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Court : Rajasthan

Decided On : Jan-20-1974

Reported in : 1974WLN176

Judge : B.P. Beri, C.J. and; D.P. Gupta, J.

Appeal No. : S.B. Civil Writ Petition Nos. 167 and 225 of 1968, 1523 of 1970, 352 and 1826 of 1971 and 624 of 197

Appellant : Kuldeep Singh and ors.

Respondent : Union of India (Uoi) and ors.

Disposition : Petition allowed

Judgement :

B.P. Beri, C.J.

1. The six petitioners before us are Railway servants who were removed/dismissed from service because each one of them was convicted for an offence by a criminal court. They complain that notwithstanding the fact that they were given the benefit of the provisions of the Probation of Offenders Act (hereinafter called 'the Probation Act') they have been removed or dismissed. They have challenged their order of removal/dismissal on the grounds that it was contrary to the provisions of Section 12 of the Probation Act or at any rate inconsistent with the objects of that statute & that it is violative of the principles of

natural justice as they were never heard before removal or dismissal. The learned Single Judge, before whom these petitions were presented, found it necessary to refer these cases to a Division Bench because Tyagi, J. in S.B. Civil Writ Petitions Nos. 481, 482 516, 517 and 600 of 1966 by his judgment dated December 19, 1969, had held that even in a case covered by Clause (c) of the proviso to Article 311(2) of the Constitution of India the principles of natural justice had to be complied with. Learned Single Judge who has referred these cases to us felt that in view of the Full Bench decisions of the Delhi and the Punjab High Courts, to which we shall presently refer, the view taken by Tyagi, J. requires reconsideration.

2. To eliminate repetition we first propose to deal with general arguments which have been urged in all the cases. Mr. Dave, learned Counsel for one of the petitioner, urged that Section 12 of the Probation Act has removed all disqualifications attaching to a conviction; that it is a mile-stone in the evolution of penology intended to reform and rehabilitate an offender and if a conviction was treated as a disqualification for holding a civil post it would be contrary to the very objects of the Probation Act. Once a criminal court had considered the circumstances of the case including the nature of the offence & the character of the offender and extended the benefit of the Probation Act the departmental authority, urged the counsel, should respectfully agree rather than throwing the offender out of employment.

3. Mr L.R. Bhansali, learned Counsel for the Railway, urged that there was nothing in the Railway Establishment Code which said that a person who had been convicted was disqualified from holding a civil post in the Railway. The removal of disqualification under Section 12 of the Probation Act relates to a disqualification, if any, attaching to a conviction for an offence under such law and, therefore, it was competent for the punishing authority to consider whether a person who has been given the benefit under the Probation Act should or should not be retained in the Railway Service. He placed reliance on the decided cases and particularly on *Om Prakash v. Director of Postal Services and Ors.* AIR 1973 Punj 1 (FB) and *Director of Postal Services and Anr. v. Daya Nand* 1972 SLR 325 (FB).

4. Let us now examine some of the decided cases on this subject by various High Courts. The Madras Probation of Offenders Act, 1936 has Section 12A which is substantially the same as Section 12 of the Probation Act. *R. Kumaraswami Aiyar v. The Commissioner, Municipal Council, Tiruvannamalai* 1953 Cr. LJ 255 was a case of an Upper Division Clerk in a Municipal Office at Tiruvannamalai. He was charged for the offence of cheating and was convicted but instead of being sentenced in view of his youth he was given the benefit of Section 4(1) of the Madras Probation of Offenders Act. The Municipal Commissioner issued a memo to the petitioner directing him to show cause why his service should not be terminated. The petitioner submitted an explanation & pleaded Section 12A of the Probation of Offenders Act as a bar to disciplinary action. The petitioner moved the High Court of Madras for a writ of prohibition and Rajagopala Ayyangar, J. observed:

In my view Section 12A is incapable of the construction sought to be put upon it on behalf of the petitioner. What the section says is 'shall not suffer any disqualification attaching to a conviction' & there is a vital distinction between a disqualification attaching to a conviction & the taking of proceedings consequent upon such a conviction.

What Section 12A has in view is an automatic disqualification flowing from a conviction and not an obliteration of the misconduct of the accused. In my judgment the possibility of disciplinary proceedings being taken against a person found guilty is not disqualification attaching to the conviction within the meaning of Section 12A of the Probation of Offenders Act.

In *Embaru v. Chairman, Madras Port Trust* 1963 (1) LLJ 49. Embaru was a fitter employed in the Madras Port Trust. He was convicted under Section 420 IPC (cheating). He was released Under Section 4 (1) of the Madras Probation of Offenders Act. He was dismissed on account of the conduct which led to his conviction. He presented a petition under Article 226 of the Constitution of India and Veeraswami, J., as he then was, observed that the true object of Section 12A of the Act was that a person released on prohibition shall be free from any disqualification attaching to a conviction for the offence concerned. But this did not

mean that a probation order is a bar to an order of dismissal from service. The dismissal was not one attaching to a conviction and it did not automatically flow from it. It was only a consequence which was attached to or flowed from a conviction that was within the ambit of Section 12A and not any result which may be based upon a conviction. The reasoning in Kumara-swami's case 1953 Cr. LJ 255 was adopted. The view taken by Veeraswami, J. was confirmed by a Division Bench in an appeal Under Section 15 of the Letters Patent. It is reported as P. Embaru v. The Chairman Madras Port Trust (1964) 2 MLJ 349.

