

(1956) 05 CAL CK 0001

Calcutta High Court

Case No: Civil Revision Case No. 2024 of 1953

Naresh Chandra
Gangopadhyaya

APPELLANT

Vs

Director of Fisheries,
West Bengal and
Others

RESPONDENT

Date of Decision: May 29, 1956

Acts Referred:

- Constitution of India, 1950 - Article 311
- Government of India Act, 1935 - Section 241, 276

Citation: 60 CWN 767

Hon'ble Judges: Sinha, J

Bench: Single Bench

Advocate: N. Dutt Mazumdar and Joy Gopal Ghosh for the Petitioner, for the Appellant; J. Majumdar, Additional Government Pleader and Mihir Kumar Sarkar for the Opposite Parties, for the Respondent

Final Decision: Dismissed

Judgement

Sinha, J.

On or about the 18th August, 1944, the Government of Bengal in its Agriculture Department, Fishery Branch, sanctioned the creation of a number of posts of District Fishery Officers. On or about the 27th October, 1944, the appointment of the petitioner to the post of a District Fishery Officer was approved by Government. The approval is contained in a letter addressed by the Assistant Secretary to the Government of Bengal to the Director of Fisheries, Bengal dated the 26th October, 1944. A copy thereof is Annexure "C" to the supplementary affidavit-in-reply affirmed by Sri Naresh Chandra Gangopadhyay on the 7th April, 1956. The relevant part thereof is as follows:

"The undersigned is directed to convey the approval of Government to the appointments of the marginally noted officers to the posts of District Fishery Officers sanctioned in this Department Government Order No.3044, dated the 18th August, 1944, on probation for a period of two years.

"The candidates will have to appear before the Professor of Clinical Surgery, Calcutta Medical College, in regard to their physical fitness prior to their appointment on probation. There is no objection however to their joining the posts immediately. They will be confirmed in service on the satisfactory completion of the period of probation and the passing of a departmental examination, which may be prescribed during the period"

2. The petitioner joined service on probation, but has never been confirmed. In May, 1951, he appeared in the prescribed departmental examination but failed. He has after being suspended from service, as stated hereinafter, passed in the said examination. In or about September, 1951, he was employed as District Fishery Officer at Malda. On or about the 22nd September, 1951, the Director of Fisheries, West Bengal, issued a charge sheet against the petitioner, a copy whereof is annexed to the petition and included in Annexure "A" (page 19). The name, rank and grade of the officer proceeded against, as stated in the charge sheet is "Sri Naresh Chandra Gangopadhyay, District Fishery Officer on probation (Malda)". In the charge sheet five charges are mentioned. The first is failure to maintain proper accounts. The second is for failure to issue receipts for monies received. The third and fourth are the issuing of excessive and unauthorized loans. The last charge is failure to inspect tanks before advancing loans. The petitioner was directed to show cause within a fortnight from the receipt of the order why disciplinary action under Rule 7 of the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936, should not be taken against him. The petitioner gave a long explanation in writing. In fact it extends over 27 closely typed pages. He nowhere took the plea that he was not an officer on probation or not governed by Rule 7 of the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936. On the same day, he was placed under suspension. He was directed to proceed at once to Headquarters and to hand over charge of his office to Sri Dhirendra Nath Chakrabarty, the Assistant Fishery Officer at Malda. This order was obviously made under Rule 10(1) of the Bengal Subordinate Services (Discipline and Appeal) Rules 1936. The charge as framed against him related mainly to his work at Malda and in respect of which the records and documents were mostly in Malda. What the petitioner did was to apply for casual leave for five days to the Superintendent of Fisheries, Northern Circle, at Murshidabad, without mentioning the order of his suspension. He then returned to Malda and made entries in the Stock Register and, inter alia, recorded a note in the same as follows: "Stock verified on 29.9.51." It is not denied that such entries were made. The explanation is that they were made in the usual course.

