1958

December 12.

HUKUM CHAND MALHOTRA

v.

UNION OF INDIA

(S. R. DAS, C. J., S. K. DAS, P. B. GAJENDRAGADKAR, K. N. WANCHOO and M. HIDAYATULLAH, JJ.)

Government Servant—Acceptance of private employment without Government's sanction—Show cause notice—Proposal of alternative punishment—Legality of notice—Validity of order of removal from service—Constitution of India, Art. 311(2).

The appellant, a Government servant, was charged with having, contrary to the rules governing the conditions of his service, accepted private employment without sanction of Government while he was still in Government service. The Officer who held an enquiry against him found the charge to be true and submitted a report. On April 14, 1954, a notice was issued to the appellant asking him to show cause in accordance with the provisions of Art. 311(2) of the Constitution in the following terms: ".....On a careful consideration of the report, and in particular of the conclusions reached by the Enquiring Officer in respect of the charges framed against you, the President is provisionally of opinion that a major penalty, viz., dismissal, removal or reduction should be enforced on you. Before he takes that action, he desires to give you an opportunity of showing cause against the action proposed to be taken.....". The appellant then showed cause and on October 1, 1954, the President passed an order removing the appellant from service with effect from that date. It was contended for the appellant, inter alia, that the show cause notice dated April 14, 1954, stated all the three punishments mentioned in Art. 311(2) and that inasmuch as it did not particularise the actual or exact punishment proposed to be imposed on the appellant, the notice did not comply with the essential requirements of Art. 311(2) and, therefore, the final order of removal passed on October, 1954, was not a valid order.

Held, that the show cause notice dated April 14, 1954, did not contravene the provisions of Art. 311(2) of the Constitution.

There is nothing wrong in principle in the punishing authority tentatively forming the opinion that the charges proved merit any one of the three major penalties and on that footing asking the Government servant concerned to show cause against the punishment proposed to be taken in the alternative in regard to him, because it gives the Government servant better opportunity to show cause against each of those punishments being inflicted on him, which he would not have had if only the severest punishment had been mentioned and a lesser punishment not mentioned in the notice had been inflicted on him.

High Commissioner for India and High Commissioner for Pakistan v. *I. M. Lall,* (1948) L.R. 75 I.A. 225 and *Khem Chand* v. *Union of India,* [1958] S.C.R. 1080, explained.

Jatindra Nath Biswas v. *R. Gupta,* (1953) 58 C.W.N. 128; *Dayanidhi Rath* v. *B. S. Mohanty,* A.I.R. 1955 Orissa 33 and *Lakshmi Narain Gupta* v. *A. N. Puri,* A.I.R. 1954 Cal. 335, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 288 of 1958.

Appeal by Special Leave from the judgment and order dated December 3, 1956, of the Punjab High Court (Circuit Bench) at Delhi in Letters Patent Appeal No. 25-D of 1956, arising out of the judgment and order dated April 9, 1956, of the said High Court (Circuit Bench) at Delhi in Civil Writ No. 8-D of 1955.

N. C. Chatterjee and *R. S. Narula,* for the appellant.

M. C. Setalvad, Attorney-General for India, B. Sen and *T. M. Sen,* for the respondent.

1958. December 12. The Judgment of the Court was delivered by

S. K. DAS, J.—This is an appeal by special leave and the only question for decision is if the order of the President dated October 1, 1954, removing the appellant from service with effect from that date is invalid, as claimed by the appellant, by reason of a contravention of the provisions of Art. 311(2) of the Constitution.

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The short facts are these. The appellant stated that he joined permanent Government service on April 4, 1924. In 1947, before partition, he was employed as Assistant Secretary, Frontier Corps of Militia and Scouts in the then North-Western Frontier Province, under the administrative control of the External Affairs Department of the Government of India. The appellant stated that the post which he held then was a post in the Central Service, Class II. After partition, the appellant opted for service in India and was posted to an office under the Ministry of Commerce in the Government of India in October, 1947. In December, 1949, he was transferred to the office of the Chief Controller of Imports, New Delhi, to clear off certain arrears of work. In August, 1951, he was posted as

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Deputy Chief Controller of Imports, Calcutta, and continued to work in that post till September, 1952. He then took four months' leave on average pay and on the expiry of his leave on January 24, 1953, he was transferred as Section Officer in the Development Wing of the Ministry of Commerce. The appellant thought that the order amounted to a reduction of his rank and he made certain representations. As these representations bore no fruit, he applied for leave preparatory to retirement on February 6, 1953. In that application the appellant stated:

"Normally I am due to retire in April 1956 but I find it difficult to reconcile myself to the new conditions of service under which I am now placed to work. I find that I would not be wasting only myself but I would also not be doing full justice to the interest of my Government and country in my present environment. Under the circumstances, I pray that I may be permitted to retire from the 1st May, 1953."