5. The view taken in the aforesaid cases was adopted by a Division Bench of the Andhra Pradesh High Court in Akella Satyanirayan Murthy v. Zonal Manager, Life Insurance Corporation of India : AIR 1969 AP371 , where the petitioner, a Development Officer in the Life Insurance Corporation of India, was found guilty Under Section 409 of the Indian Penal Code (criminal breach of trust) but released on probation of good conduct. He was dismissed and he challenged the order by a writ petition and the learned Judges of the Andhra Pradesh High Court adopting the reasoning in Kumaraswami's case 1953 Cr. LJ 255 and Embaru's case 1963 (1) LLJ 49 held that the disciplinary authority was not precluded from proceeding against an employee although he may be dealt with Under Section 12 of the Probation Act.

6. In Prem Kumar v. Union of India 1972 SLR 14 the Madhya Pradesh High Court adopted the reasoning contained in the Andhra Pradesh High Court's judgment in Satyanarayana's case : AIR 1969 AP371 .

7. In Iqbal Singh v. Inspector General of Police (1971) 2 SLR 257, a Division Bench of the High Court of Delhi considered the effect of the Probation Act qua a police servant. The petitioner in this case was a Head Constable, who was convicted for offences under Section 333/337 of the Indian Penal Code (grievous hurt to deter police servant from his duty), but was given the benefit of Section 4 of the Probation Act. He was dismissed and the order was challenged by him on the ground that Section 12 gave him the immunity from such dismissal. The learned Judges considering the provisions of Section 12 & particularly the word 'disqualification' after extracting the dictionary meaning of the word observed as

follows:

The word 'disqualify' is also stated to mean making some one unfit for something. The further meaning given is that the person may be deprived within the meaning of the word 'disqualify' of any right or privilege. We are of the view, that the words 'disqualification' if any, attaching to a conviction of an offence' as used in Section 12 of the Act would include a person's losing his right or qualification to remain or to be retained in service. Section 12 of the Act, clearly saves the convict from suffering, such disqualification attaching to his conviction. In respect of his conviction, the petitioner had the protection of Section 12 and he was saved from suffering any disqualification such as the one which resulted in his dismissal.

The writ petition was allowed.

8 The Full Bench of the Delhi High Court again considered the effect of Section 12 of the Probation Act in retard to the dismissal of a Government servant. This is Director of Postal Services and Anr. v. Daya Nand 1972 SLR 325 (FB). The petitioner in this case was charged for an offence Under Section 52 of the Indian Post Office Act, 1898 and was convicted but was given the benefit of Section 4 of the Probation Act. He was dismissed. He claimed that Section 12 was a bar against his dismissal and it appears that the case of Iqbal Singh (1971) 2 SLR 257 was cited to support his case. The learned Judges in this case considered the meaning of the word 'disqualification' in para 26 of the judgment and observed that the object of Section 12 was to remove a disqualification attached to a conviction. It did not go beyond it. The learned Judges also observed that Section 12 could not in the very nature of things modify the proviso (a) to Article 311(2) of the Constitution of India. In effect, it appears that the view taken in Iqbal Singh's case (1971) 2 SLR 257 was not accepted though the judgment does not appear to say so in so many words.

9. In The Divisional Personnel Officer, Northern Railway, New Delhi v. Shri Pritam Singh (1971) 1 SLR 713 Suri, J. of the Punjab and Haryana High Court considered the case of a Railway Trains Clerk who was convicted Under Section 324 and 506 of the Indian Penal Code and Section 120 of the Indian Railways Act. He was eventually convicted by the Magistrate under Section 324 of the Indian Penal

Code (causing hurt by sharp weapon). The Government servant was reinstated but he was allowed only to draw subsistence allowance during the period of suspension. He claimed full payment under the Payment of Wages Act. The Authority under the Act allowed him his claim. The Railway Divisional Personnel Officer, who was the Paymaster in this case, agitated the matter before the High Court and in these circumstances the learned Judge observed that the employee was not to suffer any disqualification which was otherwise attached to the conviction for the offence. In this case it may be emphasised what the learned Judge considered was the effect of Rule 2044 of the Railway Establishment Code for the payment of subsistence allowance. The learned Judge also, it appears, followed the decision in Iqbal Singh's case (1971) 2 SLR 257 .

10. Another Full Bench decision, which considered the interpretation of Section 12 of the Probation Act is *Om Prakash v. The Director, Postal Services (Posts and Telegraphs Deptt.* AIR 1973 Punj. 1 (FB). The petitioner was a Post Master, who was dismissed from service following his conviction under Sections 420/511 and 465/471 of the Indian Penal Code (attempt to commit cheating and forgery). The matter was referred to a Full Bench and Narula, J., who spoke for the Bench, observed:

What Section 12 removes is a disqualification attaching to a conviction. In my opinion, neither liability to be departmentally punished for misconduct is a disqualification, nor it attaches to the conviction, 'Disqualification in its ordinary dictionary meaning connotes something that disqualifies or incapacitates. To disqualify a person for a particular purpose means to deprive that person of the qualities or conditions necessary to make him fit for that purpose...Disciplinary proceeding cannot be called a disqualification, but is at best a liability incurred in certain circumstances.

