise of the powers conferred on them by the proviso to Article 454 of the Civil Service Regulations, extended his services first up to December 1952 and again to 31 March 1953. Apparently, when they passed the order of dismissal on 1 October 1953 they overlooked the fact that the petitioner was no longer in service then as the period of extension had expired on 31 March 1953. With a view to cure this irregularity a separate notification (annexure T) was issued on 20 February 1954 granting respectively extension of service to the petitioner from 1 April 1953 to the 19 August 1953. This retrospective extension was obviously granted so that the order of dismissal may take effect from 20 August 1953 as directed in the Government order, dated 1 October 1953.

5. Mr. Mohanti's main contentions are these;

(i) The finding of Government (overruling the finding of Sri B.C. Ratho) to the effect that charge 3 was proved against the petitioner, was based on inadmissible evidence and is therefore invalid:

(ii) On the date of the passing of the order of dismissal namely, 1 October 1953, the petitioner was no longer in Government service, his last period of extension having expired on 31 March 1953. He could not therefore be validly dismissed and the belated order of Government dated 20 February 1954, granting extension of service to the petitioner retrospectively was not authorized by law. Hence the order of dismissal is inoperative.

6. The facts are practically admitted. The only charge that was held to have been proved against the petitioner was charge 3 which related to the receipt of several sums of money as illegal gratification by the petitioner from Sheikh Khefayatullah on various dates from April 1949. The departmental proceedings against the petitioner in respect of this charge were held in three stages. Firstly, there was some sort of confidential investigation by the then Additional District Magistrate of Dhenkanal, Sri S.N. Misra. Next there was an open preliminary investigation by Sri

S.S. Patro, in which some of the witnesses were examined in the presence of the petitioner and he was given an opportunity to cross-examine them. But this investigation was meant only to be a preliminary step for the Government to decide whether a regular departmental enquiry should be held after framing a formal charge, as required by rule 55 of the Civil Services (Classification, Control and Appeal) Rules. The departmental enquiry under that rule was held by Sri R. C, Ratho before whom also all the witnesses were examined. The petitioner was given an opportunity to cross-examine them and to adduce rebutting evidence on his behalf. But during that enquiry the only witness to prove charge 3, namely, Sheikh Kefayatullah, resiled from his previous statement and did not claim to have either paid the sums himself to the petitioner or to have had personal knowledge of such payment. He stated that he heard about such payment from some other persons (who are not witnesses in the proceeding) and made necessary entries in the shop account books. The entries in the account book having thus been admitted by the maker of those entries themselves, not to have been based . on his personal knowledge, the officer who held the departmental enquiry, namely Sri R.C. Ratho, very correctly held that charge 3 was not proved. Bat Government while considering his report differed from his finding and held the charge to be proved basing their finding mainly on what Khefayatullah had stated during the preliminary investigation before Sri S.S. Patro, It is admitted that the previous statement of Khefayatullah was not put to him during the departmental enquiry, nor was he given an opportunity to explain the contradiction between the two statements made by him. Moreover, he was not declared hostile or cross-examined by the officer who conducted the proceeding, before Sri R.C. Ratho on behalf of Government. On the other hand another witness, namely, Baidya Nath Das (P.W. 13) as declared hostile and cross-examined with reference to his previous statement. Mr. Mohanti contended that the previous statement of Khefayatullah was neither exhibited in the departmental enquiry, nor put to him during his examination in that enquiry, and that consequently it was wholly inadmissible. Government committed a serious illegality in basing their finding on a statement that was not taken in as evidence during the departmental enquiry.

7. In the affidavit filed by the Under Secretary of the Revenue Department on behalf of the State of Orissa, it was admitted in Para. 5 that the finding of

Government (meaning Sri Senapati) was based not only on the evidence recorded by the enquiring officer but also on that recorded by the Additional District Magistrate (meaning Sri Patro). The Advocate-General tried to support this finding by urging that in coming to a final conclusion regarding the guilt or otherwise of a delinquent public servant, Government may take into consideration not only the evidence collected during the departmental enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, but also other, materials collected in the earlier stages.

8. I am unable to accept this extreme contention of the Advocate-General. Rule 55 was expressly made with a view to ensure that the principles of natural justice are complied with, before any public servant is held guilty of misconduct. That rule requires that the charges should be definite, and that along with the charges the public servant should be informed of the substance of the allegations on which each charge is based and any other circumstances which it is proposed to take into consideration against him. It also requires that in any oral enquiry witnesses should be examined in his presence and that he should be given an opportunity to cross-examine them and also to adduce rebutting evidence. The last portion of that rule is as follows:

The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof.