3. On or about the 7th December, 1951, the petitioner was called upon to see the Director of Fisheries in connection with the departmental enquiry. He accordingly saw the said officer on the 10th December, 1951. What happened at the enquiry is matter of dispute. According to the petitioner, he was faced with new charges and asked to make statements with regard to them which he refused to make unless and until the charges were reduced into writing. According to the respondents, all that happened was that the Director tried his best to make the petitioner answer only relevant questions in elucidation of his explanation in his written statement, but the petitioner refused categorically to answer such questions until they were given to him in writing before he would reply to the same. It is stated and not unreasonably that this would have meant giving him one set of questions one day and then on receipt of his reply giving him a supplementary set of questions in writing for his reply and so on, and that this was an unheard of and impracticable procedure in departmental proceedings. The petitioner further took up an attitude which is described as insolent, and the Director gave him further time to reconsider his position and to come up again on the 30th December, 1951. On the 11th December, 1951 however he sent in a letter virtually refusing to comply with the requisitions of the Director, and it appears that on the 11th December, 1951 the Director declared that under the circumstances the enquiry may be considered as closed. It is stated by the respondents that the matter was really decided on documentary evidence and at no time the petitioner ever expressed his desire to examine any witness. There is of course no question of cross-examining witnesses because the respondents never called any witness in support of the charges. Although in his affidavit-in-reply, paragraph 18, the petitioner has denied that he did not ask for any such opportunity, nothing has been placed before me to show that he did. The Director of Fisheries thereupon proceeded to consider the case and made a report to Government wherein he found the petitioner guilty of all the charges and made a recommendation that his services be terminated. On the 14th May, 1952 a show cause notice was issued upon the petitioner addressed by the Assistant Secretary to the Government of West Bengal, Forest and Fisheries (Fish) Department. The petitioner was described as "Sri Naresh Chandra Gangopadhyay, District Fishery Officer (on probation) Malda, now under suspension". It is stated in the said notice that Government had carefully considered the report of the Director and other relevant papers and agreed with the findings recorded therein and had come to the conclusion provisionally that the petitioner should be punished with discharge from Government service under Rule 49(VI) of the C.S. (C.C.A.) Rules. The petitioner was therefore called upon to submit within 15 days from the date of the receipt of the order any representation that he might desire to be considered as to why he should not be punished in the manner stated in the grounds referred to. The petitioner thereupon showed cause and his second representation contained 65 closely typed pages. The Government thereupon forwarded the records and its own findings to the Public Service Commission for its recommendation. The Commission carefully went into the matter and expressed the opinion that the petitioner should

be discharged from service. A copy of this recommendation was produced at the hearing and I direct that it be kept in the record. The Commission pointed out that the petitioner, even after 7 years of probation, displayed incompatible temperament apart from other omissions and commissions, and that he was unsuitable for retention in service. It pointed out that the representations made by the petitioner consisted of long dissertations on the interpretation of the Rules and Orders, which were not only incorrect and unacceptable, but that the petitioner was adamant to maintain his own view and was certainly not likely to observe discipline in public service and was therefore not suitable to be retained therein. Finally it pointed out that the petitioner had degrees in Psychology and Anthropology and his services might be utilised in departments where such qualifications were useful, but not in the department of fisheries. On the 28th March, 1953, an order was issued by the Government of West Bengal, the relevant part of which is as follows:

"With reference to this Department Memo No. 3857 dated 14.5.52, drawing up proceedings against Sri N. C. Gangopadhyay, District Fishery Officer of Subordinate Fishery Service, Class I, by the Director of Fisheries under Rule 7 of Bengal Subordinate Services (Discipline and Appeal) Rules, 1936, Government have now carefully considered the charges and the explanations offered by him in consultation with the Public Service Commission, West Bengal, and have come to the finding that Sri N. C. Gangopadhyaya is guilty in respect of all the five charges framed against him by the Director of Fisheries. On the recommendation of the Public Service Commission, it has accordingly been decided that he should be discharged from Government service.

