

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on December 06, 2013
% *Judgment Delivered on January 06, 2014*

+ **W.P.(C) 1956/2013**

THE COMMISSIONER OF POLICE & ORS.Petitioners
Represented by: Ms.Zubeda Begum, Advocate with
Ms.Sana Ansari, Advocate
versus

SUKHBIR SINGH ...Respondent
Represented by: Mr.Sachin Chauhan, Advocate

W.P.(C) 7577/2012

AJAY KUMAR BHARDWAJPetitioner
Represented by: Dr.L.S.Chaudhary, Advocate with
Mr.Ajay Chaudhary and Mr.Bhupinder
Singh, Advocates
versus

DTC & ORS. ...Respondents
Represented by: Ms.Avnish Ahlawat, Advocate with
Mr.Uday Singh Ahlawat and Mr.Nilish
Singh, Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE V.K.JAIN
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. Rule 11 of the Delhi Police (Punishment & Appeal) Rules, 1980 reads as under:-

“Rule 11.Punishment on judicial conviction.-

(1) When a report is received from an official source, e.g. a

court or the prosecution agency, that a subordinate rank has been convicted in a criminal court of an offence, involving moral turpitude or on charge of disorderly conduct in a state of drunkenness or in any criminal case, the disciplinary authority shall consider the nature and gravity of the offence and if in its opinion that the offence is such as would render further retention of the convicted police officer in service, prima facie undesirable, it may forthwith make an order dismissing or removing him from service without calling upon him to show cause against the proposed action provided that no such order shall be passed till such time the result of the first appeal that may have been filed by such police officer is known.

(2) If such police officer is acquitted on second appeal or revision, he shall be reinstated in service from the date of dismissal or removal and may be proceeded against departmentally.

(3) In cases where the dismissal or removal from service of the convicted police officer is not considered necessary, the disciplinary authority may examine the judgment and take such departmental action as it may deem proper.

(4) When a police officer is convicted judicially and consequently dismissed or removed from service, and it is desired to ensure that the officer dismissed or removed shall not be re-employed elsewhere, a full descriptive roll with particulars of punishments, shall be sent for publication in the Delhi Police Gazette.”

2. No argument being advanced whether the word ‘*shall*’ occurring in the phrase ‘*provided that no such order shall be passed till such time the result of the first appeal that may have been filed by such police officer is known*’ should be read as mandatory or directory i.e. ‘*may*’, and on the premise that the word ‘*shall*’ was to be read as mandatory, in the decision reported as 155 (2008) DLT 115 Commissioner of Police vs. Brij Pal Singh, a Division Bench

of this Court held that pending decision of the appeal against an order of conviction a police personnel governed by the Delhi Police (Punishment & Appeal) Rules, 1980 could not be proceeded against in exercise of the power conferred by Rule 11 of the Delhi Police (Punishment & Appeal) Rules, 1980.

3. Vide order dated July 15, 2013 passed in WP(C) 1956/2013, noting that in Brij Pal's case the majority view of the Constitution Bench decision reported as AIR 1985 SC 1416 Union of India vs. Tulsi Ram Patel was not noted, a reference was made to a Full Bench. The order of reference dated July 15, 2013 reads as under:-

“1. Interpreting Rule 11(1) of the Delhi Police (Punishment & Appeal) Rules, 1980, in the decision reported as 155 (2008) DLT 115 Commissioner of Police vs. Brij Pal Singh a Division Bench of this Court held that power under said Rule can be exercised by dispensing with an inquiry but before a convicted Delhi Police personnel files an appeal challenging his conviction.

2. Attention of the Division Bench was not drawn to the Constitution Bench decision of the Supreme Court reported as AIR 1985, SC 1416 Union of India vs. Tulsiram Patel. Observations of the majority view in Tulsiram Patel's case and especially in paragraph 44, 50, 51 and 54 thereof would reveal that the majority view took into account Article 309 of the Constitution of India as also Articles 310 and 311.

3. The majority view observed that the source of legislative power to legislate with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State under Article 309 of the Constitution of India is subject to the provisions of the Constitution.

4. The question of law which would arise would be: Whether Rule 11(1) of the Delhi Police (Punishment & Appeal) Rules, 1980 would run in the teeth of the second proviso to Article

311(2) of the Constitution of India as per which a person may be dismissed, removed or reduced in rank on the ground of conduct which has led to his conviction on criminal charge after dispensing with an inquiry.

5. *We refer the following two questions of law to the Full Bench:-*

1. *Whether Rule 11(1) of the Delhi Police (Punishment & Appeal) Rules, 1980 is ultra vires Article 311(2) of the Constitution of India?*

2. *Whether notwithstanding Rule 11(1) of the Delhi Police (Punishment & Appeal) Rules, 1980 a Delhi Police personnel who has been convicted at a criminal trial can be dismissed, removed or compulsory retired after dispensing with an inquiry with reference to the conduct which has led to his conviction?*

6. *The matter be placed on the administrative side before the Hon'ble Acting Chief Justice for constitution of a Full Bench."*

4. Reference made to the Full Bench in WP(C) 7577/2012 pertains to para 10(d)(4) of the executive instructions contained in the Office Order dated August 05, 1955 concerning employees of DTC which reads as under:-

"10(4). The question of taking departmental action against an employee convicted by Court, will be taken up only after the employee's appeal has been decided by the Appellate Court. In cases where the employee does not file an appeal, the question of taking departmental action will be considered on the expiry of the period fixed for filing an appeal. If an employee, who has been convicted by a Court, desires to perform duty in his organization during the period between the decision of the Lower Court and the Appellate Court, he will be put on such duties as might be considered suitable by the General Manager. If during this period he is unable to attend duty on account of lock-up etc. or otherwise desires to take leave he will be granted such leave including leave without pay as may be due to him, in accordance with the provisions of D.R.T.A.(Conditions of

appointment and Service) Regulations, 1952.”

