(1989) 04 BOM CK 0058

Bombay High Court

Case No: Writ Petition No. 4590 of 1987

Sheshrao Daulatrao Raut		APPELLANT
	Vs	
State of Maharashtra and others		RESPONDENT

Date of Decision: April 21, 1989

Acts Referred:

- Constitution (Forty-Second Amendment) Act, 1976 - Article 311
- Constitution of India, 1950 - Article 226, 311(2)
- Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 - Rule 11, 17, 18, 2, 5

Citation: (1989) 3 BomCR 353 : (1989) 59 FLR 491 : (1989) 2 LLJ 340 : (1989) MhLj 476

Hon'ble Judges: V.S. Kotwal, J; G.H. Guttal, J

Bench: Division Bench

Judgement

Guttal, J.

The petitioner was appointed as Assistant District Dairy Development Officer on 25th July, 1979 upon being selected to that post directly through the Maharashtra Public Service Commission. By Order dated 7th May, 1987, the respondents Nos. 1, 2 and 3 who are the State of Maharashtra and its Officers acting under the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979, reverted the petitioner from his class II position of Assistant District Dairy Development Officer to class III position and by the Order dated 11th June, 1987 he was posted as Assistant Dairy Chemist. These two Orders of reversion are impugned in this petition under Article 226 of the Constitution of India. The respondents Nos. 1, 2 and 3 are respectively the State of Maharashtra, the Secretary, Government of Maharashtra, Agriculture and Co-operation Department and the Section Officer in the said Department. The respondents Nos. 4 and 5 are respectively the Inquiring Authority who inquired into the conduct of the petitioner and the Dairy Development Commissioner, Government of Maharashtra.

2. A graduate in Agriculture, the petitioner was initially employed as Milk Procurement Supervisor in the Dairy Development Office in May, 1976. Eventually, he was promoted as Assistant Dairy Chemist. On 25th July, 1979, by selection through the Maharashtra Public Service Commission, he was appointed as Assistant District Dairy Development Officer.

3. An inquiry under the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979, hereinafter referred to as ''the Rules'', was held in respect of 15 charges made against the petitioner. The inquiry commenced on 12th February, 1985 and on 15th January, 1986, the Inquiring Authority who is the respondent No. 4, made his report. He held that out of the 15 charges made against the petitioner, charge No. 3 alone was proved. Charg No. 3 was that the petitioner incurred unnecessary expenditure of Rs. 76,724.50 on printing work. The remaining 14 charges were not proved. The Inquiring Authority recommended the minor penalty of stoppage of two increments and the resultant postponement of future increments. The Government of Maharashtra, who is the disciplinary authority, received the report and considered it. The disciplinary authority did two things, without notice to or without hearing the petitioner - (i) firstly, upon consideration of the evidence led before the Inquiring Authority, the disciplinary authority reverted the findings on the 14 charges which the Inquiring Authority held were not proved and held that all the 15 charges were proved; (ii) secondly, it imposed the punishment of reduction in rank, a major penalty. Consequent upon this decision, he was ordered to be posted as Assistant Dairy Chemist by the Order dated 11th June, 1987.

4. Two facts are admitted. Firstly, the petitioner''s appointment as Assistant District Development Officer was not by promotion from the post of Assistant Dairy Chemist. He was appointed by nomination to the post of Assistant District Dairy Development Officer. Secondly, although the petitioner was heard by the Inquiring Authority, the disciplinary authority who reversed the findings on the 14 charges and imposed a major penalty, did not give to him an opportunity of being heard before taking these decisions.

5. On the arguments advanced before us, two questions arise. The first question is whether the impugned Order holding the petitioner guilty of all the charges and imposing the punishment of reversion is in breach of the provisions of Article 311(2) of the Constitution of India. The second question is whether the petitioner, a direct appointee to the Office of the Assistant Dairy Development Officer could be reverted to a subordinate position vacated by him upon his selection.