In para 5 it is said:

This provision does not afford immunity against disciplinary proceedings for the original misconduct. What forms basis of the punishment is the misconduct and not the conviction.

11. From the aforesaid discussion of the cases it would appear that Iqbal Singh's case (1971) 2 SLR 257 is the only case where the learned Judges of the Delhi High Court had taken the view that holding a civil post was a qualification and if conviction meant dismissal it amounted to a disqualification, which was protected by Section 12 of the Probation Act. This view has been dissented to by the same High Court in a Full Bench judgment in Daya Nand's case 1972 SLR 325 (FB). The rest of the authorities have basically followed the Madras view of Kumaraswami's case 1953 Cr. LJ 255.

12. What we are called upon to construe is Section 12 of the Probation Act, which reads:

Section 12. Removal of disqualification attaching to conviction:

Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

Provided that nothing in this section shall apply to person who, after his release Under Section 4, is subsequently sentenced for the original offence.

This section provides that if under a statute conviction means a disqualification then the person who has been dealt with under Sections 3 or 4 of the Probation Act shall not suffer from such disqualification. We are aware of certain laws where conviction is a disqualification. Reference may be made to Section 8 of the Representation of the People Act; Section 26 Rajasthan Municipalities Act; Section 11 Rajasthan Panchayat Act etc. Section 12 has the effect of neutralising the disqualification attached to a conviction.

13. Learned Counsel argued that it appeared anomalous that a person though convicted could occupy high elective post on account of Section 12 of the Probation Act but stood disqualified to be retained as a humble Khalasi in the Railways. In this context, it will be relevant to remember that Section 12 of the English Justices Act, 1948 completely neutralised the conviction by saying that it

will not be treated as a conviction for any purpose. Further, the process of election does ordinarily involve a detailed dissection of the worth of a candidate and it is left to the discretion of the electors and the democratic process whether the electorate wishes to repose its confidence in the person notwithstanding his conviction.

14 It was also urged that removal or dismissal of a railway servant consequent to conviction amounted to a disqualification. We are unable to agree. It is 'the conduct which led to conviction' which provides cause of action & not the conviction. Conviction simpliciter would not & should not necessarily result in an employee's removal or dismissal.

15. Learned Counsel also submitted that a Criminal Court while giving the benefit to an accused of Sections 3 or 4 has to keep in mind the nature of the offence, the age of the offender; his antecedents and other circumstances and the Government should accept in good grace the judicial verdict. In this context, it is important to remember that the objects of the Probation Act, as contained in its statement of reasons & objects are to reform & rehabilitate 'without subjecting him to the deleterious effects of jail life'. This is a social angle in the field of penology. This need not coincide with an employer's angle who would examine the question from the nature of the employee's duties and responsibilities and surrounding circumstances; Judicial verdict of not sending a person to jail would not always be a safe guide for an employer to adopt. Such a proposition is not free from its hazards. Take for instance a lad employed in a Government Girls School. He was convicted for molesting his neighbour's daughter under Section 354 IPC but was given the benefit of Section 4 of the Probation Act. The judicial verdict was that the lad should not be sent to jail but will it be advisable to retain his services in a Girls School with such a judicially proved propensity? Let us take another instance. A cash clerk in a Government Department is convicted for criminal breach of trust committed by him in respect of a paltry sum entrusted to him by a friend but he was released under Section 4 of the Probation Act. Could such a person be retained in the position of a Cash Clerk? Examples could be multiplied but what we wish to emphasise is that in dealing with the conduct of an individual the angle of the Magistrate and the employer could be legitimately different. Section 12

therefore has not the effect of immunising a Government servant from departmental proceedings. The fact that a Government servant has been convicted merely establishes that his conduct after due investigation has been found to offend some provision of some penal law and the Court after examining the circumstances of the case, the age of the Offender and the nature of the offence instead of sending him to jail proceeds to give him the protection of the Probation Act. The suitability or otherwise of such Government servant for being retained on the post of responsibility in a given case qua a given offence still is a matter open for examination. Conviction does not necessarily disqualify his retention into service and conversely the benefit of the Probation Act does not give him an immunity from disciplinary proceedings. The umbrella which Section 12 provides is only against a disqualification, if it is given under some law attaching to a conviction as distinguished from the content of misconduct which may lead to different consequences regarding his employment.

16. The next submission on behalf of the petitioners is that Article 311(2) of the Constitution of India merely deprives the Government servant of the necessity of an enquiry and a reasonable opportunity of making representations on the penalty proposed but does not eat up the basic principles of natural justice and covers convictions under all kind of offences.

17. Mr. Bhansali urged in answer that Article 311(2) read with the rules framed for the Railway servants embraces all the basic principles of natural justice and because the three provisos to Article 311(2) read with para 1719 excludes all steps of natural justice, nothing more is available to the government servant. The portion material for our purposes of Article 311 of the Constitution of India reads:

311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.-(1) No person who is a member of a civil service of the Union or an All-India Service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him

and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply--

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.(3)

....