5. Backdrop facts concerning WP(C) No.1956/2013 filed by the Commissioner of Police against the judgment and order dated November 26, 2012 passed by the Central Administrative Tribunal, Principal Bench allowing O.A.No.2424/2012 filed by the respondent Sukhbir Singh is that Sukhbir Singh was arrested when an FIR was registered against him for having committed offences punishable under Section 7/13A of the Prevention of Corruption Act, 1988 for accepting illegal gratification in the sum of ₹4,000/-. He was dismissed from service vide order dated September 09, 2006 passed under Article 311(2)(b) of the Constitution of India. Sukhbir Singh challenged the aforesaid order in appeal before the Appellate Authority which rejected the same. Aggrieved by the orders of the Disciplinary Authority and Appellate Authority Sukhbir Singh approached the Tribunal vide O.A.No.220/2007 which was allowed by the Tribunal granting permission to initiate independent proceedings. Sukhbir Singh was reinstated in service with effect from September 09, 2006 and a departmental inquiry was ordered against him vide order dated March 26, 2008. In the meantime the criminal proceedings initiated against him resulted in his conviction and he was sentenced to undergo rigorous imprisonment for two years and pay fine in sum of ₹3,000/-. Sukhbir Singh filed a criminal appeal No.2958/2011 challenging his conviction and pending hearing of the appeal prayed for sentence to be suspended. The appeal was admitted but the sentence was not suspended i.e. Sukhbir Singh was not admitted to bail pending hearing of the appeal and thus he surrendered before the Trial Court and was remanded to judicial custody. On May 23, 2011 Sukhbir Singh was dismissed from service on account of the conduct which led to his

conviction, an order which he successfully challenged before the Tribunal which relied upon the decision in Brij Pal's case. The order dated November 26, 2012 passed by the Tribunal allows OA No.2424/2012 filed by Sukhbir Singh.

6. Backdrop facts concerning WP(C) No.7577/2012 are that Ajay Kumar Bhardwaj was working as an Assistant Fitter with DTC and on being convicted for offences punishable under Section 420 IPC read with Section 13 of the Prevention & Corruption Act, 1988 was dismissed from service; inquiry being dispensed with on account of the conduct which led to his conviction. He was not successful before the Tribunal since OA No.1167/2012 filed by him has been dismissed by the Tribunal vide order dated September 28, 2012.

7. Whereas HC Sukhbir Singh challenges he being dismissed from service by relying upon Rule 11 of the Delhi Police (Punishment & Appeal) Rules, 1980, Ajay Kumar Bhardwaj relies upon para 10(d)(4) of the executive instructions dated August 05, 1955.

8. In Brij Pal Singh's case (supra) the Division Bench of this Court noted Article 311(2)(a) of the Constitution as per which a civil servant could be dismissed from service on the ground of conduct which had led to his conviction on a criminal charge and held that Rule 11(1) of the Delhi Police (Punishment & Appeal) Rules, 1980 was not in conflict with Article 311(2)(a) for the reason the Rule only postponed the time when the right conferred by the Constitutional provision and embodied in the Rule itself.

9. Article 311(2) of the Constitution of India reads as under:-

"311(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.”

10. Ms.Zubeda Begum, learned counsel for the petitioners would contend that the issue is no more res-integra having been covered by the Constitutional provision of Article 311(2)(a). She would further submit the Rules have been framed by the Delhi Police under Section 147 of the Delhi Police Act (Act in short). Section 21 of the Delhi Police Act which refers to the punishments, stipulate that the punishments listed therein are subject to the provisions of Article 311 of the Constitution and the Rules. She would submit that the usage of the word ‘subject to’ in Section 21 of the Act as defined in Black’s Law Dictionary, 5th Edition to mean ‘subservient’, inferior

obedient to governed or effected by; provided that; provided; answerable. The word 'subject to' the provisions of Article 311 in the said Section limit the amplitude of that power to the extent prescribed in Article 311 including the second proviso to Article 311(2). In other words she would state that if there is a conflict between the provisions of the Statute and Rules and provisions of the Constitution, the latter shall prevail to the extent of that in consistency. (reference AIR 1964 SC 207 The South India Corporation (P) Ltd. v. The Secretary, Board of Revenue Trivandrum & Anr.

11. Ms.Zubeda Begum heavily relied upon the judgment of the Supreme Court reported as 1985 (3) SCC 398 Union of India v. Tulsiram Patel more specifically paras 70, 106, 114, 122 and 126.

12. She would further rely upon the following judgments:

1. 1995 (3) AWC 1879 (All) Vijay Shanker Tiwari v. State of U.P.

2. 1960 Cri LJ 565 Deputy Inspector General of Police, North Range v. D.Rajaram

3. Special Civil Application No. 1912 of 2000 titled as H.N.Rao v. State of Gujarat (decided on July 21, 2000).

13. In alternative, her submission is also based on the judgment of the Supreme Court in Tulsiram Patel's case (supra) that at the most Rule 11(1) can be treated as directory and not mandatory. She would also submit that an amendment has been effected to Rule 11(1) of the Rules on November 30, 2011. The amended provision reads as under:-

“11.Punishment on judicial conviction.-

(1) When a report is received from an official source, e.g. a court or the prosecution agency, that a subordinate rank has been convicted in a criminal court of an offence, involving moral

turpitude or on charge of disorderly conduct in a state of drunkenness or in any criminal case, the disciplinary authority shall consider the nature and gravity of the offence and if in its opinion that the offence is such as would render further retention of the convicted police officer in service, prima facie undesirable, it may forthwith make an order dismissing or removing him from service without calling upon him to show cause against the proposed action.”

14. On the other hand Mr.Sachin Chauhan, learned counsel appearing for the respondent appearing in WP(C) No.1956/2013 would submit that Rule 11(1) imposes a reasonable restriction that till such time the appeal against conviction is decided no action be taken against the police officer concerned till the decision of the Appellate Court. He would state that there is no conflict between Article 311(2)(a) and Rule 11 (1) of the Rules. He relied upon para 14 of the judgment of this Court in Brij Pal Singh’s case (supra).

15. No arguments were advanced by the learned counsel for the parties in WP(C) 7577/2012 for the reason learned counsel for DTC stated that she had been instructed to take the stand before the Court that the office order in question was being read by the Department as requiring imposition of penalty of dismissal or removal from service to be postponed after the appeal against the conviction was decided, but that the policy decision was applicable only to drivers. Learned counsel for DTC stated that reason was that drivers become accused for rash and negligent driving and the Department took the view that upon being convicted the Department should await the result of the appeal, if any filed by the driver. Learned counsel for Ajay Kumar Bhardwaj urged that the policy decision applied to all employees of DTC. Thus, the issue which would arise in the said writ petition filed by Ajay Kumar Bhardwaj would be whether the policy decision applies to all employees of

DTC or only to drivers, which would have to be answered by the Division Bench.

16. Proceeding to answer the reference we note paragraphs 54, 70, 106, 114, 122 and 126 of the Constitution Bench decision in Tulsiram Patel's case (supra).