6. The first question, which arise out of Article 311(2) of the constitution of India needs to be specifically and clearly formulated. The question is not whether the petitioner is entitled to a notice to show cause as to why the proposed punishment should not be imposed. The question is whether the right "that he shall not be dismissed or removed for reduced in rank except after inquiry in which he has been informed about the charges against him and given a reasonable opportunity of

being heard in respect of those charges" has been violated. (Article 311(2) of the Constitution of India :- "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 the charges".) This distinction is of fundamental importance.

7. Article 311(2) of the Constitution of India as amended by the Constitution (15th Amendment) Act, 1963 enacts that "No Government servant 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 imposed on him any such penalty, until he has been given reasonable opportunity of making representations on the penalty proposed but only on the basis of the evidence adduced during his inquiry". Constitution (42nd Amendment) Act, 1976 further amended clause (2) of Article 311. The provision that the Government servant shall not be dismissed, removed or reduced in rank without inquiry into the charges made against him and only after hearing him, was left untouched. However, the proviso introduced by the amendment did away wit the second notice to show cause against the punishment proposed to be imposed. (Article 311(2) - proviso :- "Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed".) Thus, a Government servant is not entitled to a second notice calling upon him to show cause against the proposed penalty.

8. Consequent upon the Constitution (42nd Amendment) Act, sub-rule (4) of rule 9 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 was amended by substitution of a new sub-rule (4). The new sub-rule (4) consistent with the amended Article 311(2) provides that "it shall not be necessary to give the Government servant an opportunity of being heard on the penalty proposed to be imposed". (Rule 9(4) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 :- "(4). If the disciplinary authority, having regard to its findings on all or any if the articles of charge and on the basis of the evidence adduced during the inquiry, is of the opinion that any of the penalities specified in clauses (v) to (ix) of sub-rule (1) of rule 5, should be imposed on the Government servant, it shall make an order imposing such penalty and it shall not be necessary to give the Government servant any opportunity of making representation on the penalty proposed to be imposed".)

9. In order to understand and answer the first question, the scheme of the Rules needs to be borne in mind. The scheme of the Rules is this :-

The "appointing authority", the "disciplinary authority" and the "inquiring authority" are distinct bodies. The "appointing authority" is the authority which is competent to appoint a Government servant. (Rule 2(a) - Definitions.) The disciplinary authority is

the authority competent to discipline the Government servant by imposing penalties specified in rule 5 (Rule 2(c) and Rule 6). An authority to inquire into the charges against the Government servant may be appointed by the disciplinary authority under rule 8. Rule 5 prescribes the penalties that may be imposed. Censure, withholding promotion, recovery from the pay of the whole or part of any pecuniary loss caused by a Government servant to Government and withholding of increments of pay are the minor penalties. The major penalties are - reduction to a lower stage in the time-scale of pay for a specified period, reduction to a lower time-scale of pay, grade, post or service which shall ordinarily be a bar to the promotion, compulsory retirement, removal from service and dismissal from service. In the context of this case, the Government of Maharashtra is the disciplinary authority. An authority empowered by the Governor may institute disciplinary proceedings against any Government servant. (Rule 7 - Authority to institute proceedings.) No order imposing any of the major penalties shall be made except after an inquiry held, as far as may be, in the manner provided in rules 8 and 9. Sub-rule (2) of rule 8 empowers disciplinary authority to appoint "an authority to inquire into the truth" of the charges. The disciplinary authority is bound to deliver to the Government servant a copy of articles of charge, the statement of the imputations of misconduct or misbehaviour and a list of documents and of the witnesses by which each article of charge is proposed to be proved and by written notice call upon the Government servant concerned, to submit written statement of his defence. (Rules 8(3) and 8(4). After the inquiry is concluded in accordance with the procedure laid down, (Procedure is prescribes by sub-rules (5) to (22) of rule 8), the Inquiring Authority shall prepare a report containing the prescribes particulars (Rule 8(25) - Contents of the report) and submit the record and the report to the Disciplinary Authority. (Rule 8 (27).