18. The three situations envisaged by Article 311(2) of the Constitution of India where the authorities are relieved from the necessity of giving a reasonable opportunity to a member of a civil service of being heard in respect of the charges or an opportunity of making representation on the penalty proposed against him in essence relates to a situation where a civil servant has been convicted on a criminal charge or where the authority empowered to dismiss or remove him or reduce him in rank is satisfied that for reasons to be recorded by that authority in writing it is not reasonably practicable to hold such enquiry or where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry. Proviso (a) is an exception engrafted because the civil servant has had ample opportunity in the criminal trial before a Judicial Officer who enquired into the conduct of a civil servant before reaching a conviction. The object appears to be to avoid repetition of an inquiry and possibly conflict of conclusions. Exception (b) arises from a practical difficulty but it is insisted that the satisfaction must be recorded in writing on account of which it was not found to be reasonably practicable to hold such an inquiry.

Exception (c) propounds the doctrine that the security of the State is paramount and where an inquiry has a tendency to injure it an enquiry may be dispensed with. The discretion has indeed been vested in high authorities.

19. The argument of the learned Counsel is that any offence, however trivial, if it has ended in a conviction gives a right to the punishing authority to punish a civil servant without affording him a reasonable opportunity as no qualification in regard to the nature of conviction has been included in proviso (a) to Article 311(2) of the Constitution of India. This fear was expressed when the Constitution was being framed and we have examined the observations made in this behalf while the Constituent Assembly was considering Article 282B of the draft constitution which is equivalent to Article 311 of the Constitution. One of the members urged that Article 311(2) proviso (a) takes away what has been given by Article 311 itself and it was 'much too wide' and he urged that it was therefore 'necessary, I think, that some clause may be added to the effect that the criminal charge of which the person is convicted is one which involves moral turpitude.' Other members expressed similar fears. Amendments were moved to emphasise that conviction of certain offences alone should attract the proviso (a) to Article 311(2). The Hon'ble Law Minister Dr. B.R. Ambedkar answering the criticism *inter alia* observed: The question has been raised that any person who has been convicted in any criminal case need not be given notice. There, again, I must submit that there has been a mistake, because, the regulations made by a State may well provide that although a person is convicted of a criminal offence, if that offence does not involve moral turpitude, he need not be dismissed from the State service. It is perfectly open to Parliament to so legislate. It is not in every criminal charge, for instance, under the motoring law or under some trivial law made by Parliament or by a State making a certain act an offence, that that would necessarily be a ground for dismissal. It would be open to Parliament to say in what cases there need not be any dismissal. It would be perfectly open to Parliament to exclude political offences. This clause in so many words merely deals with the question of giving notice. Parliament may exempt punishment for offences of a political character, exempt offences which do not involve moral turpitude. That liberty of the Parliament is not touched or restricted by Sub-clause (a). I want to make this clear.

(Constituent Assembly Debates, Vol. 9 pages 1099 to 1113).

20. Leraned Counsel appearing for the petitioners bemoaned that the Law Minister's hopes have not been realised and there are no rules defining which convictions will visit penalties envisaged by Article 311(2) of the Constitution. We have to give effect to the law as we find it and in our opinion in the absence of a qualification to the nature of an offence which has ended in conviction, Article 311(2) proviso (a) embraces all convictions.

21. In regard to the principles of natural justice in *Abbott v. Sullivan* (1952) 1 KB 189 at p. 195. Evershed M.R pithily observed, 'The principles of natural justice are easy to proclaim, but their precise extent is far less easy to define'. Article 311 read with the rules framed Under Section 241 of the Government of India Act, 1935 and adopted to be the rules under Article 309 of the Constitution of India in fact include the basic principles of natural justice Article 311 envisages that a civil servant shall not be visited with any of the penalties mentioned therein unless he has been given a reasonable opportunity of being heard in respect of those charges and where it is proposed after such inquiry to impose upon him any such penalty, until he has been given a reasonable opportunity of making representation against the penalty proposed. It contemplates first an inquiry, then a tentative conclusion of the proposed penalty and thereafter a representation by the civil servant against it. The first two principles of natural justice that no man shall be a judge in his own cause and the principle of audi alteram partem are clearly covered. The ancillary rules of the principles of natural justice, speaking broadly, are included in the various rules that have been framed in this regard. But if the enquiry and right of representation against proposed penalty have been eaten up by the proviso to Article 311(2) no grievance could be urged on that ground. We hasten to add that at this stage we are not considering the effect of the statutory rules as such that have been framed in this regard.