“54. Clauses (1) and (2) of Article 311 impose restrictions upon the exercise by the President or the Governor of a State of his pleasure under Article 310(1). These are express provisions with respect to termination of service by dismissal or removal as also with respect to reduction in rank of a civil servant and thus come within the ambit of the expression “Except as expressly provided by this Constitution” qualifying Article 310(1). Article 311 is thus an exception to Article 310 and was described in Parshottam Lal Dhingra v. Union of India as operating as a proviso to Article 310(1) though set out in a separate Article. Article 309 is, however, not such an exception. It does not lay down any express provision which would derogate from the amplitude of the exercise of pleasure under Article 310(1). It merely confers upon the appropriate Legislature or executive the power to make laws and frame rules but this power is made subject to the provisions of the Constitution. Thus, Article 309 is subject to Article 310(1) and any provision restricting the exercise of the pleasure of the President or Governor in an Act or rule made or frame under Article 309 not being an express provision of the Constitution, cannot fall within the expression “Except as expressly provided by this Constitution” occurring in Article 310(1) and would be in conflict with Article 310(1) and must be held to be unconstitutional. Clauses (1) and (2) of Article 311 expressly restrict the manner in which a Government servant can be dismissed, removed or reduced in rank and unless an Act made or rule framed under Article 309 also conforms to these restrictions, it would be void. The restriction placed by clauses (1) and (2) of Article 311 are two : (1) with respect to the authority empowered to dismiss or remove a government servant provided for in clause (1) of Article 311; and (2) with respect to the procedure dismissal, removal or reduction in rank of a

government servant provided for in clause(2). The second proviso to Article 311(2), which is the central point of controversy in these Appeals and Writ Petitions, lifts the restriction imposed by Article 311(2) in the cases specified in the three clauses of that proviso.

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*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 servants. 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 some 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 Badam and Ors. v. State of Mysore* 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. In *Atkinson v. United States of America Government* L.R. [1971] A.C. 197, Lord Reid said (at page 232):*

It is now well recognised that the court has power to expand procedure laid down by statute if that is necessary to prevent infringement of natural justice and is not plainly contrary to the intention of Parliament.

Here, however, the attempt is not merely to do something contrary to the intention of “Parliament”, that is, in our case, the Constituent Assembly, but to do something contrary to an express prohibition contained in the Constitution. The conclusion which flows from the express language of the second proviso is inevitable and there is no escape from it. It may appear harsh but, as mentioned earlier, the second proviso has been Inserted in the Constitution as a matter of public policy and in public interest and for public good just as the pleasure doctrine and the safeguards for a government servant provided in Clauses (1) and (2) of Article 311 have been. It is in public interest and for public good that government servant who has been convicted of a grave and serious offence or one rendering him unfit to continue in office should be summarily dismissed or removed from service instead of being allowed to continue in it at public expense and to public detriment. It is equally in public interest and for public good that where his offence is such that he should not be permitted to continue to hold the same rank, that he should be reduced in rank. Equally, where a public servant by himself or in concert with others has brought about a situation in which it is not reasonably practicable to hold an inquiry and his conduct is such as to justify his dismissal, removal or reduction in rank, both public interest and public good demand that such penalty should forthwith and summarily be imposed upon him ; and similarly, where in the interest of the security of the State it is not expedient to hold an inquiry, it is in the public interest and for public good that where one of the three punishments of dismissal, removal or reduction in rank is called for, it should be summarily imposed upon the concerned government servant. It was argued that in a case falling under Clause (b) or (c), a government servant ought to be place under suspension until the situation improves or the danger to the security of the State has passed, as the case may be, and it becomes possible to hold an inquiry. This argument overlooks the fact that suspension involves the payment at least of subsistence allowance and such allowance is paid at public expense, and that neither public interest would be benefited nor public good served by placing such government servant under suspension because it may take a

considerable time for the situation to improve or the danger to be over. Much as this may seem harsh and oppressive to a government servant, this Court must not forget that the object underlying the second proviso is public policy, public interest and public good and the Court must, therefore, repel the temptation to be carried away by feelings of commiseration and sympathy for those government servants who have been dismissed, removed or reduced in rank by applying the second proviso. Sympathy and commiseration cannot be allowed to outweigh considerations of public policy, concern for public interest, regard for public good and the peremptory dictate of a Constitutional prohibition. The Court must bear in mind that the second proviso has been in the Constitution since it was originally enacted. It was not blindly or slavishly copied from Section 240(3) of the Government of India Act, 1935. Article 311 was Article 282-B of the draft Constitution of India and the draft Article 282-B was discussed and a considerable debate took place on it in the Constituent Assembly (see the Official Report of the Constituent Assembly Debates, vol. IX, page 1099 to 1116). The greater part of this debate centered upon the proviso to Clause (2) of the draft Article 282-B, which is now the second proviso to Article 311. Further, the Court should also bear in mind that Clause (c) of the second proviso and Clause (3) of Article 311 did not feature in Section 240 of the Government of India Act, 1935, but were new provisions consciously introduced by the Constituent Assembly in Article 311. Those who formed the Constituent Assembly were not the advocates of a despotic or dictatorial form of government. They were the persons who enacted into our Constitution the Chapter on Fundamental Rights. The majority of them had fought for freedom and had suffered imprisonment in the cause of liberty and they, therefore, were not likely to introduce into our Constitution any provision from the earlier Government of India Acts which had been intended purely for the benefit of a foreign imperialistic power. After all, it is not as if a government applied to him. There are two remedies open to him, servant is without any remedy when the second proviso has been applied to him. There are two remedies open to him, namely, departmental appeal and judicial

review. The scope and extent of these remedies will be considered later in the course of this judgment.