The Government are accordingly pleased to order that Sri N. C. Gangopadhyaya be and is hereby discharged from service with effect from the date of issue of this order."

4. On the 6th July, 1953, this Rule was issued upon the respondents to show cause why a writ in the nature of mandamus should not issue directing them to forbear from giving effect to the orders dated 22.9.51 and 31.3.53 complained of in the petition. The order dated the 28th March, 1953 was forwarded to the petitioner on the 31st March, 1953. The petitioner also prays for issue of writs in the nature of certiorari and prohibition and also for such further or other orders as to this Court may seem fit and proper.

5. Mr. Dutt Majumdar appearing on behalf of the petitioner has framed his case thus. Firstly he says that his client is not employed on probation. He says that the original appointment was on probation for a period of two years. The two years" period having passed, the petitioner must be deemed to have been confirmed. So far as the departmental examination is concerned, it is true that he had once failed in it but he has now passed. Next he says that his client is not governed by the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936, but so far as the enquiry and discharge are concerned, he is governed by Rules 55 and 56 read with

Rule 49 of the C.S. (C.C.A.) Rules. He followed this up by saying if these Rules applied, there has been a clear violation of such Rules and also Article 311 of the Constitution, inasmuch as the petitioner was not given a reasonable opportunity of establishing his defence. He was not allowed to call witnesses or to examine or cross-examine witnesses to establish his defence. He has therefore argued that the order of discharge really amounted to an order of dismissal in contravention of the law and should be set aside.

6. Coming to the first point raised by learned Counsel, I do not agree that the petitioner at the relevant time was not employed as an officer working on probation. The original order has been set out above. It appoints officers on probation for a period of two years, and also says how they will be confirmed. Two conditions are imposed for such confirmation. Firstly, the officer will have to satisfactorily complete the period of probation and secondly he must pass the departmental examination during that period. There is no evidence to show that the petitioner did either. So far as the departmental examination is concerned, it is admitted that he did not pass it within two years. In fact he never passed it before his order of suspension. The petitioner therefore cannot have it both ways. On the one hand he urges that his passing the departmental examination was within time, and yet he says that upon the expiry of the two years he automatically stood confirmed. This is wholly inconsistent. Secondly, there is nothing to show that his service was considered satisfactory at any time. In fact, it is stated in the affidavit-in-opposition that there were continuous complaints against the petitioner which had to end in a departmental enquiry. I have also set out above, various notices and orders which clearly described the petitioner as being on probation. Although he made long representations, he has nowhere taken up the position that he was no longer on probation and could not be addressed as such. It is plain therefore that the petitioner at the relevant time was an officer on probation. That being so, the next question is as to what Rules apply to the petitioner. Mr. Dutt Majumdar has drawn my attention to my own decision [Hirendra Nath Roy Vs. State of West Bengal and Others](#). The learned Counsel argues that his client is governed by the Bengal Services Rules as supplemented by the C.S. (C.C.A.) Rules. According to him, the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936, no longer exist. In any event, his client is not governed by it. In the decision mentioned above, to which reference has been made by both parties, I have set out the history of the service rules applicable to employees in West Bengal. I have traced the origin of the West Bengal Service Rules and pointed out that these rules were comprehensive and self-contained and apply to all Government servants within the administrative control of the State of West Bengal. Although I have said that these Rules were comprehensive and self-contained, it is not to be taken that they deal with the entire gambit of Rules applicable to Government servants within the administrative control of the State of West Bengal. Although they are comprehensive, they are not complete. Thus they do not appear to deal adequately with the subject of

departmental enquiries in respect of punishments to be imposed or to be meted out to such employees. For this, we have to go elsewhere. So far as the employees in the subordinate services within the administrative control of the State of West Bengal are concerned, it seems clear to me that the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936, apply. These Rules were promulgated on or about the 2nd September, 1936, in exercise of the powers conferred by Rules 44 and 54 of the C.S. (C.C.A.) Rules. This is because the Government of India Act, 1935, came into operation sometime in 1937. Section 241 of the Government of India Act, 1935, for the first time introduced a provision for the appointment and control of provincial services by the Provinces. Hitherto, there was an unitary form of Government of India and everything was being controlled by the Secretary of State. The relevant part of Section 241 is as follows:

