

***IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.***

CWP No.6406 of 1994

Date of Decision: 16.12.2016

Major Singh

....Petitioner

Versus

State of Punjab and others

....Respondents

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Dheeraj Chawla, Advocate
for the petitioner.

Mr. Avinit Avasthi, A.A.G., Punjab
for the State.

DAYA CHAUDHARY, J.

The present petition has been filed for issuance of a writ in the nature of certiorari quashing the impugned order dated 31.12.1992 (Annexure P-1), whereby, the services of the petitioner were terminated and the order Annexure P-3, vide which, the appeal filed by him was rejected by respondent No.3.

Briefly, the facts of the case, as made out in the present petition, are that initially the petitioner was appointed as Constable in Punjab Police. Vide order dated 31.12.1992, he was dismissed from service as per provisions of Punjab Police Rules 16.1 read with Section 7 of the Police Act, 1861 and Article 311(2) of the Constitution of India. The appeal

filed against the said order of dismissal was also rejected. Order of dismissal and the appeal filed against the said order of dismissal have been challenged by filing the present petition.

Learned counsel for the petitioner submits that the competent authority has power to pass the order of dismissal only in case the concerned employee has committed gravest act of misconduct or in case the cumulative effect of continued misconduct proving incorrigibility and complete unfitness for police service but nothing was brought to the notice of the Court as to how he had committed gravest act of misconduct or there is cumulative effect of continued misconduct. The total length of service has to be taken into consideration while awarding the punishment. Learned counsel also submits that instead of holding a departmental inquiry, the competent authority has passed the impugned order by invoking the provisions of Article 311(2)(b) of the Constitution of India. Neither any charge sheet was issued nor any reasonable opportunity was granted. No finding, whatsoever, has been given as to how it was not practicable to conduct inquiry. The only reason, which has been mentioned in the impugned order, is that the petitioner was having links with the criminal elements. At the end, learned counsel for the petitioner submits that the impugned order is liable to be set aside as the same is in violation of principles of natural justice as even no efforts were made by the Punishing Authority to give an adequate opportunity to the petitioner. Even no satisfaction has been recorded as to how it was not practicable to conduct inquiry.

Learned counsel for the petitioner has also relied upon the judgment of Hon'ble the Apex Court in cases ***Reena Rani vs State of***

Haryana and others 2012(10) SCC 215, Jaswant Singh vs State of Punjab 1991(1) SCC 362 and judgments of this Court in cases ***Swaran Singh and others vs State of Punjab and others 1996(3) S.C.T. 113, Smt. Surinder Kaur wd/o Sh. Labh Singh vs State of Punjab through Director General of Police, Chandigarh 2008(1) RSJ 757*** and ***CWP No.17879 of 2014*** titled as ***Balkar Singh vs State of Punjab and others*** decided on ***29.09.2016***, in support of his contentions.

Learned State counsel while opposing the submissions made by learned counsel for the petitioner submits that the petitioner has been dismissed from service by attracting the provisions of Article 311(2)(b) of the Constitution of India and in such circumstances, there is no necessity to hold the departmental inquiry or to give personal hearing. It has specifically been mentioned in the order that the petitioner was having links with the terrorists and was supplying them the police information. The impugned order has been passed with proper application of mind.

Heard the arguments of learned counsel for the parties and have also perused the impugned order of dismissal and the order of rejection of appeal as well as other documents on the file.

The facts relating to appointment of the petitioner as Constable and thereafter, his dismissal from service are not disputed. It is also not disputed that the petitioner was dismissed from service by exercising the powers provided under Article 311(2)(b) of the Constitution of India. The petitioner being member of the Punjab Police Service was governed by the Punjab Police Rules. Rule 16.1 deals with the Authority competent to pass order of punishment in case of Inspectors, Sub-Inspectors, Head Constables, Constables etc. Rule 16.2 deals with the punishment which can be awarded

by the competent authority. Rule 16.2 of the Punjab Police Rules is reproduced as under :-

"16.2 (1) :- Dismissal shall be awarded only for the gravest acts of misconduct or as the cumulative effect of continued misconduct proving incorrigibility and complete unfitness for police service. In making such an award regard shall be had to the length of service of the offender and his claim to pension."

(2) An enrolled Police Officer convicted and sentenced to imprisonment on a criminal charge shall be dismissed :

"Provided that in case the conviction of a Police Officer is set aside in appeal or revision, the officer empowered to appoint him shall review his case keeping in view the instructions issued by the Government in this behalf."

(3) When a Police Officer is convicted judicially and dismissed, or dismissed as a result of departmental enquiry, in consequence of corrupt practices, the conviction and dismissal and its cause shall be published in the Police Gazette. In other cases of dismissal when it is desired to ensure that the officer dismissed shall not be re-employed elsewhere, a full descriptive role with particulars of the punishments, shall be sent for publication in the Police Gazette."