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106. It is not possible to accept this submission. The opening words of Article 309 make that Article expressly "Subject to the provisions of this Constitution". Rules made under the proviso to Article 309 or under Acts referable to that Article must, therefore, be made subject to the provisions of the Constitution if they are to be valid. Article 310(1) which embodies the pleasure doctrine is a provision contained in the Constitution. Therefore, rules made under the proviso to Article 309 or under Acts referable to that Article are subject to Article 310(1). By the opening words of Article 310(1) the pleasure doctrine contained therein operates "Except as expressly provided by this Constitution". Article 311 is an express provision of the Constitution. Therefore, rules made under the proviso to Article 309 or under Acts referable to Article 309 would be subject both to Article 310(1) and Article 311. This position was pointed out by Subba Rao, J., as he then was, in his separate but concurring Judgment in Moti Ram Deka's case at page 734, namely, that rules under Article 309 are subject to the pleasure doctrine and the pleasure doctrine is itself subject to the two limitations imposed thereon by Article 311. Thus, as pointed out in that case, any rule which contravenes Clause (1) or Clause (2) of Article 311 would be invalid. Where, however, the second proviso applies, the only restriction upon the exercise of the pleasure of the President or the Governor of a State is the one contained in Clause (1) of Article 311. For an Act or a rule to provide that in a case where the second proviso applies any of the safeguards excluded by that proviso will be available to a government servant would amount to such Act or rule impinging upon the pleasure of the President or Governor, as the case may be, and would be void as being unconstitutional. It is, however, a well-settled rule of construction of statutes that where two Interpretations are possible, one of which would preserve and save the constitutionality of the particular statutory provision

while the other would render it unconstitutional and void, the one which saves and preserves its constitutionality should be adopted and the other rejected. Such constitutionality can be preserved by interpreting that statutory provision as directory and not mandatory. It is equally well-settled that where a statutory provision is directory, the courts cannot interfere to compel the performance or punish breach of the duty created by such provision and disobedience of such provision would not entail any invalidity-see Craies on Statute Law, Seventh Edition, at page 229. In such a case breach of such statutory provisions would not furnish any cause of action or ground of challenge to a government servant for at the very threshold, such cause of action or ground of challenge would be barred by the second proviso to Article 311(2).

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114. So far as Challappan Case is concerned, it is not possible to find any fault either with the view that neither Clause (a) of the second proviso to Article 311(2) nor Clause (i) of Rule 14 of the Railway Servants Rules is mandatory or with the considerations which have been set out in the judgment as being the considerations to be taken into account by the disciplinary authority before imposing a penalty upon a delinquent government servant. Where a situation envisaged in one of the three clauses of the second proviso to Article 311(2) or of an analogous service rule arises, it is not mandatory that the major penalty of dismissal, removal or reduction in rank should be imposed upon the concerned government servant. The penalty which can be imposed may be some other major penalty or even a minor penalty depending upon the facts and circumstances of the case. In order to arrive at a decision as to which penalty should be imposed, the disciplinary authority will have to take into consideration the various factors set out in Challappan case. It is, however, not possible to agree with approach adopted in Challappan case in considering Rule 14 of the Railway Servants Rules in isolation and apart from the second proviso to Article 311(2), nor with the interpretation placed by it upon the word

"consider" in the last part of Rule 14. Neither Rule 14 of the Railways Servants Rules nor a similar rule in other service rules can be looked at apart from the second proviso to Article 311(2). The authority of a particular officer to act as a disciplinary authority and to impose a penalty upon a government servant is derived from rules made under the proviso to Article 309 or under an Act referable to that Article. As pointed out earlier, these rules cannot impinge upon the pleasure of the President or the Governor of a State, as the case may be, because they are subject to Article 310(1). Equally, they cannot restrict the safeguards provided by Clauses (1) and (2) of Article 311 as such a restriction would be in violation of the provisions of those clauses. In the same way, they cannot restrict the exclusionary impact of the second proviso to Article 311(2) because that would be to impose a restriction upon the exercise of pleasure under Article 310(1) which has become free of the restrictions placed upon it by Clause (2) of Article 311 by reason of the operation of the second proviso to that clause. The only cases in which a government servant can be dismissed, removed or reduced in rank by way of punishment without holding an inquiry contemplated by Clause (2) of Article 311 are the three cases mentioned in the second proviso to that clause. A rule which provides for any other case in which any of these three penalties can be imposed would be unconstitutional. Service rules may reproduce the provisions of the second proviso authorizing the disciplinary authority to dispense with the inquiry contemplated by Clause (2) of Article 311 in the three cases mentioned in the second proviso to that clause or any one or more of them. Such a rule, however, cannot be valid and constitutional without reference to the second proviso to Article 311(2) and cannot be read apart from it. Thus, while the source of authority of a particular officer to act as a disciplinary authority and to dispense with the inquiry is derived from the service rules, the source of his power to dispense with the inquiry is derived from the second proviso to Article 311(2) and not from any service rules. There is a well-established distinction between the source of authority to exercise a power and the source of such power. The Court in Challappan case was, therefore, in error in

interpreting Rule 14 of the Railway Servants Rules by itself and not in conjunction with the second proviso (at that time the only proviso) to Article 311(2). It appears that in Challappan case the Court felt that the addition of the words "the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit" warranted an interpretation of Rule 14 different from that to be placed upon the second proviso. This is also not correct. It is true that the second proviso does not contain these words but from this it does not follow that when acting under the second proviso, the disciplinary authority should not consider the facts and circumstances of the case or make an order not warranted by them. It is also not possible to accept the interpretation placed upon the word "consider" in Challappan case. According to the view taken in that case, a consideration of the circumstances of the case cannot be unilateral but must be after hearing the delinquent government servant. If such were the correct meaning of the word "consider", it would render this part of Rule 14 unconstitutional as restricting the full exclusionary operation of the second proviso. The word "consider", however, does not bear the meaning placed upon it in Challappan case. The word "consider" is used in Rule 14 as a transitive verb. The meaning of the word "consider" as so used is given in the Oxford English Dictionary as "To contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, given heed to, take note of." The relevant definition of the word "consider" given in Webster's Third New International Dictionary is "to reflect on: think about with a degree of care or caution". Below this definition are given the synonyms of the word "consider", these synonyms being "contemplate, study, weigh, revolve, excogitate". While explaining the exact different shades of meaning in this group of words, Webster's Dictionary proceeds to state as under with respect to the word "consider".

'Consider' often indicates little more than think about. It may occasionally suggest somewhat more conscious direction of thought, somewhat greater depth and scope, and somewhat greater purposefulness.

It is thus obvious that the word "consider" in its ordinary and natural sense is not capable of the meaning assigned to it in Challappan case. The consideration under Rule 14 of what penalty should be imposed upon a delinquent railway servant must, therefore, be ex parte and where the disciplinary authority comes to the conclusion that the penalty which the facts and circumstances of the case warrant is either of dismissal or removal or reduction in rank, no opportunity of showing cause against such penalty proposed to be imposed upon him can be afforded to the delinquent government servant. Undoubtedly, the disciplinary authority must have regard to all the facts and circumstances of the case as set out in Challappan case. As pointed out earlier, considerations of fair play and justice requiring a hearing to be given to a government servant with respect to the penalty to be imposed upon him do not enter into the picture when the second proviso to Article 311(2) comes into play and the same would be the position in the case of a service rule reproducing the second proviso in whole or in part and whether the language used is identical with that used in the second proviso or not. There are a number of orders which are of necessity passed without hearing the party who may be affected by them. For instance, courts of law can and often do pass ex parte ad interim orders on the application of a plaintiff, petitioner or appellant without issuing any notice to the other side or hearing him. Can it, therefore, be contended that the judge or judges, as the case may be, did not apply his or their mind while passing such an order?

