

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN

&

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

TUESDAY, THE 3RD DAY OF FEBRUARY 2015/14TH MAGHA, 1936`

WA.No. 622 of 2010 () IN WP(C).9795/2009

AGAINST THE ORDER/JUDGMENT IN WP(C) 9795/2009 of HIGH COURT OF KERALA
DATED 19-11-2009

APPELLANT(S)/RESPONDENTS IN WPC::

1. STATE OF KERALA, REPRESENTED BY THE
SECRETARY TO GOVERNMENT, FISHERIES DEPARTMENT
SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DIRECTOR OF FISHERIES,
THIRUVANANTHAPURAM.

BY ADV. GOVERNMENT PLEADER

RESPONDENT(S)/PETITIONER IN THE WPC::

S.ANITHA, FISHERIES SUB INSPECTOR (NOW
UNDER ORDERS OF DISMISSAL) INCHARGE OF MALSYA
BHAVAN, ANJENGO, RESIDING AT TC 18/1772
KUNNAPUZHA, ARAMADA P.O., THIRUVANANTHAPURAM.

BY ADV. SRI.ELVIN PETER P.J.

BY ADV. SRI.T.G.SUNIL (PRANAVAM)

BY ADV. SRI.K.R.GANESH

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 22.1.2015,
THE COURT ON 03-02-2015 DELIVERED THE FOLLOWING:

C.R.

ASHOK BHUSHAN, Ag.CJ & A.M.SHAFFIQUE, J

W.A.No. 622 of 2010

Dated this the 3rd February, 2015

JUDGMENT

Ashok Bhushan, Ag.CJ.

This Writ Appeal has been filed against the judgment dated 19.11.2009 in W.P(C).No.9795 of 2009 by which judgment, the Writ Petition filed by the petitioner/respondent has been allowed. Brief facts of the case giving rise to the Writ Appeal are:

The writ petitioner, Smt.S.Anitha, was working as Officer-in-charge of Malaya Bhavan of the Fisheries Department during the period from 4.6.1997 to 16.2.1998 and was entrusted with dominion over the financial transactions of the Government property of that office. She was arrayed as accused in C.C.No.66/2004 on the file of the Enquiry Commissioner and Special Judge, Thiruvananthapuram. The petitioner was convicted by

judgment dated 9.2.2009 with rigorous imprisonment for a period of two years and to pay a fine of ₹35,000/- with a default clause of rigorous imprisonment for six months for the offence under Section 13(2) read with 13(1)(c) of the Prevention of Corruption Act, 1988 and rigorous imprisonment for a period of two years and to pay a fine of ₹35,000/- with a default clause of imprisonment for six months for the offence under Section 409 of Indian Penal Code. The Director of Fisheries issued an order dated 4.3.2009 removing the petitioner from service on the basis of her conviction by invoking the provisions contained in clause (a) of the second proviso to Article 311(2) of the Constitution of India. The petitioner filed appeal before this Court against the conviction being Crl.A.No.477/2009. Crl.M.A.No.2521/2009 was filed by the petitioner in which the following interim order was passed by this court on 6.3.2009:

“Execution of the sentence imposed on the petitioner/appellant shall stand suspended and

the conviction is stayed on the petitioner executing a bond for ₹25,000/- (Twenty five thousand only) with two solvent sureties each for the like amount to the satisfaction of the trial court. It is further ordered that out of the total fine amount, ₹35,000/- shall be deposited at the time of executing the bond and the balance amount of ₹35,000/- shall be deposited within one month from the date of release.”

2. A counter affidavit in the Writ Petition was filed on behalf of the State pleading that in view of the conviction of the petitioner, the power under clause (a) of the second proviso to Article 311(2) of the Constitution of India was invoked. Reference of the Government order dated 27.8.1998 has also been made in the counter affidavit. The learned Single Judge heard the Writ Petition and by judgment dated 19.11.2009 allowed the Writ Petition by setting aside Exhibit P3 and directing the respondent to reinstate the petitioner in service. The State of Kerala, aggrieved by the said judgment, has come up in this Writ Appeal.

