A

UTTAR PRADESH GOVERNMENT

v.

SABIR HUSSAIN

April 30, 1975

B [V. R. KRISHNA IYER, R. S. SARKARIA AND A. C. GUPTA, JJ.]

Government of India Act, 1935—S. 240—If covers a case of 'removal' also —Reasonable opportunity—Test of—If obligatory to give reasonable opportunity in the case of 'removal' from service.

C Section 240 of Government of India Act, 1935 states that no person shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

Article 311(2) of the Constitution (after the 15th Amendment) states that no person shall be dismissed, removed or reduced in rank except after an enquiry 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 D 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.

The respondent was dismissed from Government service in 1942. On representations, he was reinstated in 1948 but by the same order he was suspended with retrospective effect from the date of dismissal. After an inquiry, E he was removed from service in 1949. His suit for declaration that the order of suspension and removal were illegal and *ultra vires* was dismissed and his appeal was also dismissed. The High Court allowed the appeal holding that in the absence of furnishing a copy of the report, of the inquiry officer, the plaintiff had been denied a reasonable opportunity of showing cause against his 'removal'.

F On appeal by the State to this Court it was contended that since the removal was pre-Constitutional, no protection of Art. 311(2) could be claimed by the respondent. Section 240(3) of the Government of India Act, 1935, it was contended, would not afford any protection because the word 'removal' did not find mention in that section.

Dismissing the appeal,

G *HELD* : (1) The High Court was right in holding that the respondent was not given a reasonable opportunity to show cause against the action proposed to be taken against him and that the non-supply of the copies of the material documents had caused serious prejudice to him in making a proper representation. There was disobedience of the mandate of s. 240(3) of the Government of India Act, 1935 and the impugned order stood vitiated on that score alone. [360 A-B]

H (2) A comparative study of s. 240(3) of the Government of India Act, 1935 and Art. 311(2) of the Constitution of India, 1950 would show that the protection afforded by these provisions, is in nature and extent substantially the same. The word 'removed' which appears in Art. 311(2) does not find mention in s. 240(3). But this does not mean that s. 240(3) did not cover a case of 'removal'. It is by now well settled that from the Constitutional standpoint, 'removal' and 'dismissal' stand on the same footing except as to future employment. In the context of s. 240(3) 'removal' and 'dismissal' from service, are synonymous terms, the former being only a species of the latter. Moreover, according to the principle of interpretation laid down in s. 277

of the 1935 Act, the reference to dismissal in s. 240 would include a reference to removal. [358 D-F] A

High Commissioner of India v. *I. M. Lal* [1948] 75 I.A. 225; *Purshottam Lal Dhingra* v. *Union of India* [1958] S.C.R. 825; *Khem Chand* v. *Union of India* [1958] S.C.R. 1080; *Shyam Lal* v. *The State* [1955] S.C.R. 25 referred to.

(3) Despite the non-mention of the word 'removal' in s. 240(3) it was obligatory for the removing authority as soon as it tentatively decided as a result of the enquiry, to inflict the punishment of 'removal' to give to the employee a *reasonable* opportunity of showing cause against the action proposed to be taken in regard to him. [358-G] B

(4) The broad test of "reasonable opportunity" is, whether in the given case, the show cause notice issued to the delinquent servant contained or was accompanied by so much information as was *necessary* to enable him to clear himself of the guilt, if possible, even at that stage, or, in the alternative, to show that the penalty proposed was much too harsh and disproportionate to the nature of the charge established against him. [359 B-C] C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 174 of 1968.

Appeal by Special Leave from the Judgment and Order dated the 17th August, 1967 of the Allahabad High Court (Lucknow Bench) in Second Appeal No. 155 of 1959. D

G. N. Dikshit and *O. P. Rana*, for the appellant.

R. P. Agarwal, for the respondent.

E

The Judgment of the Court was delivered by.

SARKARIA J.—This appeal is directed against a judgment of the High Court of Allahabad declaring that the orders, dated 15-8-1949 and 18-5-1951, of the respondent's removal from service were illegal.

F

The respondent was employed as Assistant Jailor at the Central Prison, Benaras. Auditing of the accounts revealed certain shortages. The respondent was charge-sheeted in respect of the same, and dismissed from the post on 4-7-1942. He made representations to the authorities against his dismissal. Ultimately, the Government reinstated him on 15-6-1948 but by the same order suspended him with retrospective effect from the date of his dismissal. On the basis of the G enquiry held earlier into the charges against him, he was removed from service on August 15, 1949. The respondent then filed suit No. 144/396 of 1952 in the Court of Munsif, Lucknow, claiming a declaration that the suspension order, dated June 15, 1948, and the removal order dated, 15-8-1949, and the Government Order, dated 18-5-1951, upholding the removal in appeal, were illegal, *ultra vires* and contrary to the rules. The plaintiff further stated that he would file a separate H suit for the recovery of the arrears of pay, to which he was entitled in respect of the period from 4-7-42 to 10-8-1949.

The suit was resisted by the State on various grounds. The trial court dismissed his suit. The First Appellate Court dismissed his appeal.