10. If the disciplinary authority who receives the report of the Inquiring Authority considers it necessary to do so, he has the power to remit the case back to the Inquiring Authority for further inquiry which shall be held according to the procedure laid down in rule 8 (Rule 9(1).

Where the case is not remitted for further inquiry, the disciplinary authority is required to act on the report and the record received from the Inquiring Authority. It has the duty to -

(a) consider the record of the inquiry;

(b) record "its" finding on "each charge"; and

(c) if "it" disagrees with the findings of the Inquiring Authority on any article of charge, it shall record its reasons for such disagreement.

(Rule 9(2)

Then the disciplinary authority is enjoined to "have regard" to "its findings" on all or any of the articles of charge and form an opinion as to whether any of the major penalties should be imposed on the Government servant. If the disciplinary authority, having regard to its findings on all or any of the charges and on the basis of the evidence adduced during the inquiry, forms the opinion that any of the major penalties should be imposed on the Government servant, it shall make an order imposing such penalty. But under rule 9(4) as amended on 29th November, 1985 "it shall not be necessary to give the Government servant any opportunity of making representation on the penalty proposed to be imposed". (Rule 9(4) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979,)

11 The orders made by the disciplinary authority shall be communicated to the Government servant who shall also be supplied with a copy of the report of the Inquiring Authority and a statement of the findings of the disciplinary authority together with the brief reasons for its disagreement with the findings of the Inquiring Authority. (Rule 11.) An appeal lies to the Government (Rules 17 and 18) against any order imposing any of the penalties specified in rule 5.

12. The petitioner contends that he was denied "a reasonable opportunity of being heard" in respect of the charges made against him in the inquiry which resulted in the impugned orders. It is therefore necessary to consider, in the first place, as to what an inquiry is. When does an inquiry commenced ? When does it terminate ? This question is important because the obligation to hear the petitioner in respect of the charges made against him continues during the inquiry. It is often erroneously assumed that the inquiry ends with the report of the Inquiring Authority. The word "inquire" means to ask about or to question, with the object of seeking truth. (Webster''s Third New International Dictionary, Volume I.) Inquiry is the act of seeking truth, information or knowledge about something. When used, in the context of departmental inquiry in respect of charges against a Government servant, it means the formal or official investigation by a person having authority to compel testimony. It is the search for the truth or otherwise of the accusations made against him. This is done by asking questions, collecting testimony of witnesses and information from documents. Inquiry is thus the totality of the steps taken in search for truth through the investigative media of issuing notice, recording and fairly considering the evidence, discussion and reasoning.

13. Therefore, the inquiry which commences with the notice to show cause continues into the written statement by a delinquent employee, follows through the evidence of witnesses, production of documents and culminates in reasoning and conclusions. It is a continuous process which terminates with a final decision into the question under investigation. We are of the opinion that the inquiry does not terminate with the report of the Inquiring Authority, but ends with the decision of the disciplinary authority.

14. At this stage, the status of the Inquiring Authority should be borne in mind. His status and functions also support our conclusion that the inquiry continues beyond the stage of the report of the Inquiring Authority and ends with the decision of the disciplinary authority. The scheme of the rules shows that the Governor directs the disciplinary authority to institute the disciplinary proceedings and where the disciplinary authority itself does not hold the inquiry, it delegates a part of its functions viz. issuing charge-sheet, recording evidence and making a report about the charges, to the Inquiring Authority. The disciplinary authority, which in this case is the Government, is not bound by the findings recorded by the Inquiring Authority. Otherwise, the rules which invest the disciplinary authority with the power to reversed the findings of the Inquiring Authority, are unnecessary. It is obvious that the Inquiring Authority is the delegate of the disciplinary authority. That indeed is the character which the Inquiring Authority inevitably occupies in a departmental inquiry at the instance of the P.C. Wadhwa Vs. Union of India (UOI) and Another, . The object of the inquiry is plain. It is to enable the Government to hold investigation into the charges framed against a delinquent Government servant so that the Government can, in due course, consider the evidence adduced and decide whether the said charges are proved or not. Union of India v. H. C. Goel (supra).