3. Sri.P.I.Davis, learned Senior Government Pleader appearing for the appellant has submitted that no error was committed in dismissing the petitioner from service consequent to her conviction. It is submitted that even though the conviction order was stayed by this Court in Crl.A.No.477 of 2009, the conviction has not come to an end and the mere fact that conviction has been stayed does not entitle the petitioner to claim reinstatement in service. He further submits that in exercise of power under clause (a) of the second proviso to Article 311(2) of the Constitution of India, there is no requirement of giving hearing to the petitioner. It is further submitted that in accordance with Rule 18 of the Civil Services (Classification Control and Appeal) Rules, 1960, in the event the Criminal Appeal is allowed and subsequently the conviction is set aside in appeal, the petitioner is entitled to be reinstated with all the benefits to which she would have been entitled had she been in service. He further submitted that Rule 18 proviso mandates that consequent

to the conviction, the employee is to be dismissed forthwith irrespective of the fact that appeal is pending or that execution of sentence is suspended as per Rule 18 proviso. It is further submitted that under the threat of contempt of the judgment, although the petitioner was reinstated in service, such reinstatement was subject to the decision in the appeal.

4. Learned counsel appearing for the petitioner, refuting the submission of the learned Government Pleader, submitted that conviction of the writ petitioner having been stayed by this Court in Crl.A.No.477 of 2009 by judgment dated 6.3.2009, the writ petitioner was entitled for reinstatement forthwith. It is submitted that stay of conviction clearly amounts to obliteration of the conviction and consequence of the stay is that as if no conviction has been ordered. It is further submitted that the dismissal order dated 4.3.2009 was also erroneous, since the order was issued by the Director violating the principles of natural justice, since no notice or opportunity

was given to the petitioner before passing the dismissal order.

5. Learned counsel for the parties have placed reliance on various judgments of the Apex Court as well as this Court, which shall be referred to hereafter while considering the submissions in detail.

6. We have considered the submissions of the parties and perused the records.

7. From the submissions made by learned counsel for the parties and the pleadings on record, following are the issues, which arise for consideration in this Writ Appeal:

- i) Whether in view of the stay of conviction by order of this Court in CRMA.2521 of 2009 in CrI.A.No.477 of 2009 dated 6.3.2009, the conviction shall stand obliterated as if there is no conviction?**
- ii) Whether after the order of this Court dated 6.3.2009 staying the conviction of the petitioner, the petitioner was entitled for reinstatement in service?**

- iii) Whether the action of the Director in dismissing the petitioner was in accordance with Rule 18 of the Civil Services (Classification Control and Appeal) Rules, 1960 and clause (a) of the second proviso to Article 311(2) of the Constitution of India?**
- iv) Whether the order passed by the Director dated 4.3.2009 dismissing the petitioner from service deserves to be set aside on the ground that the petitioner was not given any opportunity before passing the order?**

8. **Issue Nos.i, ii and iii** being interconnected, are being taken together. As noted above, the conviction of the petitioner was stayed by this Court by order dated 6.3.2009 passed in Crl.A.No.477 of 2009 as quoted above. What is the consequence of stay of conviction is the question for consideration in this Writ Appeal.

9. The learned Single Judge allowed the Writ Petition taking the following view:

“However, the Government servant is liable to be removed only when there is a conviction imposed by a Criminal Court. Such conviction stands obliterated when the Appellate Court which is seized of the matter, orders stay of the very conviction itself, after duly advertent to the circumstances of the case. Once conviction itself is stayed, all consequences of such conviction also should cease to exist until the appeal is decided.”

10. The learned Single Judge has, thus, taken the view that the conviction stands obliterated when it is stayed by the Appellate Court. The aforesaid view taken by the learned Single Judge has been challenged in this Appeal. The issue regarding the consequence of stay of the conviction came up for consideration before the Apex Court and this Court in large number of cases. Present is a case where the appointing authority has invoked the power under clause (a) of the second proviso to Article 311(2) of the Constitution of India. Article 311 of the Constitution of India reads as follows:

“311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.—(1) No

person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) 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 those charges :

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:

Provided further 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*
- (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 be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.*

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.”