On February 14, 1953, the appellant amended his leave application and said that he had been informed by the Administrative Branch of the Development Wing that the question of permission to retire was under consideration, because of some difficulty with regard to the inclusion in the service of the appellant the period during which he held the post of Assistant Secretary, Frontier Corps; therefore he said that he might be granted leave on full average pay for four months with effect from February 15, 1953, if the decision to give him permission to retire was likely to be postponed beyond May 1, 1953. He amended his leave application by making the following prayer:

"Leave may be sanctioned for four months from the 15th February, 1953, or up to the date from which I am permitted to retire whichever may be earlier".

On March 10, 1953, the appellant was informed that he could not be allowed to retire at that stage, but the Ministry had agreed to grant him leave from February 16, 1953, to April 30, 1953. The appellant then went on leave and on February 25, 1953, he

wrote to Government to say that he was contemplating to join the service of Messrs. Albert David & Co. Ltd., Calcutta, and for that purpose he was accepting a course of training in that Company for two months. In April, 1953, the appellant accepted service under Messrs. Albert David & Co. Ltd., and he wrote to Government to that effect on April 6, 1953. On June 16, 1953, the appellant was charged with having violated r. 15 of the Government Servants' Conduct Rules and Fundamental Rule 11. Rule 15 of the Government Servants' Conduct Rules states, *inter alia*, that a Government servant may not without the previous sanction of Government engage in any trade or undertake any employment other than his public duties. Fundamental Rule 11 says in effect that unless in any case it be otherwise distinctly provided, the whole time of a Government servant is at the disposal of the Government which pays him. A. P. Mathur, Joint Chief Controller of Imports, was asked to hold an enquiry against the appellant on the charge mentioned above. The appellant submitted an explanation and an enquiry was held by A. P. Mathur in due course. The Enquiring Officer submitted his report on September 12, 1953, in which he found that the appellant had, contrary to the rules governing the conditions of his service, accepted private employment without previous sanction of Government during the period when he was still in Government service. On April 14, 1954, the appellant was asked to show cause in accordance with the provisions of Art. 311(2) of the Constitution. As the whole of the argument in this case centres round this show cause notice, it is necessary to set it out in full:

"Sir,

I am directed to say that the Enquiry Officer appointed to enquire into certain charges framed against you has submitted his report; a copy of the report is enclosed for your information.

2. On a careful consideration of the report, and in particular of the conclusions reached by the Enquiry Officer in respect of the charges framed against you the President is provisionally of opinion that a

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major penalty, viz., dismissal, removal or reduction should be enforced on you. Before he takes that action, he desires to give you an opportunity of showing cause against the action proposed to be taken. Any representation which you may make in that connection will be considered by him before taking the proposed action. Such representation, if any, should be made, in writing, and submitted so as to reach the undersigned not later than 14 days from the receipt of this letter by you.

Please acknowledge receipt of this letter.

Yours faithfully,
Sd. S. Bhoothalingam,
Joint Secretary to the Government of India."

The appellant then showed cause and on October 1, 1954, the President passed an order in which it was stated that after taking into consideration the report of the Enquiring Officer and in consultation with the Public Service Commission, the President found that the charge had been proved against the appellant and the appellant was accordingly removed from service with effect from that date.

The appellant then moved the Punjab High Court by a petition under Art. 226 of the Constitution in which his main contentions were (a) that he had no opportunity of showing cause against the action proposed to be taken in regard to him within the meaning of Art. 311 (2) of the Constitution and (b) that he had asked for leave preparatory to retirement and accepted service under Albert David & Co. Ltd. in the *bona fide* belief that Government had no objection to his accepting such private employment. Dulat, J., who dealt with the petition in the first instance, held against the appellant on both points. He found that there was no contravention of the provisions of Art. 311 (2) of the Constitution and on the second point, he held that on the facts admitted in the case there was no doubt that the appellant had accepted private employment in contravention of the rules governing the conditions of his service and there was little substance

in the suggestion of the appellant that he had no sufficient opportunity to produce evidence.