22 The matter of principles of natural justice qua Article 311(2) proviso (a) came to be considered in some of the cases which we have already noticed and it will be relevant to notice in passing the observations made in them. In *Baleshwar Singh v. Commissioner for the Port of Calcutta and Ors.* (1968) 1 LLJ 314 at p. 327 at page

327 the proviso to Article 311(2) of the Constitution was considered and the learned judge observed 'These clauses have been engrafted not because, natural justice would not otherwise have been available to the employee. but because, for some paramount reasons, the Constitution-makers, in their wisdom, thought that the State cannot afford to comply with the requirements of natural justice without detriment to the public interest.' We may repeat here that the possibility of a conflict of decision and the futility of repetition have given birth to proviso (a), an utter impracticability of enquiry has produced proviso (b) and the paramount need of collective security is the reason why proviso (c) to Article 311(2) has been added, We may also observe in that context that in *Union of India v. Colonel J.M. Sinha* : (1970) IILLJ284SC the Hon'ble Judges of the Supreme Court have observed that it is perfectly possible to put the principles of natural justice out of office by a statute. In the case before us the Constitution has put these principles out of office. In the Madhya Pradesh case of *Prem Kumar* 1972 SLR 14 the reason given was that the proviso to Article 311(2) of the Constitution takes away the necessity of issuing a notice in cases of conviction by a criminal court and the learned Judges observed that if protection is taken away then the service of the Government servant is governed by Article 310 of the Constitution and therefore it was during the pleasure of the President or the Governor, as the case may be. In *Daya Nand's case* (1971) 1 SLR 713 the learned Judges of the Delhi High Court while examining the situation created by the proviso (a) to Article 311(2) of the Constitution of India have observed that the Constitution has exempted the punishing authority from compliance with the two notices envisaged by Article 311(2). Firstly, added the learned Judges, because the accused person had a much better opportunity in a criminal trial as compared to a departmental inquiry and secondly, the conviction on a criminal charge is generally a greater punishment than departmental punishment of dismissal, removal, reduction in rank, etc, and then they have observed, 'At any rate, for whatever reason, the framers of the Constitution have decided by enacting proviso (a) that both the opportunities in Article 311(2) should be dispensed with.' The Full Bench of the Punjab and Haryana High Court in the case of *Om Prakash* has considered this aspect of the matter, relying on the case of the Supreme Court in *Union of India v. Col. J.N. Sinha* : (1970) IILLJ284SC , they have observed that if principles of

natural justice have been excluded by the proviso to Article 311(2) it could certainly be done so legally.

23. We are of the opinion that proviso (a) to Article 311(2) of the Constitution of India, with which we are concerned here, has relieved the punishing authority of the necessity of issuing notice both in regard to the charge and for the penalty proposed.

24. We have now to examine the position as envisaged by the rules framed under the Government of India Act, 1935. Rule 1719, which is applicable to the circumstances of all the six cases and which was in force at the time when the six petitioners before us were dismissed or removed from service reads as under:

1719. Notwithstanding anything contained in Section 7 or Section VI:

(i) Where a penalty is imposed on a railway servant on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the Disciplinary Authority is satisfied, for reasons to be recorded in writing, that it is not reasonably practicable to follow the procedure prescribed in the said rules; or

(iii) where the President is satisfied that in the interest of the security of the State, it is not expedient to follow such procedure,

the Disciplinary Authority may consider the circumstances of the case and pass such orders thereon as it deems fit. Provided that the Union Public Service Commission shall be consulted before passing such orders in any case in which such consultation is necessary.

The learned Counsel for the petitioners have urged that the word 'the Disciplinary Authority may consider the circumstances of the case and pass such orders thereon as it deems fit' are clearly indicative (a) that some opportunity should be given to the employee to say what he wishes to say before the employee is punished., (b) that the word 'consider' necessarily implies an examination of the case on merits and, because, the merits cannot be examined unless the

employee's side of the case is duly considered, he should be given notice and (c) that in any event, the order passed Under Rule 1719 being in the nature of penalty and appealable, the order so passed must be a speaking order, namely, from which the mind of the punishing authority is capable of being read.

25. The argument urged before us in essence is that before action Under Rule 1719 is taken it involves (a) the process of consideration and (b) the content of conclusion. The crucial words, which fall for our interpretation, are 'the disciplinary authority may consider the circumstances of the case and pass such orders thereon as it deems fit'. The word 'consider' or the process of consideration has within its ambit an examination of circumstances with objectivity rather than a mere subjective occlusion. Essentially it implies the duty to act judicially. In the Black's Law Dictionary, Fourth Edition, at page 378 consideration has been assigned the following meaning:

A technical term indicating that a tribunal has heard & judicially determined matters submitted to it. *Meaney v. State Industrial Accident Commission*. 113 Or 371,232,709,791:

The Hon'ble Judges of the Supreme Court in *M. Gopal Krishna Naidu v. The State of Madhya Pradesh* : (1968)II LLJ125SC examined fundamental Rule 54 in juxtaposition to Article 311 of the Constitution of India. The rule which was considered inter alia laid down that 'When a Government servant who has been dismissed, removed or suspended is reinstated; the authority competent to order the reinstatement shall consider and make a specific order' as to how the period intervening is to be treated for the purposes of subsistence allowance & duty. Shelat, J. speaking for the Court observed:

