Raj Kishore Tewari Vs Union of India and Others

Court: Calcutta High Court

Date of Decision: Aug. 1, 1991

Acts Referred: Constitution of India, 1950 â€" Article 14, 21, 310(1), 311, 311(2)
Evidence Act, 1872 â€" Section 102, 103, 106
General Clauses Act, 1897 â€" Section 3(60), 3(8)
Railway Protection Force Act, 1957 â€" Section 9

Citation: 96 CWN 382

Hon'ble Judges: Ajoy Nath Ray, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: S. Pal, R. Deb and A.K. Majumdar, for the Appellant;N.C. Chowdhury, for the Respondent

Final Decision: Allowed

Judgement

A.M. Bhattacharjee, J.
While speech may be good and a great art, sometimes reticence is belter and also a greater art. The judgment of

brother Ray, which follows hereinafter and in which I concur, has marshalled the relevant facts and determined the questions of law with such

admirable and lucid dexterity that I thought of only signifying my concurrence without any further articulation But on a further scrutiny of the draft

prepared by Ray, J., I have thought that, in view of the importance of the question, I may add a few words, mainly by way of emphasis. The

pleasure doctrine, so zealously enshrined and solemnly proclaimed in Article 310(1) of the Constitution of India has fainted and failed in the very

succeeding Article 311(2) to such an extent that the former has become anachronistic, a hyperbole and almost a ritualistic legal verbiage. If the

Government cannot dismiss, remove or demote a holder of a Civil Post ""except after an inquiry in which be has been informed of the charges

against him and given a reasonable opportunity of being heard in respect of those charges"", as mandated in Article 311 (2), then to say, as

declared in grandiloquent terms in Article 310(1), that a holder of a Civil Post under the Union or the State ""holds office during the pleasure of "" the

President or the Governor, as the case may be, (meaning thereby the Central Government or the State Government -- Vide, Section 3(8) and

Section 3(60) of the General Clauses Act, 1897, read with Article 367 of the Constitution), would be highly incongruous. The doctrine of pleasure

as in Article 310(1) stands so much overturned and overborne by Article 311(2) as to become, by and large, an idle parade of empty words.

2. Sub-clause (b) of the Second Proviso to Article 311(2), however, provides that clause (2) shall not apply where the authority concerned ""is

satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry"" as mandated in

Clause (2) and Clause (3) provides that the decision of the authority concerned as to the impartibility of holding inquiry ""shall be final"". A too literal

reading of these provisions might suggest that it is only for the authority just to say in writing that an inquiry is not reasonably practicable for some

alleged reason and then to fire an employee on any ground alleged, but without any enquiry, and the ipse dixit of the authority as to any inquiry

being not reasonably practicable would be beyond any challenge, having been made ""final"" under Clause (3). This would obviously bring back the

doctrine of pleasure and the creed of ""hire and fire"", so openly and deliberately sought to be overthrown by Clause (21 through the back door in

disguise. Apart from the dictum of Justice Frankfurter that there is no surer way to misread a provision than to read it literally, such a literal

constitution would make the words ""reason to be recorded"" and ""reasonably practicable"" absolutely redundant and otiose, unless it is held that the

propriety of the reasons for holding the inquiry to be not reasonably practible must be subject to judicial scrutiny.

3. Fortunately, even in Union of India and Another Vs. Tulsiram Patel and Others, generally regarded to be a leading decision on the point, the

Supreme Court has ruled (at 1479, 1481) that such decision is subject to judicial review and scrutiny. I would have, with respect, thought no other

view to be reasonably possible. Now that it is settled, particularly after the decision of the Supreme Court in Olga Tellis and Others Vs. Bombay

Municipal Corporation and Others, that ""Life"" in Article 21 includes ""Livelihood"", a holder of a Civil Post, which may be the main or only source of

his livelihood, cannot be deprived thereof ""except according to reasonable procedure which is right, fair and just"". Whether or not substantive ""due

process"" has already become part of our Constitutional law, this much is settled beyond doubt, as would appear from the majority Judgment of the

Supreme Court in Bachan Singh (1980-2 SCC 684 at 730), that Article 21, with the gloss put thereon in Mrs. Maneka Gandhi Vs. Union of

India (UOI) and Another, and other post-Maneka decisions, is now to be read as ""No person shall be deprived of his life or personal liberty

except according to fair, just and reasonable procedure"".