11. The exception as carved out in clause (a) of the second proviso to Article 311(2) is that when 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, no enquiry needs to be held. The Apex Court in **Deputy Director of Collegiate Education (Administration) v. S.Nagoor Meera** [(1995)3 SCC 377) had occasion to consider clause (a) of the second proviso to Article 311(2). In the said case also the employee was convicted on a charge under Section 420 of Indian Penal Code and Section 5 of the Prevention of Corruption Act, 1947. The employee in the above case filed appeal against the conviction and sentence and the Court suspended the sentence imposed and released him on bail. Relevant observations have been made in paragraphs 9 and 10 of the judgment, which are quoted as below:

"9. The Tribunal seems to be of the opinion that until the appeal against the conviction is disposed of, action under clause (a) of the second proviso to Article

311(2) is not permissible. We see no basis or justification for the said view. The more appropriate course in all such cases is to take action under clause (a) of the second proviso to Article 311(2) once a government servant is convicted of a criminal charge and not to wait for the appeal or revision, as the case may be. If, however, the government servant-accused is acquitted on appeal or other proceeding, the order can always be revised and if the government servant is reinstated, he will be entitled to all the benefits to which he would have been entitled to had he continued in service. The other course suggested, viz., to wait till the appeal, revision and other remedies are over, would not be advisable since it would mean continuing in service a person who has been convicted of a serious offence by a criminal court. It should be remembered that the action under clause (a) of the second proviso to Article 311(2) will be taken only where the conduct which has led to his conviction is such that it deserves any of the three major punishments mentioned in Article 311(2). As held by this Court in Shankar Dass v. Union of India: (SCC p. 362, para 7)

"Clause (a) of the second proviso to Article 311(2) of the Constitution confers on the Government the power to dismiss a person from service 'on the ground of conduct which has led to his conviction on a criminal charge'. But that power like every other power has to be exercised fairly, justly and

reasonably. Surely, the Constitution does not contemplate that a government servant who is convicted for parking his scooter in a no-parking area should be dismissed from service. He may, perhaps, not be entitled to be heard on the question of penalty since clause (a) of the second proviso to Article 311(2) makes the provisions of that article inapplicable when a penalty is to be imposed on a government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly."

10. *What is really relevant thus is the conduct of the government servant which has led to his conviction on a criminal charge. Now, in this case, the respondent has been found guilty of corruption by a criminal court. Until the said conviction is set aside by the appellate or other higher court, it may not be advisable to retain such person in service. As stated above, if he succeeds in appeal or other proceeding, the matter can always be reviewed in such a manner that he suffers no prejudice".*

12. In similar circumstances in ***Union of India v. Ramesh Kumar*** (AIR 1997 SC 3531) the Apex Court had occasion to consider Rule 19 of CCS (CCA) Rules, 1965. In the said case also the employee was convicted against

which he filed appeal and the Apex Court, exercising power under Section 389 of Code of Criminal Procedure, suspended the execution of sentence. Following was laid down by the Apex Court in paragraph 7 of the judgment:

“7. A bare reading of Rule 19 shows that the Disciplinary Authority is empowered to take action against a Govt. servant on the ground of misconduct which has led to his conviction on a criminal charge. The rules, however, do not provide that on suspension of execution of sentence by the Appellate Court the order of dismissal based on conviction stands obliterated and dismissed Govt. servant has to be treated under suspension till disposal of appeal by the appellate Court. The rules also do not provide the Disciplinary Authority to await disposal of the appeal by the Appellate Court filed by a Govt. servant for taking action against him on the ground of misconduct which has led to his conviction by a competent Court of law. Having regard to the provisions of the rules, the order dismissing the respondent from service on the ground of misconduct leading to his conviction by a competent Court of law has not lost its string merely because a criminal appeal was filed by the respondent against his conviction and the Appellate Court has suspended the execution of sentence and

enlarged the respondent on bail. This matter may be examined from another angle. Under Section 389 of the Code of Criminal Procedure, the appellate Court has power to suspend the execution of sentence and to release an accused on bail. When the appellate Court suspends the execution of sentence, and grants bail to an accused the effect of the order is that sentence based on conviction is for the time being postponed, or kept in abeyance during the pendency of the appeal. In other words, by suspension of execution of sentence under Section 389 Cr.P.C. an accused avoids undergoing sentence pending criminal appeal. However, the conviction continues and is not obliterated and if the conviction is not obliterated, any action taken against a Govt. servant on a misconduct which led to his conviction by the Court of law does not lose its efficacy merely because Appellate Court has suspended the execution of sentence. Such being the position of law, the Administrative Tribunal fell in error in holding that by suspension of execution of sentence by the appellate Court, the order of dismissal passed against the respondent was liable to be quashed and the respondent is to be treated under suspension till the disposal of Criminal Appeal by the High Court."

