

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.179 of 2013

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Sachandra Kumar, S/O Sri Jagdish Sah, Resident of Village Mazhar Patti, P.S. Udakisunganj, District-Madhepura.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Director General of Police Bihar, Patna.
3. Deputy Inspector General of Police, Purnia Range, Purnia.
4. Superintendent of Police, Munger.
5. Superintendent of Police, Purnia.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Rajendra Narain, Sr. Advocate with
Mr. Dinesh Prasad Verma, Advocate
For the Respondent/s : Mr. Harendra Pd. Singh
For the State : Mr. Anil Kumar Sinha, Advocate

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 08-09-2016

Heard Mr. Rajendra Narain, learned senior counsel appearing for the petitioner and Mr. Anil Kumar Sinha, learned Government Advocate No.1 who appears for the State along with Mr. Kumar Ravish, learned A.C. to G.A.-1.

With the consent of the parties, this writ petition has been heard with a view to its final disposal at the present stage itself.

The petitioner is aggrieved by the order bearing Memo No.4216 dated 3.12.2010 passed by the Director General of Police, Bihar, Patna, whereby the memorial preferred by the petitioner against the order of dismissal from service has been rejected thus confirming the order bearing Memo No.772 dated 19.7.2007 passed by the Deputy Inspector General of Police, Purnea Range, Purnea,

whereby the appeal preferred by the petitioner was dismissed as well as the order imposing penalty passed by the Superintendent of Police bearing Memo No.780 dated 2.5.2006. Copies of the orders passed by the Disciplinary Authority, Appellate Authority and the Director General of Police are impugned at Annexures-4, 5 and 8 respectively to the writ petition.

The penalty on dismissal has been passed against the petitioner in exercise of power vested in the Disciplinary Authority under Article 311(2) (b) of the Constitution of India which vests jurisdiction in the disciplinary authority to waive of the desirability of holding a regular departmental proceeding for driving home the charges levelled against a delinquent employee in the circumstances so discussed therein.

The facts of the case is rather brief and it is simply on the basis of the show cause notice bearing Memo No.456 dated 14.2.2006 impugned at Annexure-2 to the writ petition charging the petitioner of having colluded with the kidnappers and aided them in their crime that the Superintendent of Police relying upon certain Call Details Report obtained by him which reflected that the petitioner was in communication with the kidnappers, initiated a proceeding for dismissal of the petitioner by charging him of such collusion with the kidnappers thus maligning the reputation of the department and since according to the Superintendent of Police, the encounter with the kidnappers had resulted in the death of the



kidnappers as well as the witnesses hence it was not practicable to hold a regular departmental proceeding. The petitioner was thus served with the show cause notice to respond as to why he be not dismissed from the service under Article-311(2) (b) of the Constitution of India. The petitioner filed his response which is exhaustive and a copy of which is present at Annexure-3. The petitioner has denied all allegations and prayed for dropping of the proceeding in the background of the explanation given in the reply. The Disciplinary Authority i.e. the Superintendent of Police, Purnea vide order bearing Memo No.780 dated 2.5.2006 while upholding the charge against the petitioner of dereliction of duty, negligence, suspected misconduct and of colluding, in consideration of the mobile call details, has ordered for dismissal of service of the petitioner, waiving of the requirement of a regular departmental proceeding, while taking recourse to the provisions of Article-311(2)(b) of the Constitution of India and has ordered for his dismissal from service which order impugned at Annexure-4 has been affirmed by the Appellate Authority vide order bearing Memo No.772 dated 19.7.2007 present at Annexure-5 and even the memorial preferred by the petitioner stands rejected by the Director General of Police, vide order bearing Memo No.4216 dated 3.12.2010 impugned at Annexure-8.

In between, the petitioner had approached this Court through CWJC No.10339 of 2009 as well as MJC No.3585 of 2011

but which were accordingly disposed of requiring the petitioner to take recourse to the departmental remedy at the first instance. On the confirmation of the order of dismissal by the superior authorities that the petitioner is again before this Court through the present writ petition.

A rather brief argument has been advanced by Mr. Narain, learned senior counsel appearing for the petitioner to question the impugned order. He submits that even when a charge has been levelled against the petitioner of having colluded with the criminals to aid them in the kidnapping of a boy and of giving them information regarding the police movement, it is simply on allegations that the order of dismissal has been passed without the disciplinary authority considering whether the evidence so relied upon does connect the petitioner to the alleged offence. He submits that power of waiver of the departmental proceeding vested under Article-311(2) (b) of the Constitution of India is not to be lightly exercised and the reasons for taking recourse to such remedy is completely absent in the present case. He submits that merely because the kidnappers had been killed in the encounter, can be no reason for the Superintendent of Police to waive of a regular departmental proceeding. Learned counsel in support of his submission has relied upon the judgments of the Supreme Court reported in **AIR 1991 SC 385 (Jaswant Singh v. State of Punjab)** paragraph 4 and 5 as well as a judgment reported in **(2006) 13 SCC**