I do not think there can be any doubt that the findings in a departmental enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules must be based on the evidence adduced against the delinquent public servant in that enquiry. The elaborate provisions safeguarding his right of cross-examination, the right to receive clear notice of the charge, and the allegations on which the charge was based, will all be meaningless if, after holding such an enquiry the finding about his guilt were to be based not only on the materials collected during the enquiry but also on materials collected at earlier stages. Doubtless, if those had been put to the witnesses concerned in the presence of the delinquent public servant during the departmental enquiry and he had been given an opportunity to cross-examine the witnesses in respect of those materials, it may be urged with

some justification that the previous statements also had been incorporated as evidence during the enquiry and the public servant had ample notice of the Same. It is true that the departmental enquiry need not be so elaborate as a regular criminal trial and that the provisions of the Indian Evidence Act need not be very strictly adhered to. But rule 55 refers to 'evidence' and though that expression need not be given the same narrow meaning as is given to it in the Evidence Act, it is clear that it refers to documents and statements of witnesses proved during the said enquiry.

9. Sheikh Khefayatullah's statement before Sri S.S. Patro was not taken as evidence against the petitioner when the departmental enquiry was held by Sri B.C. Ratho. The petitioner was never informed that that statement would be used against him. Khefayatullah himself was not asked to reconcile his contradictory statements. Hence Khefayatulla's previous statement should not have been taken into consideration at all in coming to a finding regarding the guilt or otherwise of the petitioner. Government's finding is based on inadmissible evidence.

10. It was urged that Khefayatullah's previous statement before Sri S.S. Patro was taken in the presence of the petitioner and he was given an opportunity to cross-examine him and that no prejudice was caused by taking it into consideration at the time of passing final orders. This argument also is unsound. The preliminary investigation by Sri Patro was extra-statutory and was meant solely to satisfy Government that there was a prima facie case against the petitioner so as to justify the drawing up of a regular proceeding under rule 55. Hence it is immaterial as to whether the petitioner cross-examined the witnesses during preliminary investigation or not. The charge which he was called upon to meet during the enquiry under rule 55 must be supported by evidence adduced during that enquiry and tested by cross-examination at the said enquiry.

11. I do not think there is any need to cite authority for this view as it is based on well-known principles of natural justice, I may however refer to a decision of the Calcutta High Court, in *A.R.S. Choudhury v. Union* 1957-1 L.L.J. 494. The following passage at p. 499 of the report is worth quoting:

In order to frame a charge it is permissible to have a preliminary enquiry, This preliminary enquiry may be ex parte and it would be permissible to interrogate the delinquent. Such preliminary enquiry is not only permissible but it is a very desirable step because civil servants should not be charged with offences recklessly and without reason. But there is one important limitation to such an enquiry, which is so often forgotten. It is no substitute for the departmental enquiry itself. The preliminary enquiry is merely for the purposes of framing a charge and the results cannot be deemed to be conclusive. If there is a report, this cannot be evidence unless the delinquent has been furnished with it and afforded an opportunity of meeting it. The evidence heard at such a preliminary enquiry must be repeated at the enquiry if it is considered necessary to rely upon it.

Again at pp, 550-501 it was observed:

It is permissible to look into documents or records which, strictly speaking, would not be evidence in a court of law, but with one safeguard. Any document or record which is looked into or relied upon, must be disclosed to the delinquent and he must be afforded an opportunity of dealing with it.

12. Hence, if Government through its Secretary, Sri N. Senapati, thought that the findings of Sri R.C. Ratho required modification they should have directed a further enquiry in which the previous statement of Sheikh Khafayatullah should have been put to him and the petitioner should also have been given an opportunity to cross-examine him with reference to his earlier statement. Government have committed a serious illegality and offended the well-known principles of natural justice by basing their finding on inadmissible evidence.

13. The order of dismissal must therefore be held to be inoperative.

14. In view of the aforesaid decision on the first contention raised by Mr. Mohanti, it is unnecessary to examine the second contention regarding the illegality of the order giving retrospective effect to extension of service to the petitioner.

15. I would therefore allow this petition, declare the order of Government dated 1 October 1953, dismissing the petitioner from service, to be inoperative. A writ shall

issue directing the opposite party to forbear from giving effect to that order. The departmental proceeding against the petitioner is restored to the stage at which it was prior to 10 November 1951 and Government may dispose of it according to law bearing in mind the observations contained in this judgment.

The petition is allowed with costs. Hearing fee Rs. 100 (rupees one hundred only).

Das, J.

16. I agree.

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