But the fact that it is consequential order does not determine the question whether the government servant has to be given an opportunity to show cause or not. It is also true that in a case where reinstatement is ordered after a departmental inquiry the government servant would ordinarily have had an opportunity to show cause. In such a case, the authority no doubt would have before him the entire record including the explanation given by the government servant from which all the facts and circumstances of the case would be before the authority and from which he

can form the opinion as to whether he has been fully exonerated or not and in case of suspension whether such suspension was wholly unjustified or not. In such a case the order passed under a rule such as the present Fundamental Rule might be said to be a consequential order following a departmental inquiry. But there are three classes of cases as laid down by the proviso in Article 311 where a departmental inquiry would not be held viz., (a) where a person is dismissed, removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge, (b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied for reasons to be recorded in writing that it is not reasonably practicable to hold such an inquiry, and (c) where the President or the Governor as the case may be is satisfied that in the interest of security of State it is not expedient to hold such inquiry. Since there would be no inquiry in these classes of cases the authority would not have before him any explanation by the government servant. The authority in such cases would have to consider and pass the order merely on such facts which might be placed before him by the department concerned. The order in such a case would be ex-parte without the authority having the other side of the picture. In such cases the order that such authority would pass would not be a consequential order as where a departmental inquiry has been held. Therefore, an order passed under Fundamental Rule 54 is not always a consequential order nor is such order a continuation of the departmental proceeding taken against the employee.

It is true as Mr. Sen pointed out that F.R. 54 does not in express terms lay down that the authority shall give to the employee concerned the opportunity to show cause before he passes the order. Even so, the question is whether the rule casts such a duty on the authority by implication. The order as to whether a given case falls under C1. 2 or C1 5 of the Fundamental Rule must depend on the explanation by the authority of all the facts and circumstances of the case and his forming the opinion therefrom of two factual findings; whether the employee was fully exonerated and in case of suspension whether it was wholly unjustified. Besides, an order passed under this rule would obviously effect the government servant adversely if it is one 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 function implies the duty to act judicially. In such a case if an opportunity to show cause against the action proposed is not afforded, as admittedly it was not done in the present case, the order is liable to be struck down as invalid on the ground that it is one in breach of the principles of natural justice.

(The italics is ours).

From the aforesaid observations it is clear that the order of dismissal, removal or reduction in rank as a result of conviction by a criminal court cannot be called a consequential order. The other side of the picture is not available to the authority called upon to objectively consider and judicially decide an important right of a Government servant whether he is going to be retained in the Government service or whether his status is going to be effected. The Supreme Court has observed that where pecuniary loss to the Government servant requires an objective consideration the fate of his service itself or his status cannot be placed at any lower level and the word employed in Rule 1719, which is crucial, is *CONSIDER* and the consideration includes the consideration of the circumstances. The Government servant although he is denied the benefit of an enquiry and a notice of the proposed penalty he can nevertheless be given an opportunity of showing his side of the case if he is told that an action was proposed to be taken against him under Rule 1719. Any objective consideration necessarily implies the examination of the two sides of the matter and the duty conferred on the punishing authority under Rule 1719 postulates that he must have both sides of the picture before he can adequately discharge the onerous duty of reaching the conclusion which to the Government servant concerned is a matter of vital importance. In our opinion, therefore, on the authority of the Supreme Court and on a correct interpretation of the words 'consider the circumstances of the case, Rule 1719 requires that an intimation must be given to the Government servant if an action is to be taken under Rule 1719. It is on principles of natural justice that such a step is warranted.

26. Mr Bhansali, learned Counsel for the Railway, strenuously urged that any such notice might be injurious to the security of the State because the proviso (c) to Article 311(2) involves such question. The Supreme Court has emphatically ruled that a show cause in all the three classes of cases is necessary. Endangering of the security of State is only possible when the facts & circumstances before the officer are disclosed to the Government servant. Disclosure of those circumstances which endanger the security of the State is certainly not necessary but the Government servant may be permitted to communicate his side of the case. Moreover, the cases before us do not relate to Article 311(2) Proviso (c).

27. The next question is what should be the content of the conclusion reached by the employer. We are in entire agreement with the arguments advanced by the learned Counsel for the petitioners that the conclusion must be a speaking order, and the simple reason for this necessity is that there is a right of appeal to the Government servant against the action taken against him Under Rule 1719. In Daya Nand's case 1972 SLR 325 (FB) the learned Judges of the Delhi High Court have observed as under:

An order of punishment visits a Government employee with evil consequences. It affects his rights adversely. It has to be, therefore, a speaking order....

In Rajindersingh v. The Punjab State 1969 SLR 754 also, the Division Bench of the Punjab and Haryana High Court has taken the same view. Reference may in this connection be also made to the State of Punjab v. Bakhraswarsingh and Ors. 1972 SLR 85 where the Supreme Court found the following order to be not a speaking order and observed that it was arbitrary to the core and could not be upheld,-

I have gone through the charges and the explanation furnished by Shri R.P Abrol. From the material on the file, I am definitely of the opinion that he is not a fit person to be retained as part time member of the Electricity Board, I therefore order that Shri Abrol may be removed from membership under Sub-clause (iv) of Clause (e) of Sub-Section (1) of Section 10 of the Electricity Supply. Act, 1948.

CM. may kindly see. After C.M. has seen, immediate orders be issued.

Sd/-Sohan Singh Basi,

1 P.M.

17-7-69.