581 (Tarsem Singh v. State of Punjab and others) to submit that these are the cases relatable to extreme circumstances prevailing in the State of Punjab during the period the State was facing turmoil and the Supreme Court even while taking note of the circumstances, did not approve of the recourse taken by the disciplinary authority in the respective cases to waive of requirement of a departmental proceeding. Learned counsel has referred to the impugned order at Annexure-4 to submit that even though an imputation of misconduct resting on collusion with the criminals has been made against the petitioner in reference to the mobile call details but without taking any steps to prove whether at all the petitioner was in conversation with the kidnappers, that the charges have been upheld exclusively relying upon the call details which required to be proved in a duly constituted proceeding. He submits that even though in the encounter, the criminals had been killed but the submission of the Superintendent of Police, Purnea that even the witnesses had been killed in the encounter is not the correct position. He submits that merely for a reason that the department may not be able to lead supportive evidence, cannot be a ground for waiving of a departmental proceeding as held by the Supreme Court in the judgments rendered in the case of **Jaswant Singh** (supra) **and Tarsem Singh** (supra). He submits that the case of the petitioner is squarely covered by the observations of the Supreme Court.



The argument of Mr. Narayan, learned senior counsel has been seriously contested by Mr. Sinha, learned Government Advocate No.1 to submit that that since it has been proved from the call details received from the mobile company that the mobile possessed by the petitioner bearing no.9835402598 was in continuous conversation with one of the mobile possessed by the alleged kidnappers bearing no.9835276016 which though was in the name of one Arun Kumar but was being utilized by the kidnappers, it confirms that the petitioner was in continuous conversation with the kidnappers during the period of kidnapping of the boy and this evidence by itself is sufficient to drive home the charge against the petitioner. He submits that on being confronted, the petitioner has given an excuse that his mobile got lost in the month of July but then there is no report to that effect in any police station. He thus submits that since the mobile number possessed by the petitioner was found to be in conversation with one of the mobile being used by the kidnappers, the allegation made against the petitioner was confirmed and which single factor is enough to order for dismissal of the petitioner who was a member of a police force and was required to maintain a secrecy in the police movement. Learned counsel has referred to celebrated judgment rendered in the case of **Union of India vs. Tulsiram Patel** since reported in (1985) 3 SCC 398 and with particular reference to the opinion expressed at paragraph-130 of the judgment he submits that no detailed



discussion is required to be given by a Disciplinary Authority in case where he feels satisfied that it is not practicable to hold a departmental proceeding. He submits that even though the Supreme Court has held that such decision is not to be taken lightly or arbitrarily but in the nature of the circumstances prevailing in the present case where the Call Detail Report shows a conversation in between the petitioner's mobile and the mobile possessed by one of the kidnappers, this single instance is enough for recording a satisfaction of the Disciplinary Authority to waive of a regular disciplinary enquiry. He submits that the matter is very serious as the petitioner being a member of the police force has colluded with the kidnappers and it is in consideration of the materials available on the record that the disciplinary authority on being satisfied, has ordered for dismissal of the petitioner from service, by taking recourse to the powers vested under Article-311(2) (b) of the Constitution of India.

I have heard learned counsel for the parties and I have perused the records.

Considering the rival submissions advanced by the learned counsel for the parties in my opinion, the only issue relevant for the present is, whether in the circumstances discussed in the show cause notice impugned at Annexure-2, a recourse taken by the Disciplinary Authority to waive of the requirement of a regular departmental proceeding relying upon the provisions of

Article-311(2)(b) of the Constitution of India, would require any interference and whether the materials on record would bring the case of the petitioner within the pre requisites discussed in the said Article.

The show cause notice dated 14.2.2006 is enclosed at Annexure-2 and lists 18 cases instituted against a gang of kidnappers led by one Ramesh Yadav. The gang was involved in crimes of kidnapping as well as for other serious offences and it is on examination of the call details relatable to mobile no.9830866316, 9414443262, 9835614764 and 9835272348 transpired that the demand of extortion was made from these mobiles from the family of the kidnapped child. The Call Detail Report also transpired that the mobile number used by the petitioner i.e. 9835402598 was in conversation with one of the mobiles possessed by the kidnappers i.e. 9835276016 in between the period 15th August to 23rd August. It is in consideration of such report and since admittedly mobile no.9835402598 was possessed by the petitioner that he was charged of colluding with the kidnappers and aiding them in their crime of kidnapping while being a member of a police force. The Superintendent of Police charging the petitioner of colluding with the kidnappers and of maligning the reputation of police has held that since the witnesses concerned have been killed in the police encounter with the kidnappers hence it was not practicable to hold a regular departmental proceeding and thus the

petitioner was show caused under Article-311(2) (b) as to why he be not dismissed from service. The petitioner having responded to the charges with denial vide Annexure-3 that the order of dismissal is passed impugned at Annexure-4 on dereliction of duty, suspected misconduct and of colluding with the kidnappers.