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122. It will be noticed that Rule 37, except the last paragraph thereof, is in pari materia with Rule 14 of the Railway Servants Rules and Rule 19 of the civil Services Rules with this difference that a provision akin to Clause (iii) of Rule 14 of the Railway Servants Rules and Clause (iii) of Rule 19 of the civil Services Rules is not to be found in Rule 37 of the CISF Rules. The same interpretation as placed by us on the word "consider" occurring

in Rule 14 of the Railway Servants Rules and Rule 19 of the civil Services Rules must, therefore, be placed upon the word "consider" in Rule 37 of the CLSF Rules. The last paragraph of Rule 37 of the CISF Rules is peculiar to itself and does not find a place either in the said Rule 14 or the said Rule 19. It is clumsily worded and makes little sense. To provide that a member of the CIS force who has been convicted to rigorous imprisonment on a criminal charge "shall be dismissed from service" and at the sometime to provide that "only a notice shall be given to the party charged proposing the punishment of dismissal for his having been convicted to rigorous imprisonment and asking him to explain as to why the proposed punishment of dismissal should not be imposed", is a contradiction in terms. If either of these provisions were taken as mandatory, it would be void as violating the second proviso to Article 311(2) because the penalty contemplated by the second proviso to Article 311(2) is not the penalty of dismissal only but also of removal or reduction in rank, and to make it mandatory to issue a notice to show cause against the proposed penalty of dismissal would equally violate the second proviso because it would whittle down the exclusionary effect of the second proviso. Therefore, both these provisions in the last paragraph of Rule 37 must be read as directory and not mandatory, not only to make sense out of them but also to preserve their constitutionality. So read, a breach of these provisions would not afford any cause of action to a member of the CIS Force.

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126. As pointed out earlier, the source of authority of a particular officer to act as a disciplinary authority and to dispense with the inquiry is derived from the service rules while the source of his power to dispense with the disciplinary inquiry is derived from the second proviso to Article 311(2). There cannot be an exercise of a power unless such power exists in law. If such power does not exist in law, the purported exercise of it would be an exercise of a non-existent power and would be void. The exercise of a power is, therefore, always referable to

the source of such power and must be considered in conjunction with it. The Court's attention in Challappan Case was not drawn to this settled position in law and hence the error committed by it in considering Rule 14 of the Railway Servants Rules by itself and without taking into account the second proviso to Article 311(2). It is also well settled that where a source of power exists, the exercise of such power is referable only to that source and not some other source under which were that power exercised, the exercise of such power would be invalid and without jurisdiction. Similarly, if a source of power exists by reading together two provisions, whether statutory or constitutional, and the order refers to only one of them, the validity of the order should be upheld by construing it as an order passed under both those provisions. Further, even the mention of a wrong provision or the omission to mention the provision which contains the source of power will not invalidate an order where the source of such power exists. (See Dr. Ram Manohar Lohia v. State of Bihar and Ors. 1966 Cri LJ 608 : 721 and The Municipal Corporation of the City of Ahmedabad v. Ben Hiraben Manilal : [1983]2SCR676 : 681. The omission to mention in the impugned orders the relevant clause of the second proviso or the relevant service rule will not, therefore, have the effect of invalidating the orders and the orders must be read as having been made under the applicable clause of the second proviso to Article 311(2) read with the relevant service rule. It may be mentioned that in none of the matters before us has it been contended that the disciplinary authority which passed the impugned order was not competent to do so.”

17. From the reading of the aforesaid paras of the judgment in Tulsiram Patel's case (supra) the following position emerges:-

- (1) The Rules framed by the President or the Governor of a State must conform to the provisions of the Constitution with regard to legislative competence and division of legislative powers.
- (2) Article 309 is subject to Article 310(1) and therefore any

provision of any Act or Rule made under Article 309 restricting the exercise of pleasure by the president or the Governor not being an express provision of the Constitution must be held to be unconstitutional.

(3) The phrase “*this clause shall not apply*” appearing in the second proviso to Article 311(2) of the Constitution is mandatory in nature and not directory. It is in the nature of prohibiting injunction restraining the disciplinary authority from holding an inquiry under 311 (2) or giving any kind of an opportunity to the concerned Government servant. Thus, there is no scope for introducing into the second proviso any kind of inquiry or opportunity by a process of inference or application. The express language of the second proviso is inevitable and there can be no escape from it. The same has been inserted as a matter of public policy and in public interest and for public good.

(4) Article 309 opens with the words “*Subject to the provisions of this Constitution*” which implies that Rules made under the provision to Article 309 must be subject to the provisions of the Constitution and thus such Rules must be in consonance with Article 310(1) and Article 311 and where a Disciplinary Authority comes to know that a Government servant has been convicted on a criminal charge it must consider whether his conduct which has led to his conviction warrants the imposition of penalty under clause (a) of Second Proviso to Article 311(2).

18. Section 147 of the Delhi Police Act is the Rule making power of the

Administrator. Sub-Section 3 of the said Section reads as under:-

*“3. Awarding of any of the punishments referred to in sub-Section (1) or sub-Section (2) of Section 21 to any police officer of subordinate rank
(d) procedure for awarding punishments under Section 22.”*

19. Section 21 of the Delhi Police Act, which relates to powers of punishment, reads as under:-

“21. Powers of punishment.

(1) Subject to the provisions of Art. 311 of the Constitution and the rules, the Commissioner of Police, Additional Commissioner of Police, Deputy Commissioner of Police, Additional Deputy Commissioner of Police, Principal of the Police Training College or of the Police Training School or any other officer of equivalent rank, may award to any police officer of subordinate rank any of the following punishments, namely:

- (a) dismissal;*
- (b) removal from service;*
- (c) reduction in rank;*
- (d) forfeiture of approved service;*
- (e) reduction in pay;*
- (f) withholding of increment; and*
- (g) fine not exceeding one month's pay.*

(2) Subject to the rules-

(a) any police officer specified in sub-section (1) may award the punishment of censure to any police officer of subordinate rank;

(b) the Assistant Commissioner of Police may award the punishment of censure to police officers of, or below, the rank of Sub-Inspectors of Police;

(c) any police officer of, and above, the rank of Inspector may award punishment drill not exceeding fifteen days or fatigue duty or any other punitive duty to constables.