We are bound by the observations in the above case. That apart, under Rule 1725 of the Railway Establishment Cods an appeal lies against an order under Rule 1719 A Government employee cannot effectively take advantage of appeal against an order which is not a speaking order.

28. In the light of the aforesaid observations, let us now examine the each one of the petitions before us.

1. Petition No. 225/68 Kuldeep Singh v. Union of India

29. The petitioner joined as cleaner on 10-2-1956. He was promoted as Fireman, Grade 'C' on 31-12-1957. It is said that on 2-6-1965 he misbehaved with his Foreman Mohanlal who was his officer-in-charge. He was prosecuted Under Section 120 of the Railway Act and Section 448 of the Indian Penal Code. He was acquitted under Section 448 of the Indian Penal Code but he was ordered to pay a fine of Rs. 45/ by the Railway Magistrate Under Section 120 of the Railways Act on 21-10-1965. On a reference by the Additional Sessions Judge, Jodhpur this Court by its order dated 17-11-1966 gave him the benefit of thd provisions of Probation Act. On 16 2-1967 his suspension was revoked and he joined the service on 20-2-1.967. By another order of 30-3-1967 he was removed. He appealed before the Divisional Superintendent, Northern Railway on 26 4 1967; which was also rejected and so was his revision. He has challenged his order of removal dated 30-3-1967 on the grounds that no reasons for the order of removal have been given and that he was given no opportunity of submitting his representation. In other words, the order removing him is not a speaking order and is violative of the principles of natural justice. The order reads as under:

WHERSAS Shri Kuldeep Singh, Fireman 'C', has been convicted on a criminal charge Under Section 120 of the Indian Railways Act.

AND WHEREAS it is considered that the conduct of the said Shri Kuldeep Singh, which has led to his conviction, is such as to render his further retention in the public service undesirable.

Now, therefore, in exercise of the powers conferred by Rule 1719(1) of the Indian Railway Establishment Code, Vol.I, the undersigned hereby removes the said Shri Kuldeep Singh, Fireman, 'C' from service with immediate effect.

sd/-

Divisional Mech. Engineer, Northern Railway, Bikaner.

In view of the Supreme Court decision in Bakhtawar Singh's case 1972 SLR 85 this order cannot be called a speaking order and it suffers from arbitrariness. The petitioner was also not given an opportunity which the language of Rule 1719 requires. The order of removal dated 30-3-1967 is accordingly quashed and so also the subsequent orders in appeal and revision. We award him Rs. 200/as costs.

2. Petition No. 167 1968- Lalsingh v. Union of India:

30. Lal Singh was a Khalasi in the Northern Railway, Bikaner. He was convicted on 25-5-1964 for an offence Under Section 330 I.P.C. for stealing electric wires from the Northern Railway Workshop. The trial court convicted him for the offence and the appellate court gave him the benefit of Section of the Probation Act on 21-7-1964. The Works Manager dismissed him on 24-2-1965 He preferred an appeal before the General Manager, which was also dismissed. The only arguments raised in this petition are that the provisions of Section 12 of the Probation Act immunise the petitioner from all departmental proceedings. There is no grievance made either on account of the violation of the principles of natural justice or lack of opportunity or that the order was not a speaking order. The petitioner is not entitled to any relief on the grounds that he has raised in view of our conclusion that Section 12 of the Probation Act does not immunise a Government servant from departmental proceedings. We cannot take into account the arguments that have not been raised in the petition. The petition is accordingly dismissed. There

will be no order as to cost'.

3. Petition No. 624/1970- Gangaram v. Union of India:

31. The petitioner was an Engine Lighter, Loco Shed, Barmer. He was on 23-7-71 convicted under Section 379 I.P.C. for unlawful possession of 8 kgs of coal and given the benefit of Section 4 of the Probation Act. He was suspended on 6-6-1969. His suspension was revoked on 22-10-1970 and he was removed on 7-10-1971. He has challenged his order of removal on two grounds, namely, that no enquiry was conducted and that he was not given any show cause notice. He has also complained that the non-petitioner did not give him the grounds on which he was considered as undesirable to be kept in service. The order of dismissal reads;

Northern Railway

No. 119M/185/M.3/19 Dated Oct.7, 1971 From-Asstt. Mech Engineer (1), Northern Railway, Jodhpur

To -Shri Gangaram s/o Ganesh, Engine Lighter c/o LSG Barmer.

SUB: Case No. 1 under Section 3 RP (UP) Act 1966 dated 23-5-69-Theft of Coal on 23-5-69.

Since you have been convicted in above case on 23-7-71 and you have not appealed against the conviction, you are hereby removed from service with immediate effect, under Para 14(1) of the Railway Servants D&A; Rules, 1948.

sd/- 11/10

Asstt. Mech. Engineer (I) Jodhpur.

The aforesaid order is clearly tot a speaking order. In fact it is in the nature of a consequential order. The conduct of the petitioner has not been taken into consideration. We cannot uphold it. We accordingly quash it and allow the petition and award a sum of Rs. 200/ as costs.