13. The consequence of stay of the conviction order was considered by a Constitution Bench of the Supreme Court in ***K.Prabhakaran v. P.Jayarajan*** [(2005)1 SCC 754]. The said was a case where order of conviction was stayed. Following was laid down by the Apex Court in paragraph 42 of the judgment:

“42. A person convicted may have filed an appeal. He may also have secured an order suspending execution of the sentence or the order appealed against under Section 389 of the Code of Criminal Procedure, 1973. But that again would be of no consequence. A court of appeal is empowered under Section 389 to order that pending an appeal by a convicted person the execution of the sentence or order appealed against be suspended and also, if he is in confinement, that he be released on bail or bond. What is suspended is not the conviction or sentence; it is only the execution of the sentence or order which is suspended. It is suspended and not obliterated.”

14. The Apex Court in the above case has clearly laid down that even suspension of conviction does not result

obliteration of the conviction. In view of the ratio of the above Constitution Bench judgment, it is clear that the learned Single Judge fell in error in taking the view that by suspension of conviction, the conviction is completely obliterated.

15. The effect of stay granted by this Court has been considered by the Apex Court in ***Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association*** [(1992)3 SCC 1], where the order of stay was granted under Article 226 of the Constitution of India against an order passed by the statutory authority. In paragraph 10 the following was laid down by the Apex Court:

“10.While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not,

however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.”

16. Thus, it is clear that stay of an order does not mean that the order has become nonest, rather the order is only inoperative. Thus, the conviction of an employee is not wiped out merely by stay of the conviction and there is no impediment for the employer in invoking the power under clause (a) of the second proviso to Article 311(2). Rule 18 of the KCS (CC & A) Rules as applicable at the relevant time is also relevant in the present case. Rule 18 has been amended on 18.9.2003, which is quoted below:

“18. Special Procedure in certain cases.- *Notwithstanding anything contained in rules 15, 16 and 17,*

(i) where a penalty is imposed on a Government servant on the ground of conduct which had led to his conviction on a criminal charge; or

(ii) where the Disciplinary Authority is satisfied for reason to be recorded in writing that it is not reasonably practicable to follow the procedure prescribed in the said rules; or

(iii) where the Governor is satisfied that in the interest of the security of the State it is not expedient to follow such procedure; the Disciplinary Authority or the Governor, as the case may be, may consider the circumstances of the case and pass such orders thereon as he deems fit:

Provided that before passing such orders under clauses (i) and (ii) the Commission shall be consulted in cases where such consultation is necessary under the rules:

Provided further that where a Government servant is convicted on a criminal charge by a criminal court and sentenced to imprisonment and/or with fine,-

(a) he shall be dismissed or removed from service forthwith by invoking the provisions contained in item (a) of the second proviso to clause (2) of article 311 of the Constitution of India irrespective of the fact that an appeal is pending or that the execution of sentence is

*suspended in respect of the said conviction,
and*

(b) in case the said conviction is subsequently set aside in appeal or otherwise and the Government servant is acquitted of the charges, the order of dismissal or removal ceases to have effect and revised orders shall be issued forthwith to reinstate him in service entitling him all the benefits to which he would have been entitled had he been in service:

Provided also that in case where conviction is on a summary trial for petty offences and the sentence is for a fine upto Rupees Two Thousand only such conviction shall not be treated as a conviction for the purpose of this rule and for the entry into service or retention in service as the case may be."

17. A perusal of Rule 18(a) clearly contemplates that where a Government servant is convicted by a Criminal Court and sentenced to imprisonment and/or with fine, he shall be dismissed from service forthwith by invoking the provisions contained in item (a) of the second proviso to

clause (2) of Article 311 of the Constitution of India irrespective of the fact that an appeal is pending or that the execution of sentence is suspended in respect of the said conviction. Thus, the provision of Rule 18 is statutorily requiring the appointing authority to dismiss the employee irrespective of suspension of sentence.