As I have said, for the present this Court is not entering into the sufficiency or relevancy of the evidence on record for the issue presently contested by Mr. Narain is as to whether the case in hand was a case covered under Article-311(2)(b) of the Constitution of India to waive of the necessity of a regular departmental proceeding.

Article-311(2)(b) of the Constitution of India reads thus:

“311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.

... ..
... ..

(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-

... ..
... ..

(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;”

While the substantive provision upholds a requirement of a departmental enquiry but exceptions are provided in the second proviso to the Article and in so far as the present case is concerned, it is proviso (b) which has been put to service which empowers the disciplinary authority to dismiss or remove a person or to reduce him in rank, if he is satisfied, for the reason to be recorded, that it was not practicable to hold such enquiry. The two pre-requisites for exercise of such power as manifest from the Article is:

- a) That there must exist a situation which renders holding of any enquiry reasonably not practicable; and
- b) The disciplinary authority must record sound reasons in support of his satisfaction.

The power vested in a Disciplinary Authority under the 2nd proviso to Article 311(2) is an extreme measure and has to be exercised in extreme circumstances for it forfeits a valuable right vested in the delinquent. It is not merely on a personal satisfaction of the Disciplinary Authority that he can be permitted to exercise such jurisdiction rather the facts accompanying in any case, should justify such decision. Paragraph-130 of the judgment rendered in the case of **Tulsiram Patel** (supra) discusses some of the



circumstances in which such power can be resorted to which may not be exhaustive but a plain reading thereof would show that it is primarily in such of the cases where a delinquent concerned is found terrorizing the witnesses and obstructing the course of the departmental proceeding that a recourse to such an extreme exercise, is to be taken. In fact, in my opinion the very observation of the Constitution Bench present at paragraph-130 of the judgment is sufficient to allow the writ petition and for the purpose I am tempted to reproduce the relevant extract thereof:

“130.

.....

Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is nor practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidates witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct if to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify

while an individual may not. The reasonable practicability of holding an enquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty.

 (Emphasis supplied by me)

The judgment relied upon by Mr. Narain appearing for the petitioner as well as Mr. Sinha appearing for the State do not make any departure from the settled principles that a decision for not holding a departmental proceeding has to rest on sound reasons and has to be subjective. In the present case, it is simply because in the opinion of the Superintendent of Police, the witnesses had been killed that he has chosen to waive of a necessity of a regular departmental proceeding. Such kind of mechanical satisfaction if allowed to continue would give alarming result for in every case where the department is not in possession with sufficient evidence to uphold the charge, it may take a short route through this proviso. Whether or not the mobile of the petitioner has been lost and whether or not it is the petitioner who was in conversation with the

kidnappers are issues of fact and requires to be driven home in a regular proceeding and not on the basis of a show cause under Article 311(2) of the Constitution. Merely since the encounter has resulted in the death of the kidnappers again cannot be a ground for waiving of the necessity of a departmental proceeding.

Another relevant aspect of the matter is that even when the petitioner is being proceeded on charge of colluding with the kidnappers, it is informed by Mr. Narain, learned senior counsel appearing for the petitioner that he has not been arraigned as an accused in the criminal case instituted against the kidnappers. The reasons be whatsoever, I would not express any opinion, but in so far as the case in hand is concerned, in the nature of misconduct levelled against the petitioner is concerned, the reason assigned by the Superintendent of Police in his order dated 14.2.2006 annexed at Annexure-2 regarding death of the witnesses in the encounter is neither supported by names nor can be a valid ground for bringing the case within the exceptions provided under Article- 311(2)(b) of the Constitution of India, to vest a jurisdiction in the Disciplinary Authority, to waive of necessity of holding a regular departmental proceeding, to drive home the charges so framed against the petitioner, resulting in extreme penalty of dismissal.

For the reasons and discussions made hereinabove the order of dismissal passed by the Disciplinary Authority dated 2.5.2006 together with the order passed by the Appellate Authority

dated 19.7.2007 and the rejection of the memorial by the Director General of Police dated 3.12.2010 impugned at Annexure-4, 5 and 8 respectively are quashed and set aside.

The writ petition is allowed. The petitioner stands reinstated in service but in the circumstances discussed above, the petitioner would be entitled to 50% of his back wages together with the consequential benefits.

This order, however, would not preclude the Disciplinary Authority to proceed in the matter afresh but in accordance with law.

(Jyoti Saran, J)

deepika/SK Pathak-

AFR	
CAV DATE	
Uploading Date	30.9.2016
Transmission Date	