The second point no longer survives, and the only substantial point for our consideration is the alleged contravention of Art. 311(2) of the Constitution.

Mr. N. C. Chatterjee, who has appeared on behalf of the appellant, has submitted before us that the show cause notice dated April 14, 1954, stated all the three punishments mentioned in Art. 311 (2) and inasmuch as it did not particularise the actual or exact punishment proposed to be imposed on the appellant, the notice did not comply with the essential requirements of Art. 311 (2) of the Constitution; therefore, the final order of removal passed on October 1, 1954, was not a valid order.

In the recent decision of *Khem Chand* v. *Union of India* (1) this Court explained the true scope and effect of Art. 311 (2) of the Constitution. It was stated in that decision that the reasonable opportunity envisaged by Art. 311 (2) of the Constitution included (a) an opportunity to the Government servant to deny his guilt and establish his innocence, (b) an opportunity to defend himself, and finally (c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority after the enquiry is over and after applying its mind to the gravity or otherwise of the charges proved against the Government servant tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant. It is no longer in dispute that the appellant did have opportunities (a) and (b) referred to above. The question before us is whether the show cause notice dated April 14, 1954, gave the appellant a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. Mr. N. C. Chatterjee has emphasised two observations made by this Court in *Khem Chand's case* (1). He points out that in connection with opportunity (c) aforesaid, this Court observed that a Government

(1) [1958] S.C.R. 1080.

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servant can only make his representation if the competent authority after the enquiry is over and after applying its mind to the gravity or otherwise of the charges proved against the Government servant tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant. Mr. Chatterjee emphasises the observation "one of the three punishments". Secondly, he has drawn our attention to the observations made in the judgment of the Judicial Committee in *High Commissioner for India and High Commissioner for Pakistan* v. *I. M. Lall* (1), which observations were quoted with approval in *Khem Chand's case* (2). One of the observations made was:

"In the opinion of their Lordships no action is proposed within the meaning of the sub-section" (their Lordships were dealing with sub-section (3) of s. 240 of the Government of India Act, 1935) "until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on."

Mr. Chatterjee emphasises the expression "actual punishment" occurring in the said observations. It is to be remembered, however, that both in *I. M. Lall's case* (1) and *Khem Chand's case* (2) the real point of the decision was that no second notice had been given to the Government servant concerned after the enquiry was over to show cause against the action proposed to be taken in regard to him. In *I. M. Lall's case* (1) a notice was given at the same time as the charges were made which directed the Government servant concerned to show cause "why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce, etc." In other words, the notice was what is usually called a combined notice embodying the charges as well as the punishments proposed. Such a notice, it was held, did not comply with the requirements of sub-s. (3) of s. 240. In *Khem Chand's case* (2) also the report of the Enquiring Officer was approved by the Deputy Commissioner, Delhi, who imposed the

(1) (1948) L.R. 75 I.A. 225, 242. (2) [1958] S.C.R. 1080.

penalty of dismissal without giving the Government servant concerned an opportunity to show cause against the action proposed to be taken in regard to him. In *Khem Chand's case* (1) the learned Solicitor-General appearing for the Union of India sought to distinguish the decision in *I. M. Lall's case* (2) on the ground that the notice there asked the Government servant concerned to show cause why he should not be dismissed, removed or reduced or subjected to any other disciplinary action, whereas in *Khem Chand's case* (1) the notice issued to the Government servant before the enquiry mentioned only one punishment, namely, the punishment of dismissal. Dealing with this argument of the learned Solicitor-General this Court said (at p. 1100):

"A close perusal of the judgment of the Judicial Committee in *I. M. Lall's case* will, however, show that the decision in that case did not proceed on the ground that an opportunity had not been given to I. M. Lall against the proposed punishment merely because in the notice several punishments were included, but the decision proceeded really on the ground that this opportunity should have been given after a stage had been reached where the charges had been established and the competent authority had applied its mind to the gravity or otherwise of the proved charge tentatively and proposed a particular punishment."