18. In view of the foregoing discussion, we are of the considered opinion that the appointing authority has rightly invoked the power under clause (a) of the second proviso to Article 311(2) of the Constitution of India read with Rule 18 of the KCS (CC & A) Rules, 1960 and the conviction of the petitioner is neither wiped out nor obliterated by stay of conviction. In the present case the order of dismissal was passed on 4.3.2009 and the stay of conviction was granted by this Court on 6.3.2009. Thus, the appellant was not entitled for reinstatement, even though the conviction was stayed.

19. The learned Single Judge has placed reliance on a judgment of this court in ***Sudheer v. K.S.R.T.C*** (2004(3)

KLT 217) on which learned counsel for the petitioner has also placed much reliance. In the said judgment in paragraph 20 the learned Single Judge has opined that no notice of hearing is contemplated when power is invoked under Clause (a) of the second proviso to Article 311(2) of the Constitution of India. The learned Single Judge has sum up the ratio of the case in paragraph 20. Relevant portion of paragraph 20 of the judgment is to the following effect:

“20.To sum up:

xx

xx

xx

(7) Merely because there is a general order of stay of operation of the judgment in a criminal case in which there is conviction of a government servant on a criminal charge by a criminal Court followed by sentence of imprisonment or fine or with both, there is no escape from the operation of the second proviso to R.18, unless the appellate or revisional Court has made a specific reference to the consequence which would otherwise follow if the conviction is stayed.

(8) In case in an appeal or revision the Court on a specific request regarding the ramifications which would follow if the conviction is not suspended and if the Court applying its mind to the consequences has stayed the conviction apart from sentence, then the Government servant shall not be dismissed or removed from service under the second proviso to R.18."

From the above, it is clear that one of the conclusions drawn by the learned Single Judge is that when the appellate court or the revisional court has made a specific reference to the consequences, which would otherwise follow, if the conviction is stayed and such stay order has been passed suspending the conviction, then the Government servant shall not be dismissed or removed from service under the second proviso to Rule 18 of the KCS (CC & A) Rules. As quoted above, stay of conviction does not obliterate or wipe out the conviction. Thus, even if the conviction is stayed, then the conduct of an employee, which led to his conviction can be made the basis for exercising power under clause (a) of the second proviso

to Article 311(2) of the Constitution of India. The power to be invoked by the appointing authority is the power under clause (a) of the second proviso to Article 311(2) of the Constitution of India, which power can be exercised after the employee is convicted on a criminal charge. The power under clause (a) of the second proviso to Article 311(2) of the Constitution of India has to be exercised on the basis of the conduct which led to conviction of the employee.

20. The learned Government Pleader has placed reliance on a Division Bench judgment of this Court reported in ***Kumaran v. State of Kerala*** (2000(1) KLJ 247), where the Division Bench has held that merely because the conviction is suspended, the conviction does not cease to be operative. It is useful to quote paragraph 4 of the said judgment, which reads as under:

“4. It is to be noted that in Deputy Director of Collegiate (Admn.) v. S. Nagoor Meera (JT (1995) 3 SC 32), it was observed that the order to be passed by the Government relates to the

conduct which has led his conviction on a criminal charge, and is not really relatable to the sentence or punishment awarded. Merely because the sentence is suspended and the accused is released on bail, the conviction does not cease to be operative. S.389 of the Code of Criminal Procedure, 1973 (in short 'the Code') empowers the appellate court to order that pending the appeal the execution of the sentence or order appealed against be suspended and, if he is in confinement, that he be released on bail, or on his own bond. S.389 (1) speaks of suspending the execution of the sentence or order. It does not speak of suspension of conviction. This point was again highlighted by the Apex Court in Union of India v. V.K. Bhaskar 1997 (11) SCC 383). In Deputy Director of Collegiate Education (Admn.) v. S. Nagoor Meera (AIR 1995 SC 1364) it was observed by the apex court as follows:--

"Taking proceedings for and passing orders of dismissal, removal or reduction in rank of a Government servant who has been convicted by a criminal court is not barred merely because the sentence or order is

suspended by the appellate court or on the ground that the said government servant accused has been released on bail pending the appeal. It cannot be said that until the appeal against the conviction is disposed of action under Clause (a) of second proviso to Art.311 (2) is not permissible. The more appropriate course in all such cases is to take action under clause (a) of second proviso to Art.311 (2) once a Government servant is convicted of a criminal charge and not to wait for the appeal or revision, as the case may be. If however, the government servant is reinstated, he will be entitled to all the benefits to which he would have been entitled to had he continued in service. The other course suggested viz. to wait till the appeal, revision and other remedies are over, would not be advisable since it would mean continuing in service a person who has been convicted of the serious offence by a criminal court."