4. True, the Second Proviso to Article 311(2) and also Article 311(3) were in the Constitution from the inception and no provision of the

Constitution as originally enacted can be assailed as ultravires Article 21 or any other Article in Part III or elsewhere. But even in respect of the

provision of the original Constitution, if two interpretations are reasonably possible the one in tune with the provisions of Part III must be adopted

in preference to the other not in accord with the provision of that part. The interpretation that the propriety of the reasons for dispensation of

enquiry under Article 311(2) is subject to judicial scrutiny and review being more to conformity with the provisions of Article 21 as construed in

Maneka and later decisions, must, therefore, be accepted.

5. But what would be scope and extent of such judicial review? Tulsiram Patel (supra), which ruling in favour of judicial review has not spelt out

the same with precision. Brother Ray, obviously relying on Tulsiram (supra), has held that ""if the Court finds that on the materials on record, no

reasonable authoritu could dispense with enauirv in anu reasonable view of the matter then the Court will interfere"" Correct, if I may so with

respect. But not then and then only, as the later decisions of the Supreme Court, referred to by Ray, J., also, would demonstrate. To borrow from

Tennyson, Freedom has broadened in our land from precedent to precedent. In Jaswant Singh Vs. State of Punjab and others, the Supreme Court

has struck down an Order of dispensation of enquiry on the ground that ""the impugned order is not fortified by any independent material"", and not

that by any material at all. The quality or reliability of the materials on record was accordingly reviewed and scrutinised. In Chief Security Officer

and Others Vs. Singasan Rabi Das, a three-Judge Bench of the Supreme Court, even after due advertance to Tulsiram Patel (supra), has struck

down the Order (at 1044) on the ground of ""total absence of sufficient materials or good grounds"" and the materials being ""totally insufficient in

law"". The sufficiency of the materials, as distinguished from no materials at all, has accordingly been considered by the Court. Not that there must

be no material to warrant judicial intervention; but that even the sufficiency, relevance and reliability of the materials on which Order of dispensation

is founded are amenable to judicial scrutiny and review.

6. Ray, J., has rightly pointed out, relying on Jaswant Singh (supra), that when the satisfaction of the concerned authority is questioned in a Court

of law, it is incumbent on those who support the Order to show that the satisfaction is based on certain objective facts and is not the outcome of

the whim or caprice of the concerned officer. Enquiry being the general rule and dispensation thereof being an exception, the authority concerned

resorting to any such exceptional or extra-ordinary course must justify the same by producing materials in accordance with the provisions of

Section 102,103 and 106 of the Evidence Act.

7. Ray, J., however, is not so much on the abstract question of onus and the technical aspect of adverse inference, but appears to be more on the

aspect of justice and fairplay and, if I may add has the high authority of the Privy Council in support of his view. Early as in 1917, in AIR 1917 6

(Privy Council) the Privy Council observed that -

a practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine

of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to the third parties, this may be

right enough: they have no responsibility for the conduct of the suit: but with regard to the parties to the suit, it is in their Lordship''s opinion, an

inversion of sound practice, for those desiring to rely upon certain state of facts, to withhold from the Court the evidence in their possession which

would throw light upon the proposition.

8. These observations, reiterated by the Judicial Committee in AIR 1929 95 (Privy Council) have been quoted with approval by the Supreme

Court in Hiralal and Others Vs. Badkulal and Others, and also in a number of later decisions.

9. Thus, both from the point of view of onus and also as a matter of sound judicial practice, the Respondents were obliged to produce materials

before the Court justifying dispensation of enquiry under Article 311(2), and they, as held by Ray, J., having failed to so, the Order of dispensation

must be held to be bad enough to vitiate the impugned Order of dismissal imposed on the apellant.

10. One word more before leaving the Court to brother Ray. Ray, J., has observed that ""as the European continent inherited the laws of Rome, so

have we inherited the laws of England"". With respect, I do not know where and how Ray, J., has been able to trace a legitimate line or order of

succession to come to a conclusion that we in India have inherited the British Laws. It is a settled principle of Public International law that until

overthrown or altered by the new Sovereign, the laws in force in the subjugated country continues as before. We know about this principle having

been applied in British India from the decisions of the Privy Council in Mayor of the City of Lyons (1 Moore''s Indian Appeals 175 at 271) and

then in Advocate General of Bengal vs. Ranee Sumomoye Dossea (9, Moore''s Indian Appeals 368 at 426). But many of us may not know or

care to know that this Law was enunicated in India by Kautilya, Yajnavalkya and others thousands of years before the Britishers could dream of it.