Therefore, the real point of the decision both in *I. M. Lall's case* (2) and *Khem Chand's case* (1) was that no opportunity had been given to the Government servant concerned to show cause after a stage had been reached when the charges had been established and the competent authority had applied its mind to the gravity or otherwise of the charges proved and tentatively proposed the punishment to be given to the Government servant for the charges so proved. It is true that in some of the observations made in those two decisions the words "actual punishment" or "particular punishment" have been used, but those

(1) [1958] S.C.R. 1080. (2) (1948) L.R. 75 I.A. 225, 242.

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observations must, however, be taken with reference to the context in which they were made.

Let us examine a little more carefully what consequences will follow if Art. 311(2) requires in every case that the "exact" or "actual" punishment to be inflicted on the Government servant concerned must be mentioned in the show cause notice issued at the second stage. It is obvious, and Art. 311 (2) expressly says so, that the purpose of the issue of a show cause notice at the second stage is to give the Government servant concerned a reasonable opportunity of showing cause why the proposed punishment should not be inflicted on him; for example, if the proposed punishment is dismissal, it is open to the Government servant concerned to say in his representation that even though the charges have been proved against him, he does not merit the extreme penalty of dismissal, but merits a lesser punishment, such as removal or reduction in rank. If it is obligatory on the punishing authority to state in the show cause notice at the second stage the "exact" or "particular" punishment which is to be inflicted, then a third notice will be necessary if the State Government accepts the representation of the Government servant concerned. This will be against the very purpose for which the second show cause notice was issued.

Then, there is another aspect of the matter which has been pointedly emphasised by Dulat, J. If in the present case the show cause notice had merely stated the punishment of dismissal without mentioning the other two punishments, it would still be open to the punishing authority to impose any of the two lesser punishments of removal or reduction in rank and no grievance could have been made either about the show cause notice or the actual punishment imposed. Can it be said that the enumeration of the other two punishments in the show cause notice invalidated the notice? It appears to us that the show cause notice in the present case by mentioning the three punishments gave a better and fuller opportunity to the appellant to show cause why none of the three punishments should be inflicted on him. We desire to

emphasise here that the case before us is not one in which the show cause notice is vague or of such a character as to lead to the inference that the punishing authority did not apply its mind to the question of punishment to be imposed on the Government servant. The show cause notice dated April 14, 1954, stated in clear terms that "the President is provisionally of opinion that a major penalty, namely, dismissal, removal or reduction, should be enforced on you." Therefore, the President had come to a tentative conclusion that the charge proved against the appellant merited any one of the three penalties mentioned therein and asked the appellant to show cause why any one of the aforesaid three penalties should not be imposed on him. We see nothing wrong in principle in the punishing authority tentatively forming the opinion that the charges proved merit any one of the three major penalties and on that footing asking the Government servant concerned to show cause against the punishment proposed to be taken in the alternative in regard to him. To specify more than one punishment in the alternative does not necessarily make the proposed action any the less definite; on the contrary, it gives the Government servant better opportunity to show cause against each of those punishments being inflicted on him, which he would not have had if only the severest punishment had been mentioned and a lesser punishment not mentioned in the notice had been inflicted on him.

We turn now to certain other decisions on which learned counsel for the appellant has relied. They are: *Jatindra Nath Biswas* v. *R. Gupta* (1), *Dayanidhi Rath* v. *B. S. Mohanty* (2) and *Lakshmi Narain Gupta* v. *A. N. Puri* (3). In the case of *Jatindra Nath Biswas* (1) no second show cause notice was given and the decision proceeded on that footing. Sinha, J., observed, however:

"Where there is an enquiry, not only must he have an opportunity of contesting his case before the

(1) [1953] 58 C.W.N. 128. (2) A.I.R. 1955 Orissa 33.

(3) A.I.R. 1954 Cal. 335.

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enquiry, but, before the punishment is imposed upon him, he must be told about the result of the enquiry and the exact punishment which is proposed to be inflicted."