(3) Nothing in sub-section (1) or sub-section (2) shall affect any police officer's liability for prosecution and punishment for any offence committed by him.

(4) The Commissioner of Police, Additional Commissioner of Police, Deputy Commissioner of Police, Additional Deputy Commissioner of Police, Principal of the Police Training College or of the Police Training School, Assistant Commissioner of Police, or any other police officer of equivalent rank may suspend any police officer of subordinate rank who is reasonably suspected to be guilty of misconduct, pending an investigation of enquiry into such misconduct.

(5) An Inspector of Police may suspend any police officer below the rank of Sub-Inspector of Police, who is reasonably suspected to be guilty of misconduct, pending an investigation or enquiry into such misconduct."

20. Section 23 of the Delhi Police Act provides for appeals from orders of punishment. The same reads as under:-

"23. Appeal from orders of punishment.-An appeal against any order of punishment passed against a police officer under Sec. 21 or the rules thereunder [not being an order of punishment under clause (c) of sub-section (2) of that section] shall lie-

(a) where the order is passed by the Commissioner of Police, to the Administrator;

(b) where the order is passed by an Additional Commissioner of Police, to the Commissioner of Police;

(c) where the order is passed by a Deputy Commissioner of Police Additional Deputy Commissioner of Police, Principal of the Police Training College or School, Assistant Commissioner of Police or any other officer of equivalent rank, to the Additional Commissioner of Police."

21. Rule 8 of the Delhi Police (Punishment & Appeal) Rules, 1980 prescribes principles on which penalties have to be inflicted. These penalties are the one which have been prescribed in Section 21 of the Act. Rule 23 deals with appeals. It inter-alia stipulate that appeal shall lie against order of dismissal or removal from service, reduction in rank or pay, forfeiture of service, fine not exceeding one month's pay, withholding of increment and censure.

22. Section 21 of the Act commences with the words '*Subject to the provisions of Article 311 of the Constitution and Rules*'. The purport of these words would mean that the punishments listed therein are to be imposed in accordance with the conditions/procedures/safeguards as prescribed in Article 311 of the Constitution which would include Article 311(2)(a) of the Constitution. In other words, no punishment can be imposed in violation of Article 311 of the Constitution.

23. Similar provisions had come up for interpretation before the Supreme Court. In fact the Supreme Court in Tulsiram Patel's case (supra) had in para No.106 dealt with the expression "*Except as expressly provided by this Constitution*" to mean that Rules made under the proviso to Article 309 or under Acts referable to Article 309 would be subject both to Article 310(1) and Article 311. The Supreme Court in the said para referred to its earlier judgment reported as (1964) 5 SCR 683 Motiram Deka vs. General Manager, NEF Railway wherein the Supreme Court held that the Rules under Article 309 are subject to the pleasure doctrine and the pleasure doctrine is subject to the two limitations imposed thereon by Article 311. Further, the Supreme Court in the decision reported as AIR 1964 SC 07 South India Corporation vs. Secretary Board of Revenue, Trivandrum, wherein the expression '*Subject*

to other provisions of the Constitution’ had come up for interpretation, held as under:-

“But the real question is whether the said impugned law is inconsistent with the provisions of the Constitution other than those dealing with its legislative competency. The words "subject to other provisions of the Constitution" mean that if there is an irreconcilable conflict between the pre-existing law and provision or provisions of the Constitution the latter shall prevail to the extent of that inconsistency.”

24. If the expression ‘*provided that no such order shall be passed till such time the result of the first appeal that may have been filed by such police officer is known*’ in Rule 11(1) of the Delhi Police (Punishment & Appeal) Rules, 1980 is read mandatorily, it would be at variance with Article 311(2)(a) of the Constitution and Section 21 of the Delhi Police Act for the reason the said two provisions do not recognize a time lag between when the power can be exercised viz-a-viz the date when a conviction is rendered.

25. We only need to highlight that in paragraph 106 of its decision in Tulsiram Patel’s case (supra) the Supreme Court had observed : *For an Act or a rule to provide that in a case where the second proviso applies any of the safeguards excluded by that proviso will be available to a government servant would amount to such Act or rule impinging upon the pleasure of the President or Governor, as the case may be, and would be void as being unconstitutional.*

26. The Supreme Court has, in Tulsiram Patel’s case (supra), inter-alia held that the service rules may reproduce the provisions of the second proviso authorizing the disciplinary authority to dispense with the inquiry contemplated by clause (2) of Article 311 in 3 cases mentioned in the second proviso to that clause or anyone or more of them. Such a rule however cannot

be valid and constitutional without reference to the second proviso to Article 311(2) and cannot be read apart from it. The Supreme Court held that while the source of authority of a particular officer to act as a disciplinary authority and to dispense with the inquiry is derived from the service rules, the source of the power to dispense with the inquiry is derived from the second proviso to Article 311(2) and not from any service rules. The Supreme Court held that there is a well established distinction between the source of authority to exercise its power and source of such power.

27. While interpreting the last para of Rule 37 of CISF Rules, which provides for a notice before imposing penalty of dismissal on the delinquent government servant, the Supreme Court, in para No.122 of Tulsiram Patel's case (supra) held the same to be void as violating the second proviso to Article 311(2) for the reason, such a clause whittled down the exclusionary effect of the second proviso. The Supreme Court did not declare such a clause as ultra-vires and treated it as a directory and not mandatory. The reasons for the same are as under:-

“It is, however, a well-settled rule of construction of statutes that where two Interpretations are possible, one of which would preserve and save the constitutionality of the particular statutory provision while the other would render it unconstitutional and void, the one which saves and preserves its constitutionality can be preserved by Interpreting that statutory provision as directory and not mandatory. It is equally well settled that where a statutory provision is directory, the Courts cannot interfere to compel the performance or punish breach of the duty created by such provision and disobedience of such provision would not entail any invalidity see Craies on Statute Law, Seventh Edition, at page 229. In such a case, breach of such statutory provision would not furnish any cause of action or ground of challenge to a Government servant for at the very threshold, such cause of

action or ground of challenge would be barred by the second proviso to Article 311(2).”