(Vide, Yajnavalkya, Chapter I Verse 343-YASMIN DESHE YA ACHARA VYAVAHARA KULASTHITI TATHAIVA PARIPAL YOSOU

YADA VASAM UPAGATA). And, therefore, we go on saying that this law is also British manufacture and we have got it from them by way of

donation, inheritance or otherwise.

11. Be that as it may, the British Soverign overthrew all our laws, except in matters relating to marriage, succession and other family relations, and

thrusted upon us laws of their own by legislative as well as judicial fiats. This was never inheritance, but coercive imposition. This continued till

India won freedom and became its own Sogereign, when we could also overthrow all these Anglo-Indian laws. We, however, did not and allowed

those laws to continue (vide, Article 372 of the Constitution) with the hope, belied by now, that we would very soon be able to make our own

laws to fit in with out ethos and culture and to meet our Indian necessities. We have failed and thus though the British Rule has ended, the British

Rules are still allowed to reign with almost devotional fervour. But at any rate, this is the result of our own action, right or wrong, and surely not any

involuntary transmission by way of inheritance.

Ajoy Nath Ray, J.

12. This appeal raises the question of the sustainability of orders of dismissal of the writ petitioner, a railway servant. The first order, dated 28th

December, 1982, is a composite one both dispensing with an inquiry, and imposing punishment. On 28th April, 1983, the order was confirmed in

departmental appeal.

13. u/s 9 of the Railway Protection Act, 1957, Article 311 is applicable, as indeed it would be for a railway servant even without such an express

provision.

14. The forty seventh rule framed under the said Act provides for dispensation of enquiry. The rule is as follows :-

47. Special procedure in certain case. Notwithstanding anything contained in Rules 44, 45 and 46, where a penalty is imposed on a member of the

Force (a) on the ground of conduct which has led to his conviction on a criminal charge or (b) 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, the Disciplinary

Authority may consider the circumstances of the case and pass such orders thereon as it deems fit.

15. The reason given in the first order for dispensation of inquiry is as follows :-

The witnesses of the case, who have disclosed the above facts, are very much afraid to give their statement openly, as they have been threatened

of dire consequences and as such they scared to come forward to give their statements and face any enquiry. It is, therefore, not possible to

examine them openly, record their statements and to dispose of the case under the normal D & A Rules, as is provided in Rule 44, 45 and 46 of

the RPF Rules, 1959. It is also not desirable under the above circumstances to disclose the identities and names of the witnesses and thereby

expose those persons before an organised gang of criminals and thereby make them liable to be subjected to humuliation, insult, even risk of their

lives and also risk of the lives of their family members. They have disclosed commission of such an organised crime and deserves to be protected

against any untoward incident. The witnesses disclosed your direct aid and abetment in this crime and also forming of a criminal gang with others,

who are operating with the Rly. property at BASC area. Under such circumstances, the normal procedure of D & A Rules had to be dispensed

with and the procedure as laid down under Rule 47(b) of the RPF Rules, 1959 had become absolutely necessary to take deterrent measure at an

early date.

16. That the reasons for dispensation are subject to judicial review and scrutiny is beyond dispute. Vide Union of India and Another Vs. Tulsiram

Patel and Others,

17. It is also settled now that a mere likelohood of insult, humiliation or even violence to witnesses or their families, which can be a consequence in

case of every possible witness action, is not sufficient in law to brand a situation as being one where it is not reasonably practicable to hold an

inquiry. In the case of Chief Security Officer vs. Singasan Rabi Das, Judgment Today, 1991(5) SC 117 , (since reported also in Chief Security

Officer and Others Vs. Singasan Rabi Das, the Supreme Court set out the reasons which had been given in that matter for dispensation of inquiry

as follows : -

... because of the facts that it is not considered feasible of desirable to procure the witnesses of the security/other Railway Employees since this will

expose them and make them ineffective for future. These witnesses if asked to appear at a confronted enquiry are likely to suffer personal

humiliation and Insults thereafter or even they and their family members may become targets of acts of violance.