A The plaintiff preferred a second appeal in the High Court. Before the learned Judge of the High Court, who heard the appeal, it was contended, *inter-alia* that copies of the Enquiry Officer's report and findings were not supplied to the plaintiff and therefore, he was not afforded a reasonable opportunity of showing cause in terms of Art. 311(2) of the Constitution. In substance, the learned Judge seems to B have accepted this contention when he concluded that "in the absence of furnishing a copy of the report, it could not be said that the plaintiff had been afforded a reasonable opportunity to show cause". He, however rested this conclusion also on the ground "that no cause could properly be shown without a copy of the proceedings being handed over as provided in Rule 5-A of the Punishment & Appeal Rules for Subordinate Services notified by the State Government under C Notification No. 2627/II-266 dated August 3, 1932", (hereinafter referred to as the Appeal Rules). In the result, he allowed the appeal and declared the impugned orders, dated 15-8-1949 and 18-9-1951 to be void. He did not think it necessary to record any finding with respect to the suspension order, dated June 15, 1958, as the same had merged in the removal orders. Hence this appeal by special leave by D the State.

The plaintiff-respondent has not appeared before us despite notice. Mr. Aggarwal has assisted us as *amicus curiae*.

Shri Dikshit, learned Counsel for the appellant contends that the High Court was wrong in holding that the impugned order of removal E violated the provisions of Rule 5-A of the Appeal Rules. It is pointed out that the application of Rule 5-A to the employees of Jail Department was expressly excluded by Rule 6 of the Appeal Rules. It is further submitted that since the removal in question was a pre-constitutional removal, no protection of Art. 311(2) of the Constitution could be claimed by the respondent. Even s. 240(1) of the Govern- F ment of India Act, 1935, according to the Counsel, would not afford any protection because the word 'removal' did not find mention in that section. 'Removal', says the Counsel, is something different from 'dismissal' and the authors of the Government of India Act were aware of this difference when they did not include it in the protective provisions of s. 240. Since the impugned order, dated 10-8-1949, was only an order of removal as distinguished from dismissal, s. 240(3) was G not attracted and no opportunity to show cause against the intended removal was required to be given to the servant. It is further submitted that in any case, the respondent had no right to be supplied with a copy of the report and the findings of the Enquiry Officer on the ground that it was a requirement of natural justice. In support of his contentions, learned counsel has cited *Suresh Koshy George* v. *The University of Kerala and ors.*(1), *Satish Chander Anand* v. *The Union* H *of India*(2) and *State of Uttar Pradesh* v. *Mohammad Nooh*(3).

On the other hand, Shri R. P. Aggarwala submits that even if Rule 5-A of the Appeal Rules was not applicable, the respondent was entitled to the protection of s. 240(3) of the Government of India

(1) [1969] SCR 317 (2) [1953] S.C.R. 655.
(3) [1958] S.C.R. 595.

Act, 1935. According to Counsel, the word 'dismissal' used in s. 240(3) was wide enough to cover a case of removal as a punishment. It is maintained that 'removal' and 'dismissal' in the context of s. 240(3) were synonymous terms. The argument proceeds that since the respondent was not furnished with a copy of the enquiry report and the findings recorded therein, the opportunity, if any given, was not a '*reasonable* opportunity' as required by the mandatory provisions of s. 240(3). Even after making the order of removal, it is stressed, the authorities despite written requests made by the respondent, did not supply a copy of those documents to enable him to file an effective appeal/representation under the service rules to the appropriate authority. This infransigent attitude, says the learned *amicus curiae*, was also violative of the procedure prescribed in Government circular No. 47/B8EC, dated 13-12-47, (Ex. PW 1/2) and the fundamental principles of natural justice embodied therein. Reliance in this behalf has been placed on *High Commissioner of India* v. *I. M. Lall*(1), *Purshotam Lal Dhingra* v. *Union of India* (2), *Khem Chand* v. *Union of India*(3), *State of Gujarat* v. *R. G. Teradesai and anr.* (4) Counsel further distinguished the decision in *Suresh Koshy George's case* (supra).

The first point to be considered is whether the safeguard in s. 240(3) of the Government of India Act 1935, was available to a civil servant in a case of 'removal' from service as a punishment? In other words, was the protection afforded by s. 240(3) less extensive than the one given by Art. 311(2) of the Constitution?

Section 240(3) was in these terms :

> "No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him :
>
> Provided that this sub-section shall not apply—
>
> (a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
>
> (b) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause."

Article 311(2) (after the 15th Amendment) runs thus :

> "No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given

(1) [1948] 75 I.A. 225. (2) [1958] S.C.R. 825.
(3) [1958] S.C.R. 1080. (4) [1969] 2 S.C.R. 157.

A a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such enquiry, 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 :

B 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

C (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 D be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry."