Mr. Chatterjee has emphasised the use of the word "exact". As we have pointed out, the decision proceeded on a different footing and was not rested on the ground that only one punishment must be mentioned in the second show cause notice. The decision in *Dayanidhi Rath's case* (1) proceeded on the footing that if the punishment that is tenatively proposed against a civil servant is of a graver kind, he can be awarded punishment of a lesser kind; but if the punishment that is tentatively proposed is of a lesser kind, there will be prejudice in awarding a graver form of punishment. What happened in that case was that the show cause notice stated that in view of the Enquiring Officer's findings contained in the report with which the Secretary agreed and in consideration of the past record of the Government servant concerned, it was proposed to remove him from Government service; in another part of the same notice, however, the Government servant concerned was directed to show cause why the penalty of dismissal should not be inflicted for the charges proved against him. Thus, in the same notice two punishments were juxtaposed in such a way that it was difficult to say that the punishing authority had applied its mind and tentatively come to a conclusion as to what punishment should be given. It was not a case where the punishing authority said that either of the two punishments might be imposed in the alternative; on the contrary, in one part of the notice the punishing authority said that it was proposed to remove the Government servant concerned and in another part of the notice it said that the proposed punishment was dismissal. In *Lakshmi Narain Gupta's case* (2) the notice called upon the petitioner to show cause why disciplinary action, such as reduction in rank, withholding of increments, etc., should not be taken against him. The learned Judge pointed out

(1) A.I.R. 1955 Orissa 33. (2) A.I.R. 1954 Cal. 335.

that there were seven items of penalties under r. 49 of the Civil Service (Classification, Control and Appeal) Rules, and the notice did not indicate that the punishing authority had applied its mind and come to any tentative conclusion as to the imposition of any of the punishments mentioned in that rule. On that footing it was held that there was no compliance with the provisions in Art. 311(2) of the Constitution. We do not, therefore, take these decisions as laying down that whenever more than one punishment is mentioned in the second show cause notice, the notice must be held to be bad. If these decisions lay down any such rule, we must hold them to be incorrect.

We have come to the conclusion that the three decisions on which learned counsel for the appellant has placed his reliance do not really support the extreme contention canvassed for by him, and we are further of the view that the show cause notice dated April 14, 1954, in the present case did not contravene the provisions of Art. 311 (2) of the Constitution. The appellant had a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

This disposes of the principal point in controversy before us. Mr. Chatterjee referred to certain mistakes of reference in the order of the President dated October 1, 1954. Instead of referring to r. 15 of the Government Servants' Conduct Rules, r. 13 was referred to. There was also a reference to para. 5 of a particular Government order which prohibited Government servants from taking up commercial employment within two years of retirement. Mr. Chatterjee submitted that this particular order did not apply to Government servants in Class II. We do not think that the inaccurate references were of any vital importance. In effect and substance the order of removal dated October 1, 1954, was based on the ground that the appellant violated r. 15 of the Government Servants' Conduct Rules and r. 11 of the Fundamental Rules; he accepted private employment without sanction of Government while he was still in Government service. That was the basis for the enquiry against

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the appellant and that was the basis for the order of removal passed against him.

For these reasons we hold that there is no merit in the appeal which must accordingly be dismissed with costs.

Appeal dismissed.

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December 16.

THE STATE OF RAJASTHAN

v.

SHRI G. CHAWLA AND DR. POHUMAL

(S. R. DAS, C. J., S. K. DAS, P. B. GAJENDRAGADKAR K. N. WANCHOO and M. HIDAYATULLAH, JJ.)

Legislative Competence—Validity of enactment—Control of Sound Amplifiers—Pith and substance of legislation—Ajmer (Sound Amplifiers Control) Act, 1952 (Ajmer 3 of 1953), s. 3—Government of Part C States Act, 1951 (49 of 1951), s. 21—Constitution of India, Sch. VII, List I, Entry 31, List II, Entries 1, 6.

The Ajmer (Sound Amplifiers Control) Act, 1952, was enacted by the Ajmer Legislative Assembly which, by s. 21 of the Government of Part C States Act, 1951, was empowered to make laws for the whole or any part of the State with respect to any of the matters enumerated in the State List or in the Concurrent List. The respondents were prosecuted under s. 3 of the Act for breach of the conditions of the permit granted for the use of sound amplifiers. On a reference under s. 432 of the Code of Criminal Procedure, the Judicial Commissioner of Ajmer held that the Act fell within Entry No. 31 of the Union List and not within Entry No. 6 of the State List as was claimed by the State, and, therefore, was *ultra vires* the State Legislature.

Held, that the pith and substance of the impugned Act was the control of the use of amplifiers in the interests of health and also tranquillity and thus the Act was substantially within the powers conferred by Entry No. 6 and conceivably Entry No. 1 of the State List, and did not fall within Entry No. 31 of the Union List, even though the amplifier, the use of which is regulated and controlled, is an apparatus for broadcasting or communication. Accordingly, the Act was *intra vires* the State Legislature.