"241 (1):- Except as expressly provided by this Act, appointments to the Civil Services of, and civil posts under, the Crown in India, shall, after the commencement of Part III of this Act, be made -

(a)

(b) in the case of services of a Province and posts in connection with the affairs of a Province by the Governor or such person as he may direct.

(2) Except as expressly provided by this Act, the conditions of service of persons serving His Majesty in a civil capacity in India shall, subject to the provisions of this section, be such as may be prescribed -

(a)

(b) in the case of persons serving in connection with the affairs of a Province, by Rules made by the Governor of the Province or by some person or persons authorised by the Governor to make rules for the purpose."

7. The most important section however for our purpose is Section 276 which runs as follows:

"Until other provision is made under the appropriate provisions of this Part of this Act, any rules made under the Government of India Act relating to the civil services of, or civil posts under, the Crown in India which were in force immediately before the commencement of Part III of this Act, shall, notwithstanding the repeal of that Act, continue in force so far as consistent with this Act, and shall be deemed to be rules made under the appropriate provisions of this Act."

8. In my decision quoted above, I have pointed out the genesis of the C.S. (C.C.A.) Rules, which were made u/s 96B of the Government of India Act, 1919. The result was that rules made under the C.S. (C.C.A.) Rules would be valid rules, as provided by Section 276 of the Government of India Act, 1935, and would in fact be deemed to be made under that Act. Therefore rules which were made for the purpose of

controlling the provincial services would be valid rules and must be deemed to be rules made u/s 241 of the Government of India Act, 1935. These Rules, namely, the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936 are quite short and deal with only discipline and appeals. The rules really comprise mostly of a voluminous schedule setting out the titles of services, the authorities empowered to appoint, the authorities empowered to impose penalties and the appellate authorities. The schedule however is not complete. I have already pointed out that these subjects are not adequately dealt with in the West Bengal Services Rules, so far as subordinate services are concerned. That the petitioner is in a subordinate service is not denied. Therefore there does not seem to be any reason why these Rules are not applicable. Mr. Dutt Majumdar's effort in this behalf to exclude the operation of these Rules is quite understandable, and the reason is as follows. According to Rule 7, several penalties are mentioned, the last two being removal and dismissal. Then there is an explanation to Rule 7. Explanation (a) says that the discharge of persons appointed on probation during the period of probation does not amount to removal or dismissal within the meaning of these Rules. The position therefore is as follows: The petitioner being a civil servant under the Government, Article 311 would prima facie apply to him, if it was a case of dismissal or removal. The present case would be certainly a case of dismissal or removal, had it not been in respect of an officer employed on probation. It is however one of the conditions of service that if he is discharged during the period of probation, then it will not amount to dismissal or removal. In other words, the appointment is on "probation", that is to say, on the condition that the petitioner should conduct himself satisfactorily to the employer. If he does not do so, then during the period of probation, the Government could terminate his service. Such termination is not removal or dismissal because it is in accordance with the terms of service and not by way of punishment. It has now been authoritatively held that the termination of service of an employee in Government service which is in accordance with his contract and/or conditions of service is not dismissal or removal. [Satish Chandra Anand Vs. The Union of India \(UOI\)](#), and *Shyamlal v. State of Uttar Pradesh*, [(1954) SCA 476 : AIR (1954) SC 250].