18. Then, it was said in the concluding paragraph of the Order in that case as follows:

It was stated further that if these witness were asked to appear, at a confronted enquiry they were likely to suffer personal humiliation and insults

and even their family members might become targets of acts of violence. In our view these reasons are totally insufficient in law. We fail to

understand how if these witnesses appeared at a confronted enquiry, they are likely to suffer personal humiliation and insults. These are normal

witnesses and they could not be said to be placed in any delicate or special position in which asking them to appear at a confronted enquiry would

render them subject to any danger to which witnesses are not normally subjected and hence these grounds constitute no justification for dispensing

with the enquiry. There is total absence of sufficient material or good grounds for dispensing with the enquiry.

19. The grounds for dispensation in the instant case are also no grounds for dispensing with in quiry. If for protecting unnamed witnesses an

unspecified number against unspecified threats by undisclosed men (or may be a single man) an inquiry is not practicable, then, a mere stock

formula can deprive a person of his Job. I am quite unable to agree that it can.

20. The learned Judge in the Court below, with respect, was not right to allowing his lordship''s self to be guided by a secret inquiry report which

was made available to the Court below (paper book, page 87). The opposition to the writ is totally lacking in any particulars as to why the inquiry

was impracticable. The opposition is Just as vague as the order quoted above and the relevant paragraphs are not even verified properly as true to

the deponents knowledge. The learned Judge in the Court below was again with respect, swayed by the details of the theft scheme as apparent

from the secret report of the secret inquiry, but found nothing much therefrom about why holding the inquiry was itself an impracticable proposition.

21. In general, where a challenge is thrown in a writ to the existence of jurisdictional fact or jurisdictional circumstance, it is imperative on the part

of the respondent authorities to lay before the Court all available materials which establish the same. So also here. If a person, against whom an

order dispensing with an inquiry has been passed, comes to Court and challenges the order of dispensation, all materials regarding the existence of

emergent circumstances must be brought before Court. Vide Jaswant Singh''s case AIR 1991 SC 386 at page 390, left column. The Court will not

judge upon the same whether the dispensation of enquiry was right or wrong; but the Court will surely judge on the same whether dispensation of

enquiry under the circumstances could at all be a reasonable procedure of any reasonable authority. If the Court finds that on the materials on

record no reasonable authority could dispense with inquiry in any reasonable view of the matter, then the Court will interfere. Thus, on materials

before it. the Supreme Court found in the case of Ikramuddin Ahmed Borah Vs. Superintendent of Police, Darrang and Others, that it was not

possible to hold that there was any abuse of power in invoking the provision for dispensing with inquiry. If, however, the authorities choose not to

produce any material before the Court, as here, by way of an affidavit, the Court must proceed on the basis that such materials are not there.

Without drawing any technical adverse inference, the Court would still be bound to assume that no relevant material exists, because otherwise the

safeguard of a judicial scrutiny of dispensation would be utterly lost.

22. Though Article 311 might originally have been inserted to create a deliberate difference with the English Constitutional doctrine that most

crown servants hold office during good pleasure (as distinct from good behaviour), yet the presence of that Article in our Constitution appeared to

become increasingly odd to the first year Indian Law student, as the rules of natural justice found their foothold on an ever firmer and wider

ground. What is this article doing here, he asked, when the same hearing is bound to be given ? Though he shows his inexperience in the history of

this article, yet, his question is still of benefit to us. For, the recognition of Article 311 as an enshrinement of the second rule of natural justice in the

special field of government service, helps us to understand its amendment in the true light. The amendment also does no more than enshrine the

same rule of natural justice, which permits the hearing to be dispensed with, if the situation would not permit of a hearing. To be under the

impression that the amendment does more than what is permissible under other relationships calling for a hearing to be given, would be clearly

erroneous in view of the supreme Constitutional mandate of equality. A government servant losses his job; there is a riot, so he has lost his job

without an enquiry. A government licensee loses his licence; there is riot, so he has lost his licence without a hearing. The point is that, what would

not do for the licensee, will not do for the government servant either. Their situation, viewed through the two eyes of ''natural justice'' and ''Article

14'' Is materially the same.

23. In an extraordinary situation, the requirements of natural justice may be satisfied by giving an ex post facto hearing, after the emergent action

affecting a person''s rights has been taken. In Article 311 situation, an appeal by way of special rules usually provides the remedy of the expost

facto hearing. Here it is rule 58. In Ram Chander Vs. Union of India (UOI) and Others, it was Rule 22(2). Though according to Tulsiram''s case

no rules and no back doors can provide an opening if the main gate of the first inquiry is shut for impracticability of holding that inquiry, yet,

according to all authority, (Tulsiram at paras 70 and 102; Ram Chander, at paras 22 to 24; Satyavir Singh and Others Vs. Union of India (UOI)

and Others, an appeal, where the results of such ex parte inquiry are tested, is not excluded by the words of Article 311. I should have thought that

such an ex post facto testing, in the line and on the factors indicated in The Divisional Personnel Officer, Southern Railway and Another Vs. T.R.