The aforesaid decision was taken note of by one of us (Radhakrishnan, J.) in Chandrasekharan Nair v. Commissioner of Police & others (1997 (2) KLJ 351). In Nagoor Meera's case supra, it was observed that the relevant fact is the conduct of a government

servant, who had been convicted of a criminal charge. The appellant in this case has been found guilty of corruption by the criminal court. Until the said conviction is set aside by the appellate or higher court, it may not be advisable to permit him to continue in service. The matter can be reviewed in such a manner that employee suffers no prejudice if he is ultimately acquitted. That being the position, we find no reason to interfere with the order passed by the learned single Judge.”

21. In view of the judgments of the Apex Court referred to above and the judgment of this Court in **Kumaran's case (supra)**, we are of the view that the judgment in **Sudheer's case (supra)** cannot be followed.

22. We, thus, are of the view that the appellant was not entitled for reinstatement. The learned Single Judge committed error in directing reinstatement of the appellant in service.

Issue No.iv:

23. Now we come to the last issue. Learned counsel for the petitioner has submitted that the order of dismissal was void, since principles of natural justice have not been

followed, since no notice or opportunity was given to show cause. Clause (a) of the second proviso to Article 311(2) when expressly provides to pass dismissal order on the ground of conduct, which has led to the employee's conviction on a criminal charge, which provision is an exception to constitutional provision of Article 311(2) that no person shall be dismissed or removed except after an enquiry and after giving reasonable opportunity of being heard, the entitlement of opportunity cannot be read in clause (a) of the second proviso to Article 311(2) of the Constitution of India. The interest of employee is fully protected by Rule 18 of the KCS (CC & A) Rules, 1960, which provides that an employee, if his conviction is set aside, shall be entitled for the benefit as if the employee were never dismissed from service.

24. The Apex Court in ***Union of India v. Tulsiram Patel*** (AIR 1985 SC 1416) had occasion to consider the provisions of clause (a) of the second proviso to Article 311(2) of the Constitution of India. The Apex Court has

clearly laid down that there is no scope for introducing opportunity under the second proviso to Article 311(2) of the Constitution of India. The following was laid down by the Apex Court in paragraph 70 of the judgment:

“70. The position which emerges from the above discussion is that the keywords of the second proviso govern each and every clause of that proviso and leave no scope for any kind of opportunity to be given to a government servant. The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of a Constitutional prohibitory injunction restraining the disciplinary authority from holding an inquiry under Article 311 (2) or from giving any kind of opportunity to the concerned government servant. There is thus no scope for introducing into the second proviso sonic kind of inquiry or opportunity by a process of inference or implication. The maxim "expressum facit cessare tacitum" ("when there is express mention of certain things, then anything not mentioned is excluded") applies to the case. As pointed out by this Court in B. Shankara Rao Badami v. State of Mysore (1969) 3 SCR 112 : (AIR 1969 SC 453 at P. 459). this well-known maxim is a principle of logic and common sense and not merely a technical rule of construction. The second proviso

expressly mentions that clause (2) shall not apply where one of the clauses of that proviso becomes applicable. This express mention excludes everything that clause (2) contains and there can be no scope for once again introducing the opportunities provided by clause (2) or any one of them into the second proviso....."

25. Thus, no fault can be found with the order of dismissal passed by the appointing authority invoking clause (a) of the second proviso to Article 311(2) of the Constitution of India on the ground that it was passed without opportunity to the petitioner.

In view of the foregoing discussion, the Writ Appeal is allowed, the judgment of the learned Single Judge in W.P (C).No.9795 of 2009 is set aside and the Writ Petition is dismissed.

**ASHOK BHUSHAN
ACTING CHIEF JUSTICE**

**A.M.SHAFFIQUE
JUDGE**

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