9. On the other hand, if the C.S. (C.C.A.) Rules apply, then the petitioner would be in a different position. The C.S. (C.C.A.) Rules have been considerably modified by amendments from time to time. Mr. Dutt Majumdar has drawn my attention to the tenth list of correction published by Government as amended by correction slip No.52, dated the 28th March, 1948. Rule 49 has been amended and it has been provided that the termination of employment of a person appointed on probation during or at the end of the period of probation in accordance with the terms of appointment and the rules governing the probationary service, does not amount to removal or dismissal within the meaning of this Rule or of Rule 55. By correction slip No.114, dated the 28th January, 1949, a new Rule, namely, Rule 55(B) has been introduced which is as follows:

"55-B. Where it is proposed to terminate the employment of a probationer whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment".

10. It will thus appear that if the petitioner is governed by the C.S. (C.C.A.) Rules, he should have had an opportunity to show cause against an order terminating his employment. It is clear that his employment is being terminated for a specific fault as also for his unsuitability for the service. Mr. Dutt Majumdar has also referred me to an amendment in the C.S. (C.C.A.) Rules of Rule 55 made by the Government of West Bengal, by notification dated the 27th July, 1949, published in the "Calcutta Gazette" of 1949, Part I, page 1341. From this he appears to argue that Rule 55 applies to all Government servants. Obviously it does not. The C.S. (C.C.A.) Rules have not been abrogated wholly so far as services in the State is concerned, but are referred to in the West Bengal Services Rules. Thus persons who are not in the subordinate services would be governed by those rules. I find however no reason why the Subordinate Services (Discipline and Appeal) Rules, 1936, are not in force and why it does not apply to the petitioner. In this view of the matter Rule 55B of the C.S. (C.C.A.) Rules does not. The result must inevitably be that the discharge or removal of the petitioner who was on probation does not amount to either dismissal or removal from service as contemplated by Article 311 of the Constitution. Therefore even assuming that the departmental enquiry was not made properly, the petitioner has no legal remedy because by a law it is not necessary to hold any enquiry or any enquiry in any particular manner. Mr. Dutt Majumdar has drawn my attention to the fact that in the notice, dated 14th May, 1952, the petitioner was asked to show cause why he should not be punished and discharged from service under Rule 49(VI) of the C.S. (C.C.A.) Rules. This is obviously a blunder on the part of the officials concerned. The original charge sheet clearly mentions that the proceedings had been initiated under Rule 7 of the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936. The order of discharge, dated 28th March, 1953, also shows that the discharge was under Rule 7 of the said rules. A mistake somehow crept into the second show cause notice. I do not think that this has made the order of discharge illegal. I might also mention that the rules applicable to probationers have been placed on a clear footing now by the "Services (Training and Examination) Rules, West Bengal" which came into operation on the 19th March, 1953. Under these rules, a probationer is not to be treated as a permanent employee and is not entitled to insist on any formal departmental enquiry for his discharge during the period of probation. If these rules apply, then also the petitioner is not entitled to any relief.

11. Mr. Majumdar has also drawn my attention to the fact that even if Rule 55B applies, there is a significant difference in its wordings to Article 311 of the Constitution. In the Constitution the words "reasonable opportunity" appear. In

other Rules the words "adequate opportunity" have been used. All that Rule 55B says is that the delinquent should be given "an opportunity" to show cause. He argues that in this case "an opportunity" has been given. I think that this is an arguable proposition. The petitioner was served with show cause notices. He filed long representations dealing with every aspect of the case. He never asked for an opportunity for calling evidence. Under the circumstances, I do not see why, even if Rule 55B applies, can it be said that the petitioner was wholly deprived of an opportunity to show cause. The authorities proceeded on the documents which were fully dealt with by the petitioner in his representations. Taking the case as a whole, I am by no means convinced that the petitioner has no opportunity to establish his innocence. In any event, as I have shown above, there has been no violation of any of his legal rights.

12. The result is that the points made have all failed and this application must be dismissed. The Rule will stand discharged. Interim order, if any, is vacated. There will however be no order for costs.