Chellappan and Others, and approved pro tanto in Tulsiram para 114, (p. 1470), is not only not excluded, but is an imperative necessity for

observance of the rules of reasonableness and natural justice. For, the practical time gap between the inquiry and the actual imposition of

punishment is not in any manner touched by Article 311, and in that gap, the rules of natural justice shall operate, as they are not excluded by any

necessary implication.

24. Even in Satyavir''s case, where at paragraph 34 (AIR 1986 SC at 562) Justice Madon saw it fit to compare natural justice to a horse, stating

that it should not run unruly, reminding one of the comparison similarly made in England with reference to the doctrine of public policy (e.g., when

interfering with private bargains), even there, it has been said at paragraph 96 (p. 569) that departmental rules should be so interpreted as to read

into them the provision of an appeal from the ex parte consideration initially made, as soon as the hearing of the appeal or revision becomes

practicable. It is now for the Supreme Court to consider if such a revision (by way of inherent powers) can be maintained before the disciplinary

authority itself, that passed the initial order when a hearing was impracticable, as soon as the hearing becomes practcable. The relevant part of

Article 311(2) is as follows :-

No such person.....shall be dismissed..... except after an inquiry..... Provided.....that

this clause shall not apply..... (b) where the authority..... is satisfied for..... reason.....in writing, it is not

reasonably practicable to hold such inquiry;.....

25. Let us suppose that a penalty of a reprimand is being considered against a civil servant. Can he be reprimanded without giving him an

opportunity to clear himself of the charges ? Surely not. But again, and quite as surely, he can indeed be reprimanded if it is not reasonably

practicable to hear him; say, if he is away on a foreign tour with indefinite plan of return. This is no more and no less than the principle of natural

justice itself. What Article 311 and its amendment seek to do is to put this law of natural justice on a high pedestal of a Constitutional article in

cases of government servants who are being proceeded against with a view to imposing major service penalties on them.

26. It may be asked that if the inquiry itself is dispensed with, then where is the question of the gap between the inquiry and the imposition of

punishment ? The simple answer is that what is dispensed with is not all and every type of inquiry, but ''such inquiry'', i.e., an inquiry upon hearing

the officer. Surely, when an inquiring authority recommends or orders, usually subject to a departmental appeal, a punishment, there must be an

inquiry in the mind, an application of the mind, and a consideration of the relevant facts and circumstances. The word consideration, connoting a

unilateral application of mind of the disciplinary authority, was with all due respect, well emphasized by Justice Fazl Ali in Challappan''s case. It

expresses and reminds of the distinction between itself and an inquiry, which carries with it, as a word, the idea of a full fledged hearing of both the

sides.

27. I do not propose to enter into the question whether in this case the first order or the appellate order shows a consideration of all or any of the

relevant factors regarding the punishment imposed. Where I not so totally satisfied about the illegality of the initial dispensation of a full inquiry, I

would embark upon a very detailed consideration of the two orders to see whether, on the face of the reasons recorded (and all authorities say

they must be) each and every relevant factor can be said to have been considered, either expressly, or by reasonable implication. Reading these

two orders, I am shocked to find that the attitude of the disciplinary authority, upon dispensing with inquiry, as well as that of the appellate

authority, is not that of extreme doublefold caution (as the party to be punished is absent), but of comparative case and carefreedom. Indeed, in

appeal, there is no reason why the writ petitioner was not heard. Vide Ram Chander''s case, at para 24 (AIR 1986 SC 1182). For these reasons

the appeal is allowed. The judgment and Order of the Court below dated 22nd March, 1988 is set aside. The prayers in the writ application are ill

framed. Thus the two orders dated 28.12.82 and 28.4.83 as well as the communication dated 30.4/2.5.1983 are quashed, cancelled and declared

as void ab initio. The writ petitioner shall be treated by the respondents as being in service throughout and as having worked continuously. The writ

petitioner shall be given a posting and shall be allowed to join service within a month hereof. All the arrears of salary and other benefits shall be

paid and made available to the writ petitioner within two months hereof.

Ajoy Nath Ray, J.

I agree.