28. Similarly, Rule 11(1) of the Delhi Police (Punishment & Appeal) Rules, 1980 if read mandatorily, whittled down the effect of Article 311(2)(a) and therefore cannot survive, being in conflict with it. For the reasons given by the Supreme Court in Tulsiram Patel’s case this Rule can be saved by treating it as directory and not mandatory. In other words, in a given case if the disciplinary authority is of the view for good valid reason that he should await the outcome of the appeal filed by the police officer against his conviction he can do so. Per contra, if he doesn’t wait for the outcome of the appeal, the same cannot be questioned.

29. Exceptions to Article 311(1) of the Constitution have been carved out in three classes of cases under Article 311(2) of the Constitution. We are concerned in this case with Article 311(2)(a) which states that, provided further that this clause shall not apply 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. The Supreme Court in paras 62 and 127 of Tulsiram Patel’s case (supra) has observed as under:-

“62. Before, however, any clause of the second proviso can come into play the condition laid down in it must be satisfied. The condition for the application of each of these clauses is different. In the case of Clause (a) a government servant must be guilty of conduct deserving the penalty of dismissal, removal or reduction in rank which conduct has led to him being convicted on a criminal charge. In the case of Clause (b) the disciplinary authority must be satisfied that it is not reasonably practicable to hold an inquiry. In the case of Clause (c) the President or the Governor of a State, as the case may be, must be satisfied that in the interest of the security of the State, it is not expedient to hold

an inquiry. When these conditions can be said to be fulfilled will be discussed later while dealing separately with each of the three clauses. The paramount thing, however, to bear in mind is that the second proviso will apply only where the conduct of a government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. If the conduct is such as to deserve a punishment different from those mentioned above, the second proviso cannot come into play at all, because Article 311(2) is itself confined only to these three penalties. therefore, before denying a government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank. Once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an inquiry. The extent to which a government servant can be denied his right to an inquiry formed the subject-matter of considerable debate at the Bar and we, therefore, now turn to the question whether under the second proviso to Article 311(2) even though the inquiry is dispensed with, some opportunity at least should not be afforded to the government servant so that he is not left wholly without protection. As most of the arguments on this Part of the case were common to all the three clauses of the second proviso, it will be convenient at this stage to deal at one place with all the arguments on this part of the case, leaving aside to be separately dealt with the other arguments pertaining only to a particular clause of the second proviso.”

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127. Not much remains to be said about Clause (a) of the second proviso to Article 311(2). To recapitulate briefly, where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment

of the criminal court and consider all the facts and circumstances of the case and the various factors set out in Challappan case. This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in all the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, in Shankar Dass v. Union of India (1985)II LLJ 184 SC, this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the Court should always order reinstatement. The Court can instead substitute a penalty which in its opinion would be just and proper in the

circumstances of the case.”

30. In terms of clause (a) of the Second Proviso to Article 311(2) it is the conduct which has led to his conviction on a criminal charge which is of relevance. In other words the Disciplinary Authority cannot pass an order of dismissal or removal or reduction in rank of the police officer straightaway on being found that he has been convicted by the criminal court. The Disciplinary Authority is required to examine the conduct of the police officer which led to his conviction on a criminal charge before imposing the penalty. This would include as held by the Supreme Court various factors as set out in (1976) 3 SCC 190 Divisional Personnel Officer Southern Railway & Anr. v. T.R.Chellappan & Ors. In Chellappan's case (supra) it has been laid down that while examining the conduct the authority concerned has to consider the entire conduct of the employee, gravity of conduct committed by him the impact which his misconduct is likely to have on the administration and any redeeming features, if any, in the case.

31. We only note for the benefit, that the Supreme Court in the case of (1995) 3 SCC 377 Deputy Director of Collegiate Education (Administration) Madras v. S.Nagoor Meera has held as under:-

“8. We need not, however, concern ourselves any more with the power of the appellate court under the Code of Criminal Procedure for the reason that what is relevant for Clause (a) of the second proviso to Article 311(2) is the "conduct which has led to his conviction on a criminal charge" and there can be no question of suspending the conduct. We are, therefore, of the opinion that 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.

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 services "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 proceedings, the matter can always be reviewed in such a manner that he suffers no prejudice.”

32. In a decision dated September 06, 1995 disposing of C.M.W.P No.4594/1991 Vijaya Shanker Tiwari vs. State of U.P. & Ors., Regulation 492 of the U.P. Police Regulations was considered by a learned Division Bench which read : *‘Whenever a police officer has been judicially tried, the Superintendent must await the decision of the judicial appeal, if any, before deciding whether further departmental action is necessary.’* Considering the question whether upon being convicted the delinquent police officer had a right to result of appeal filed by him against his conviction being declared by the Appellate Court and hence a fetter on the power of the disciplinary authority to dispense with an inquiry and proceed to consider the conduct which led to the conviction and take a call whether it was desirable to retain the delinquent in service, noting the decision of the Supreme Court in Tulsiram Patel’s case (supra), the Division Bench held as under:-

“4. In view of the provisions of Clause (2) of Article 311 of Constitution of India, no Government servant can be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges levelled against him and given reasonable opportunity of being heard in respect of those charges. This clause, however, is not applicable to three types of cases mentioned in second proviso to Clause (2), with the result

that no opportunity is required to be given to the Government servant if his case falls within those three exceptions mentioned in second proviso. Clause (a) of second proviso, which is relevant for this case, is as under:

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. What is relevant in the above proviso is the conduct of the employee which has led to his conviction on a criminal charge and not the mere conviction. Government servant as such cannot be dismissed under Clause (a) of second proviso merely on the ground of his conviction on a criminal charge, Supreme Court in Union of India v. Tulsi Ram Patel AIR 1985 SC 1416 (supra) has, in this connection, laid down as under:

Not much remains to be said about Clause (a) of the second proviso to Article 311(2). To recapitulate brief, where a disciplinary authority comes to know that a Government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the Imposition of a penalty and, if so, what that penalty should be. For that purpose, it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in Challapparis case AIR 1975 SC 2216. This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the Government servant's conduct was such as to require his dismissal or removal from service or reduction in rank, he must decide which of these three penalties should be imposed on him. This too, it has to do by itself and without hearing the concerned Government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned Government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order.

In paragraph 62 of the same judgment, the Supreme Court observed as under:

in the case of Clause (a) a Government servant must be guilty of conduct deserving the penalty of dismissal, removal or reduction in rank which conduct has led to him being convicted on a criminal charge.

The paramount thing, however, to bear in mind is that the second proviso will apply only where the conduct of a Government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. Therefore, before denying a Government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned Government servant is such as Justifies the penalty of dismissal, removal or reduction in rank.