It is apparent from the said Rule that the competent authority has power to pass the order of dismissal only in case of gravest acts of misconduct or as the cumulative effect of continued misconduct proving incorrigibility and complete unfitness for police service. The Punishing Authority, while passing such orders, is to take into consideration the total length of service of the employee. The said punishment can be awarded, in case, gravest act of misconduct is there. Secondly, such conduct has resulted

into a situation that the police officer is rendered unfit for police service. The respondent authority is to record a finding that the misconduct attributed to the concerned employee is gravest act of misconduct. Meaning thereby, the mandatory provisions of Rule 16.2 of the said Rules have to be complied with while passing the impugned order. The competent authority has also exercised the provisions of Article 311(2)(b) of the Constitution of India. Clause (2) of Article 311 of the Constitution of India provides that “no such person shall be dismissed or removed or reduced in rank” except after an enquiry in which he has been informed of the charges against him and has been given reasonable opportunity of being heard relating to those charges. For attracting sub-clause (2), two conditions are necessary to be satisfied – (i) there must exist a situation which renders that holding of an enquiry is not reasonably practicable and (ii) the Disciplinary Authority must record reasons in writing in support of his satisfaction.

In case, said two conditions are not satisfied then it appears that the competent authority was not justified in dispensing with the enquiry. As per clause (b) of 2nd proviso to Article 311 of the Constitution of India, in case, the competent authority is satisfied with the material placed before him or it is not reasonably practicable to hold the departmental enquiry, then only, this power can be exercised.

A perusal of impugned order shows that nowhere it is mentioned that the satisfaction of the competent authority has been recorded or it was not practicable to hold departmental enquiry. Nothing has been placed on record or brought to the notice of this Court, even during arguments as to how the competent authority has reached to the conclusion that the petitioner was having links with the terrorists and how it was not

reasonably practicable to hold the departmental enquiry. Even nothing has been mentioned as to whether any past incidence was there to show that the petitioner was having any link with the terrorists or any adverse remarks were conveyed to the petitioner during his service.

Article 311(2)(b) of the Constitution of India is relevant for resolving the controversy in hand and the same is reproduced as under :-

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

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed.:

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;

or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such

inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

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

It has been held in various judgments of this Court as well as Hon'ble the Supreme Court that an inquiry under Article 311(2)(b) of the Constitution of India is a rule and dispensing with the inquiry is an exception. This power is not to be exercised arbitrarily and out of ulterior motive. The competent authority is bound to follow the principles of natural justice and the normal procedure cannot be dispensed with only on the pretext that it is not practicably possible to hold departmental inquiry. In the present case, nowhere it has come on record that even any attempt was made to hold regular departmental inquiry by the appointing inquiry officer or any witness was not in a position to depose against the petitioner. No cogent material has even been brought on record while passing the impugned order of dismissal as to how it was not possible to conduct the departmental inquiry and no reason whatsoever has been mentioned as to why the procedure for dispensing with the departmental inquiry has not been adopted. While passing the impugned order, the punishing authority has not even seen the service record of the petitioner and extreme penalty of dismissal has been imposed. Even it has not been considered as to whether the lesser penalty could have been awarded to the petitioner.

As per Rule 16.2 of the Punjab Police Rules, 1934 (for short

'the Rules'), the past service record cannot be ignored and prior to passing of impugned order of dismissal, the competent authority was required to exercise his power provided under Rule 16.2 of the Rules as it is imperative for the authority to record a finding that the employee is guilty of the gravest act of misconduct or that he is guilty of continued misconduct, which proves its incorrigibility and complete unfitness for police service. No such finding has been recorded while passing the impugned order. Even there is no reference with regard to the service record of the petitioner in the impugned order to show that any other penalty had been imposed upon the petitioner. Even the appellate authority has also not taken into consideration the mandatory provisions of Rule 16.2 of the Rules while passing the impugned order.

The scope of Article 311(2)(b) of the Constitution of India has been dealt with by Hon'ble the Apex Court in **Jaswant Singh's case (supra)** wherein it has been held as under: -

“The decision to dispense with the departmental enquiry cannot be rested solely on the ipse dixit of the concerned authorities. When the satisfaction of the concerned authority is questioned in a Court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim and caprice of the concerned Officer.”

The scope of judicial scrutiny was also considered in **Jaswant Singh's case (supra)** wherein earlier judgment of the Constitution Bench in **Union of India vs. Tulsiram Patel, (1985) 3 SCC 398**, has been relied upon wherein it has been held as under: -

“Although clause (3) of that article makes the decision of the disciplinary authority in this behalf

final, such finality can certainly be tested in a Court of law and interfered with, if, the action is found to be arbitrary or malafide or motivated by extraneous considerations or merely a ruse to dispense with enquiry.”

The Hon'ble Apex Court in case of ***Sudesh Kumar Vs. State of Haryana & others*** reported as **2005 (11) SCC 525** had held that an inquiry under Article 311 sub clause (2) of the Constitution of India is a rule and dispensing with the inquiry is an exception. It was also held that the authority dispensing with the inquiry under Article 311 sub clause (2) (b) of the Constitution of India must satisfy for reasons to be recorded that it is not reasonably practicable to hold an inquiry. It is by now well settled in a catena of judgments that the subjective satisfaction of the competent authority for dispensing with a regular departmental inquiry must be based on cogent material and a regular inquiry cannot be dispensed with solely on the ipse dixit of the concerned authority. Subjective satisfaction for dispensing with the inquiry not supported by any material cannot be held to be justified. An order of dismissal, where the same is found based on material available before the punishing authority in the form of a preliminary inquiry, information etc. which could be made the basis for forming an opinion that it was reasonably impracticable to hold a regular departmental inquiry would certainly not call for any interference but in a situation where no such material was available as is the case in the present situation, the exercise of power under clause (b) of the second proviso to Article 311 sub clause (2) would have to be held to be arbitrary and illegal.