4. Petition No. 1826/1971-Abdul Hamid v. Union of India.

32. Abdul Han-id at the material time was Second Fireman. On 9-9-1970 he was convicted Under Section 420 of the Indian Penal Code and given the benefit of the Probation Act. He was removed on 3-2-1971. He preferred an appeal which was dismissed on 2-3-1971 and he has now come up before us on the ground that the order is not a speaking order and the principles of natural justice have been violated. The order of removal is Ex. 1, which reads as under:

Northern Railway

Divl. Supdts office. N. Rly. Jodhpur,

No. 726E/P2A/ Abdul Hamid /2077/70 D/-3rd Feb,71

Office Order

Whereas Shri Abdul Hamid, IInd, FM Loco shed, Jodhpur, Staff No. 2077, who has been convicted by the Court of Law Under Section 420 IPC and then released on production of personal bond of Rs. 1000/-and a security of like amount for one year for good behaviour giving him the benefit of Section 4 of Probation of Offenders' Act.

And where as, the accused has not gone into appeal and the period for filing such appeal has also expired on 9-11-70 it is considered that the conduct of said Shri Abdul Hamid IInd. FM. S. No. 2077 which led to his conviction is not a fit person to be retained in service

Now, therefore, in exercise of the powers conferred by Rule 14(1) of the R S. (D&A;) Rules, 1968, the undersigned hereby removes Shri Abdul Hamid, IInd. FM, 2077 from service with immediate effect.

sd/- 9-2-71 Assistant Mechanical Engineer.

On the authority of Bakhtawarsingh's case 1972 SLR 85, the aforesaid order is not a speaking order and is arbitrary and is accordingly quashed; There is an additional infirmity that the petitioner was not given the opportunity to have his say in this regard and the principles of natural justice have been violated. This petition is allowed with costs Rs. 200/.

Petition No 1523/70 : Suresh Chandra Kalla v. U.O.I.

33. The petitioner was a Traffic Waterman at Deedwana. He was convicted on 11-12-1967 Under Section 324 I P.C. and given the benefit of the Probation Act by the appellate court by its order dated 21-6-1969. He was dismissed by the Assistant Personnel Officer on 2-8-1969. This order of dismissal is assailed in the writ petition on the ground that he was not given an opportunity of having his say in the matter and that due consideration was not given to him Under Rule 1719. The order of his removal is Ex.3 which reads as under:

Northpn Railway

Divil Supdt's Office, Jodhpur

No 730/E/P2D/WM-DI/Suresh

8th August, 69

Whereas Sh. Suresh Chandra Kalla s/o Kedir Math, Water Man Didwana, has been convicted on a criminal charge Under Section 324 I. P.C. and has given benefit Under Section 4 of the Probation of Offenders Act.

And Where as it is considered that the conduct of the said Shri Suresh Chandra s/o Kedar nath, water man, D I A which led to his conviction is such as to render his further retention in the public service undesirable.

Now, therefore the undersigned hereby dismisses the said Shri Suresh Chandra s/o Kedarnath, WM, DIA from service with immediate effect.

Sd/-

Asstt. Personnel Officer.

It is clearly not a speaking order on the authority of Bakhtawar Singh's case (17) and must be and is hereby quashed. The petitioner is also entitled to an opportunity of having his say. The writ petition is accordingly allowed with costs of Rs. 200/-.

(6) Petition No. 352/71 : Narsingh v. Union of India:

34. The petitioner was a Khallasi at the workshop at Jodhpur. He was convicted Under Section 3 of the Railway Property (Unlawful Possession) Act, 1966 for having stolen 4 kilos 890 grammes of copper. The appellate court by its order dated 20-11-1970 gave him the benefit of the Probation Act. His grievance in the petition is that he was not allowed to have his say in regard to the action that was going to be taken Under Rule 1719 of the Railway Establishment Code. He was dismissed by the Assistant Personnel Officer on

Northern Railway

Dy. Com (w)'s Office, Jodhpur,

No.433E/P2D/2107/3/26 Dated 26-2-71.

Office order

Where as Shri Nar Singh s/o Shri Lalla, Khalasi T. No. 2107 of Shop No. 26, Northern Railway Workshop, Jodhpur (under suspension) has been found guilty and convicted under Section 4 of the Probation of Offenders Act by the Additional Sessions Judge No. 1, Jodhpur (Cr. Appeal No. 57/1969)

And where as it is considered that the conduct of the said Shri Nar Singh Khalasi T. No. 2107 Shop No. 26 which has led to his conviction is such as to render his further retention in public service undesirable.

Now, therefore in exercise of the powers conferred by Rule No. 14(1) of the Railway Servants Discipline and Appeal Rules, 1968, the undersigned hereby dismisses the said Shri Nar Singh, Khalasi T No 2107 Shop No. 26 from service with effect from 27-2-1971 A N. (27-2-71 AN).

Sd/- Manohar Lall, Asstt. Personnel Officer (W), N.Rly. Jodhpur.

The Railway's answer does not say that any opportunity was given to him. Accordingly, the order of his dismissal Annexure 3 is violative of principles of natural justice and is accordingly quashed. The writ is allowed with costs which we

assess at Rs. 200/-.

35. It will be open to employers however to proceed against the successful petitioners if it thinks fit.

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