15. The Inquiring Authority merely aids the disciplinary authority in coming to a conclusion about the truth of the charges. It is the disciplinary authority who takes a decision in respect of each of the charges, after considering the evidence. The role of the Inquiring Authority, as the delegate of the disciplinary authority, ends with the making of the report. His findings on the charges and the report are merely an aid in the inquiry which the disciplinary authority is called upon to hold because it is the disciplinary authority who takes a decision on each of the charges, notwithstanding the conclusions made by the Inquiring Authority. The disciplinary authority may accept, modify or reject the conclusion made by the Inquiring Authority. He does this on consideration of the evidence on record which means that his mind is engaged in the search for the truth in respect of the articles of charges. In this endeavor, his mind considers the record, the inference from facts and evaluates the evidence. Where it disagrees with the Inquiring Authority, reasons have to be recorded. The disciplinary authority is required to "determine" what penalty should be imposed on the Government servant. In our opinion, the scheme of the Rules contemplates one inquiry. The proceedings before the Inquiring Authority, a delegate of the disciplinary authority, are in aid of the Inquiry which continues beyond the proceedings before the Inquiring Authority. The decision-making process of the disciplinary authority is a part of the Inquiry envisaged by Article 311(2) of the Constitution of India and the Rules.

16. For the reasons stated above, we hold that the inquiry continued until the disciplinary authority by its Resolution No. BME 5283/1784/1451/Adm. 6 dated the 7th May, 1987 (a) reversed the findings on 14 charges; (b) confirmed the finding on charge No. 3 and (c) reverted the petitioner from class II to class III position. The

question is whether in this inquiry, the petitioner was "given a reasonable opportunity of being heard in respect of the charges". The need to furnish an opportunity of being heard arises because the disciplinary authority has its mind attuned to the evidence, its interpretation and reasoning which may lead to one or the other conclusions. Where the disciplinary authority decides to reverse the findings of the Inquiring Authority, an opportunity of being heard in respect of the matters on which the adverse findings are given, is of the essence of the Inquiring process. The rule of reasonable opportunity of defence is violated by dental of such opportunity, when the findings are reversed. Besides the adverse findings of the disciplinary authority on the charges, in respect of which the Inquiring Authority has acquitted the Government servant, enter the decision to impose the punishment. In other words, the decision to impose punishment proceeds from consideration of the gravity of the totality of the charges which include the charges in respect of which the findings are reversed. It is difficult to comprehend and enumerate exhaustively all the facts and circumstances which may violated the rule of reasonable opportunity of defence. But it is of fundamental importance that before taking an adverse decision, a Government servant is given reasonable opportunity of being heard. This is the primary duty of the disciplinary authority enjoined by Article 311(2) of the Constitution of India. Such situations may arise in diverse circumstances, such as, when additional documents not produced earlier is considered, a new witness testifies, a view of the facts different from the one taken earlier is taken and so on.
There are judicial decisions where situations similar to the one obtaining in this case did arise. Where the disciplinary authority "without giving an opportunity" to the delinquent officer "to show cause against the proposed view" reversed the findings of the Inquiring Authority, it commits "a serious error of law". It has, therefore, been held that in such a case the reasonable opportunity covered by Article 311(2) of the Constitution is denied to the Brij Nandan Kansal Vs. State of U.P. and Another, .

In Narayan Misra v. State of Orissa 1969 (3) SLR 657 , the delinquent was found guilty of only one of the three charges and the punishment of suspension was proposed. The disciplinary authority held him guilty of all the three charges and dismissed him. The Supreme Court held that the action taken without giving an opportunity of being heard, was "against all principles of fair play and natural justice". Chandrama Tewari Vs. Union of India (UOI) (through General Manager, Eastern Railways), , illustrates how the rule of reasonable opportunity laid down by Article 311(2) of the Constitution is violated by failure to supply a copy of documents relied upon to prove the charges. The report of the Inquiring Authority has to be supplied to the Government servant. If it is not supplied and the disciplinary authority takes the report into consideration, there is clear denial of the reasonable opportunity of being heard. M. P. Naik v. State of Karnataka 1981 (3) SLR 22.