On close reading of Article 311(2), it cannot be denied that a Government employee cannot be dismissed from service without holding an inquiry and affording an opportunity of hearing. However, clauses (b) and

(c) of Article 311(2) give ample power to the authority empowered or the President or the Governor to impose penalty of dismissal, if it is satisfied that it is not practicable to hold inquiry. The order of dismissal or removal from service can be passed under any of the three clauses.

There are two conditions precedent which must be satisfied before action under clause (b) of second proviso is taken against a government servant. These conditions are as under: -

“(i) There must exist a situation which makes the holding of an inquiry contemplated by Article 311(2) not reasonably practicable. What is required is that holding of inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate all the cases in which it would not be reasonably practicable to hold the inquiry. Illustrative cases would be: -

(a) Where a civil servant, through or together with his associates, terrorises, threatens or intimidates witnesses who are likely to give evidence against him with fear of reprisal in order to prevent them from doing so; or

(b) where the civil servant by himself or with or through others threatens, intimidates and terrorises the officer who is the disciplinary authority or members of his family so that the officer is afraid to hold the inquiry or direct it to be held; or

(c) where an atmosphere of violence or of general indiscipline and insubordination prevails at the time of attempt to hold the inquiry, is made.

The disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motive or merely in order to avoid the holding of an inquiry or because the department's case against the civil servant is weak and, therefore, is bound to fail. In the present case none of these contingencies exist.

The other aspect of the matter is that in the impugned order it was held that it was not reasonably practicable to hold inquiry. The respondents should have justified their stand in arriving at the conclusion

that it was not reasonably practicable to hold inquiry. Had any attempt to hold inquiry been made i.e., witnesses were called and they failed to appear, only in such eventuality it could be held that it was not reasonably practicable to hold inquiry. In this case, no inquiry was made and the petitioner was dismissed from service by invoking the provisions of Article 311(2) of the Constitution of India.

There is no material on the record that witnesses could not come forward freely to depose against the petitioner in a regular departmental inquiry and the case of the petitioner is fully covered by **Tulsi Ram Patel's case (supra)**, **Jaswant Singh's case (supra)** and **Chief Security Officer vs. Singasan Ravi Dey, 1981(2) SLR 140**.

It is also well settled that statutory powers conferred upon authorities have to be exercised by them and if in substance it is exercised by another, it will be a case of failure to exercise the said statutory powers resulting decision in such a case to be ultra vires and void.

In ***Union of India vs. Subramanian, 1985(1) SLR 238***, the action taken by the employer to dispense with the inquiry by declaring it to be reasonably impracticable to hold, was declared to be invalid. The Court held that the constitutional requirement of Article 311(2) cannot be converted into a dead letter for the simple reason that the employees have developed class or group feelings.

In ***Arun Chaubey vs. Union of India, AIR 1964 SC 1356***, Hon'ble the Apex Court quashed the orders passed by the Deputy Chief Commercial Superintendent of the Northern Railways while exercising the powers under proviso (b) of Article 311 of the Constitution of India, on the ground that no material was available with the said authority for satisfying

itself that it was not reasonably practicable to hold an inquiry.

In view of the facts and circumstances as well as the law as discussed above, it has been established that the authority dispensing with the inquiry under Article 311(2)(b) has not recorded any satisfaction/reason to show as to why it was not reasonably practicable to hold an inquiry. Simply saying that it is not practicable to hold departmental inquiry, is not sufficient in such circumstances as there is no ground for dispensing with the inquiry. A reasonable opportunity of hearing as required under Article 311(2) of the Constitution of India was necessary to be given to the petitioner to defend himself and to establish his innocence by cross-examining the prosecution witnesses produced against him or by examining the defence witnesses in his favour, if any. This could have been done only if inquiry was conducted or the petitioner was informed of the charges levelled against him.

In the present case, the mandate of Article 311(2) of the Constitution of India has been violated by depriving the reasonable opportunity of being heard to the petitioner.

By considering the facts and law position as discussed above, the present petition deserves to be allowed and as such the order of dismissal of the petitioner dated 31.12.1992 (Annexure P-1) and the order passed in the appeal (Annexure P-3) are hereby quashed.

However, the respondents are at liberty, if so advised, to hold a departmental inquiry against the petitioner by affording him reasonable opportunity of being heard and thereafter, pass appropriate order as it may deem fit in accordance with law within a period of two months from the

date of receipt of certified copy of this order.

The writ petition is accordingly allowed.

16.12.2016

gurpreet

Whether speaking/reasoned

Whether Reportable

(DAYA CHAUDHARY)
JUDGE

Yes

Yes