A comparative study of s. 240(3) and Art. 311(2) would show that the protection afforded by these provisions, is in nature and extent, substantially the same. Of course, the word 'removed', which appears in Art. 311(2), does not find mention in s. 240(3). But this E does not mean that s. 240(3) did not cover a case of 'removal'. It is by now well settled that from the constitutional stand-point, 'removal' and 'dismissal', stand on the same footing except as to future employment. In the context of s. 240(3), 'removal' and 'dismissal' from service, are synonymous terms, the former being only a species of the latter. Moreover, according to the principle of interpretation laid down F in s. 277 of the 1935 Act, the reference to dismissal in s. 240 would include a reference to removal (see *High Commissioner of India* v. *I. M. Lall*) (supra); *Shyam Lal* v. *The State*(1); *Purshottam Lal Dhingra* v. *Union of India* (supra), *Khem Chand* v. *Union of India* (supra).

It is thus clear that despite the non-mention of the word 'removed' G in s. 240(3), it was obligatory for the removing authority, as soon as it tentatively decided, as a result of the enquiry, to inflict the punishment of 'removal', to give to the employee a *'reasonable* opportunity' of showing cause against the action proposed to be taken in regard to him".

It is to be noted that the section requires not only the giving of an opportunity to show cause, but further enjoins that the opportunity H should be "reasonable". What then is "reasonable opportunity" within the contemplation of s. 240(3) ? How is it distinguished from an opportunity which is not reasonable ? The question has to be answered in the context of each case, keeping in view the object of this provision and the fundamental principle of natural justice subserved by it.

(1) [1955] SCR 26.

As pointed out by this Court in *State of Gujarat* v. *Teredesai* (supra), "the entire object of supplying a copy of the report of the enquiring officer is to enable the delinquent officer to satisfy the punishing authority that he is innocent of the charges framed against him and that even if the charges are held to have been proved the punishment proposed to be inflicted is unduly severe. If the enquiry officer had also made recommendations in the matter of punishment, that is likely to affect the mind of the punishing authority even with regard to penalty or punishment to be imposed on such officer. The requirement of reasonable opportunity, therefore would not be satisfied unless the entire report of the Enquiry Officer including his views in the matter of punishment are disclosed to the delinquent servant". Thus the broad test of "reasonable opportunity" is, whether in the given case, the show cause notice issued to the delinquent servant contained or was accompanied by so much information as was necessary to enable him to clear himself of the guilt, if possible, even at that stage, or, in the alternative, to show that the penalty proposed was much too harsh and disproportionate to the nature of the charge established against him.

Now let us apply this test to the facts of the present case. The case of the defendant-State in the written statement (as extracted by the Munsif in his judgment) was :

> ".....that the accounts of the Civil Prison Benaras for the years 1939 to 1947 were audited by the Senior Departmental Auditor who detected heavy shortages whereupon the matter was thoroughly investigated and the I.G. ordered charge-sheets to be framed against the plaintiff which was accordingly done and the Superintendent, Central Prison, Benaras submitted the proceedings of those charges *along with his comments* and explanation of the plaintiff *whereupon* the I.G. of Prison found the plaintiff guilty of those charges and ordered his removal."

It is clearly discernible from what has been extracted above that the order of the removal in question proceeded on an acceptance of the report of enquiry proceedings and "comments" of the Enquiry Officer, (Superintendent). Evidently, the Inspector-General who made the impugned order was influenced and guided both with regard to the proof of charges and the prescribing of the type of punishment by the report and "comments" (which term will cover "recommendations") of the Enquiring Authority.

Further, it is an uncontroverted fact found by the courts below that no copy of the report, findings and "comments" of the Enquiring Officer, was supplied to the delinquent servant. Another undisputed fact is that no copy of the enquiry report and allied documents was given to him, even when he applied for the same in order to file an appeal to the higher authorities against the order of removal. The servant was told that he was not entitled to those copies excepting a copy of the impugned order of punishment, and that too on payment of Rs. 3 as copying charges.

A In view of these stark facts, the High Court was right in holding that the plaintiff (respondent) was not given a *reasonable* opportunity to show cause against the action proposed to be taken against him and that the non-supply of the copies of the material documents had caused serious prejudice to him in making a proper representation. There was a disobedience of the mandate of s. 240(3) of the Gov-
B ernment of India Act, 1935 and the impugned order stood vitiated on that score alone. Reference to Rule 5-A of the Appeal Rules, made by the High Court in support of its conclusion, was unnecessary because application of that Rule to the employees of the Jail Department had been expressly excluded by Rule 6 of the Appeal Rules. Moreover, Rule 5-A was inserted in 1953, while we are dealing with a
C removal order made in 1949.

It was contended before us by Mr. R. P. Agarwala that the removal order, dated 18-5-1951, passed by the Government of the respondent's appeal was also invalid because in violation of the basic principles of natural justice and fair play, copies of the proceedings, report and findings of the Enquiring Officer were not supplied to
D the plaintiff to enable him to file an effective appeal. There is undoubtedly force in this contention but we think it unnecessary to decide this point as the order or removal, dated 15-8-1949, being void *ab initio* due to non-compliance with the requirements of s. 240(3), the appellate impunged order would automatically fall within it.

Before parting with this judgment, we place on record our appre-
E ciation of the valuable assistance rendered by the learned counsel on both sides, particularly the *amicus curiae,* Shri Aggarwala.

The appeal fails and is dismissed without any order as to costs.
P.B.R.

Appeal dismissed.