17. The reasonable opportunity of being heard is the fundamental element in every inquiry. Its breach may occur in various ways illustrates by the cases referred to in

the last paragraph. No formula can prescribes the exact content of the right of reasonable opportunity of being heard. Yet its breach can be easily recognised. It can occur where a documents is not supplied, as in Chandrama Tewari v. Union of India (supra). The Government may violated the rule by reversing the finding of the Inquiring Authority without hearing the Government servant, as in Narayan Misra v. State of Orissa (supra). The rule is also violated when the report of the Inquiring Authority is not supplied to the Government servant as in M. P. Naik v. State of Karnataka (supra).

18. For the reasons stated in the foregoing paragraph, we are of the opinion that in the inquiry into the charges against the petitioner held by the disciplinary authority, the latter committed a clear breach of its duty to give to the petitioner "a reasonable opportunity of being heard in respect of the charges". As envisaged by Article 311(2) of the Constitution of India. We are not oblivious to the fact that Government servant is not entitled to a second notice before punishment is imposed. But in our opinion, the primary duty of the disciplinary authority to provide to the Government servant opportunity of being heard in respect of the charges, continues throughout the inquiry. This primary duty, which has not been abridged by the Constitution (42nd Amendment) Act, 1976, exists not only during the proceedings before the Inquiring Authority but continues until the disciplinary authority arrives at its conclusions.

19. Since the petitioner has been held guilty of the charges by the disciplinary authority, without giving to him a reasonable opportunity of being heard in respect thereof, the order of the disciplinary authority contained in Resolution No. BME 5283/1784/1451/Adm. 6 dated 7th May, 1987 is void. Since the findings of the disciplinary authority on the charges which he considered in exercise of his authority under rule 9 are vitiated by failure to fulfill the primary duty of hearing the petitioner, it follows that the consequential order No. Adv. 15(4)/3380/SDR/87 dated 11th June, 1987 posting him as Assistant Dairy Chemist is also void. The petitioner, therefore, shall be deemed to continue to hold the Office of Assistant District Dairy Development Officer, Government of Maharashtra, on the same terms and conditions on which he was working immediately before the impugned orders were made. He shall be deemed to have held that Office continuously notwithstanding the impugned orders. He shall be paid all the emoluments as if he were in actual service as Assistant District Dairy Development Officer.

20. The next question is whether the petitioner who was appointed by nomination through the Maharashtra Public Service Commission can be reverted to the subordinate position of Assistant Dairy Chemist. In Hussain Sasan Saheb Kaladgi Vs. State of Maharashtra, , an employee of the Education Department was directly appointed by nomination to the post of Assistant Deputy Education Inspector. He was not appointed through departmental promotion. The Supreme Court held that only a promotee can be reverted to the lower post and that a direct appointee to the

post cannot be so reverted. This is clear because there is not post to which he can be reverted. Again in Nyadar Singh Vs. Union of India (UOI) and Others, , the Government servants were reduced to posts lower than those to which they were directly recruited. The Supreme Court held the reduction illegal. The fact that the petitioner was not a departmental promotee to the Office of the Assistant District Dairy Development Officer but was appointed directly, has not been disputed. We are, therefore, of the opinion that his reversion to the post of Assistant Dairy Chemist is illegal.

21. For all these reasons, we allow the petition. We declare that the impugned orders are void and the petitioner shall be deemed to have been continuously in service in the Officer of the Assistant District Dairy Development Officer from the date on which the impugned orders were made. The petitioner shall be paid all the emoluments in accordance with the rules. The respondents shall pay costs of this petition to the petitioner. The rule is made absolute.