Following the above decisions of Supreme Court, a Division Bench of this Court in Shyam Narain Shukla v. State of U.P. 1989 (2) UPLBEC 418, (supra) has held that a Government servant, who has been convicted, cannot be dismissed from service merely on the ground of conviction, but the authorities have to consider his conduct, which has led to his conviction on a criminal charge. Same was the view taken in another Writ Petition No. 1701 of 1985, Jamuna Prasad Shukla v. State of U.P. (supra). The orders of dismissal in those cases were quashed by this Court on the ground that they were passed only on the basis of conviction of the Petitioners and not on the basis of the conduct which has led to their conviction on the criminal charge. However, the decision of this Court in Writ Petition No. 1701 of 1985, on other issues regarding holding of full fledged disciplinary inquiry and giving of opportunity of being heard to the Petitioner therein before passing the order of dismissal under Clause (a) of the second proviso to Article 311(2) of the Constitution, was declared by this Court in the aforesaid case of Shyam Narain Shukla v. State of U.P. (supra), as not binding and enforceable in view of decision of Supreme Court in Tulsi Ram Patel's case (supra).

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6. For the purpose of taking action under Clause (a) of second proviso to Article 311(2) of the Constitution, what is relevant is the conduct of the Government servant which has led to his conviction on a criminal charge. it is not open to the authorities to pass on order of dismissal or removal or reduction in rank of the Government servant merely on the basis of conviction. Even in those cases where offence for which a Government servant is convicted is serious, he cannot be dismissed from service merely on the basis of his conviction. In such a case also, his conduct which led to his conviction on a criminal charge, has to be examined by the appropriate authority before imposing any penalty Under Clause (a) of second proviso. As held by Supreme Court In Tulsi Ram Patel's case (supra) in such cases before imposing any penalty under Clause (a) of the second proviso, the appropriate authority "will have to persue the judgment of the criminal court and consider all the facts and circumstances of the case and various factors set out in Challappan's case, AIR 1975 SC 2216. This, however, has to be done by it ex prate and by itself. Supreme Court in Challappan's case (supra) has laid down that before imposing a penalty, the appropriate authority has to consider the entire conduct of the employee, the gravity of mis-conduct committed by him, the impact which his mis-conduct is likely to have on the administration and other extenuating circumstances and redeeming features, if any, in the case. Government servant, therefore, cannot be dismissed from service merely on the basis of his conviction howsoever serious or heinous the offence may be for which he has been convicted. The authority concerned has to consider his conduct which has led to his conviction on a criminal charge, along with all other relevant factors and circumstances including redeeming feature, if any. The decision of Division Bench of this Court in Shyam Narain Shukla (supra) lays down the correct law and does not require reconsideration. Decision of Writ Petition No. 1701 of 1985 is good only to the extent whereby it was held that an order of dismissal of a Government servant cannot be based on mere conviction. Other issue decided in the latter case (Writ Petition No. 1701 of 1985) has been rightly declared wrong and unenforceable by Division Bench in the case of Shyam Narain

Shukla (supra) in view of decision of Tulsi Ram Patel's case (supra).

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10. Regulation 492, however, requires the Superintendent of Police to await decision of judicial appeal, of any, before deciding the question as to whether departmental action is necessary. This runs counter to Clause (a) of second proviso to Article 311(2). Supreme Court in Tulsi Ram Patels case (supra) has held that neither the Act nor the Rule nor the Government Instructions can alter or liberalise the effect of the second proviso to Article 311(2). in this connection. Supreme Court has laid down as Under:

Service rules may reproduce the provisions of the second proviso authorizing the disciplinary authority to dispense with the inquiry contemplated by Clause (2) of Article 311 In the three cases mentioned in the second proviso to that clause or any one or more of them. Such a rule, however, cannot be valid and constitutional without reference to the second proviso to Article 311(2) and cannot be read apart from it. Thus, while the source of authority of a particular officer to act as a disciplinary authority and to dispense with the inquiry is derived from the service rules, the source of his power to dispense with the inquiry is derived from the second proviso to Article 311(2) and not from any service rules. There is well established distinction between the source of authority to exercise a power and the source of such power.

Supreme Court accordingly, in para 122 of its Judgment, held that last part of Rule 37 of the C.I.S.F. Rules which provides for a notice before Imposing penalty of dismissal to the delinquent Government servant, would be void as violating the second proviso to Article 311(2), "because It would whittle down the exclusionary effect of the second proviso". Supreme Court, however, did not declare it ultra verse and treated it as directory and not mandatory. The reasons for treating the rules which are in conflict with second proviso to Article 311(2) as directory, a given by Supreme Court, are as under:

It is, however, a well-settled rule of construction of statutes that where two Interpretations are possible, one of which would preserve and save the constitutionality of the particular statutory provision while the other would render it unconstitutional and void, the one which saves and preserves its constitutionality should be adopted and the other rejected. Such constitutionality can be preserved by Interpreting that statutory provision as directory and not mandatory. It Is equally well-settled that where a statutory provision Is directory, the courts cannot interfere to compel the performance or punish breach of the duty created by such provision and disobedience of such provision would not entail any invalidity see Craies on Statute Law, Seventh Edition, at page 229. In such a case, breach of such statutory provision would not furnish any cause of action or ground of challenge to a Government servant for at the very threshold, such cause of action or ground of challenge would be barred by the second proviso to Article 311(2).

11. Regulation 492 whittles down the effect of Clause (a) of second proviso to Article 311(2) and, therefore, cannot survive being in conflict with it. But for the reasons given by Supreme Court in Tulsa Ram Patel's case, this Regulation can be saved by treating it directory and not mandatory. Regulation 492 is, therefore, declared directory only."

33. We thus answer the reference as follows:-

(1) Rule 11(1) of the Delhi Police (Punishment & Appeal) Rules, 1980 with reference to the expression '*provided that no such order shall be passed till such time the result of the first appeal that may have been filed by such police officer is known*' has to be read as directory and to this extent the Division Bench judgment in Brij Pal Singh's case is overruled.

(2) In view of the answer to reference No.1, reference No.2 becomes irrelevant.

34. We do not answer the reference in WP(C)7577/2012 in view of the stand taken by learned counsel for DTC which we have noted hereinabove.

35. The two writ petitions shall now be listed for directions before the Roster Bench on January 13, 2014.

(V.KAMESWAR RAO)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

(V.K.JAIN)
JUDGE

JANUARY 06, 2014
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