

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

CWP No.12697 of 2014

Date of Decision : 15.12.2016

Satnam Singh

....Petitioner

Versus

The State of Punjab and others

....Respondents

CWP No.8865 of 2014

Avtar Singh and another

....Petitioners

Versus

The State of Punjab and others

....Respondents

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Ms. Kaavya Jariyal, Advocate
for Mr. B.S. Jaswal, Advocate
for the petitioner
in ***CWP No.12697 of 2014.***

Mr. A.K. Walia, Advocate
for the petitioners
in ***CWP No.8865 of 2014.***

Mr. Rupam Aggarwal, D.A.G., Punjab
for the State.

DAYA CHAUDHARY, J.

By this judgment of mine, two writ petitions bearing ***CWP No.12697 of 2014*** and ***CWP No.8865 of 2014*** shall be disposed of as common question of law and facts are involved.

However, for the sake of convenience, the facts are being

derived from ***CWP No.12697 of 2014***.

The present petition has been filed under Articles 226/227 of the Constitution of India for issuance of a writ in the nature of *certiorari* for quashing the impugned order dated 21.08.2012, whereby, the petitioner has been dismissed from service without issuing any show cause notice or without conducting regular inquiry and by invoking the provisions of Article 311(2)(b) of the Constitution of India as well as order dated 14.08.2013 passed by the Appellate Authority, whereby, the appeal filed by the petitioner has been rejected without any application of mind and by passing a non-speaking order.

A further prayer has also been made for issuance of a direction to the respondents to reinstate the petitioner along with all consequential benefits.

Briefly, the facts of the case, as made out in the present petition, are that the petitioner initially joined service as Warder on 30.05.1983 and he continued to work as such for approximately 30 years. While being posted at Central Jail, Amritsar in the year 2012, the petitioner and other two Jail Warders, namely, Avtar Singh and Surjit Singh (who are the petitioners in ***CWP No.8865 of 2014***) were deputed to take one undertrial Sumanjit Singh to Guru Nanak Hospital, Amritsar as per orders of the officers as said undertrial-Sumanjit Singh was suffering from loose motion and vomiting. As per advise given by jail Doctor, undertrial-Sumanjit Singh was to be admitted in the Civil Hospital for emergency treatment. Said undertrial was got admitted by the present petitioner as well as petitioners in ***CWP No.8865 of 2014*** in Guru Nanak Dev Hospital, Amritsar, where he remained admitted for treatment up to 17.08.2012 and

was discharged at about 1:45 p.m. While bringing back the undertrial to jail, he went to toilet for motion but when he did not come out. The toilet was checked but he was not found there in the toilet as he had escaped through a window of the toilet. Efforts were made by the petitioners to trace him but he could not be found. An information was given by the petitioners to senior officers of the jail from their mobile cells and thereafter, they returned to jail. Subsequently, FIR No.377 dated 18.08.2012 was registered under Sections 222/223/224 IPC at Police Station Civil Lines, Amritsar at the instance of Superintendent, Central Jail, Amritsar.

A preliminary enquiry was conducted by recording the statements of various witnesses who did not depose against the petitioner and other employees. However, in the preliminary enquiry, it was found that the undertrial escaped due to negligence or connivance of the petitioner. Thereafter, the petitioner was dismissed from service vide order dated 21.08.2012 by attracting the provisions of Article 311(2)(b) of the Constitution of India. The petitioner challenged the order of dismissal by way of filing appeal, which was also dismissed.

Both the orders of dismissal of the petitioner from service as well as rejection of appeal are subject matter of challenge in the present petition.

Learned counsel for the petitioner submits that neither any Show Cause Notice nor charge sheet was issued to the petitioner and without holding any regular enquiry, the petitioner was dismissed from service by invoking the provisions of Article 311(2)(b) of the Constitution of India. Learned counsel also submits that the impugned order of dismissal from service has been passed by an authority subordinate to the

Appointing/Punishing Authority and as such, the order of dismissal is liable to be set aside. Learned counsel also submits that neither the satisfaction of the punishing authority nor any reason has been recorded as to how it was not practicable to hold the departmental enquiry. Learned counsel also submits that the order of dismissal can be passed in case of gravest misconduct or by seeing the conduct of the petitioner, which has resulted into continued misconduct which shows that the petitioner was unfit for the public service.

In response to notice of motion, reply has been filed.

Learned State counsel while opposing the submissions made by learned counsel for the petitioner submits that in the enquiry, the negligence or connivance of three police officials was proved. It was the duty of the police officials to keep strict supervision over the undertrial but the petitioner remained negligent in discharging of his official duty, as a result of which, the undertrial remained successful in escaping. Learned State counsel also submits that not only the petitioner but two other officials were also there, hence, the connivance of the police officials was apparent. Even no information was given to any higher officer regarding the escape of the undertrial which proves not only the negligence but connivance of the present petitioner as well as petitioners in *CWP No.8865 of 2014*.

Heard the arguments of learned counsel for the parties and have also perused the impugned order of dismissal as well as order passed in the appeal. The facts regarding appointment of petitioner as Warder, duty assigned to him and his dismissal from service by attracting the provisions of Article 311(2)(b) of the Constitution of India are not disputed. The only reason which has been mentioned in the impugned order is that it was not

practicable to hold enquiry.

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.

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 vs State of Punjab and others 1991(1) SCT 125**, 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. Tulsi Ram 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.

In the present case, while passing the impugned order, neither the total length of service of the petitioner has been considered nor any satisfaction has been recorded as to how it was not practicable to hold enquiry. Although, it has been mentioned that a preliminary enquiry was conducted and statements of certain persons were recorded but nowhere it has been mentioned that the witnesses have not deposed anything against the petitioner. Even while passing the impugned order, the punishing authority has not mentioned as to how the petitioner was guilty of gravest misconduct.

By considering the total length of service, lesser punishment could have been awarded. It appears that the impugned order has been passed in a mechanical manner without recording any satisfaction or without recording any finding as to how it was not practicable to conduct enquiry. Even the Appellate Authority has not mentioned any reason and the order passed therein is without any application of mind and without giving any reasons as to how the grounds of appeal were considered.

By considering the facts and law position as discussed above, both the abovesaid petitions i.e **CWP No.12697 of 2014** and **CWP No.8865 of 2014** deserve to be allowed and as such the order of dismissal dated 21.08.2012 (Annexure P-4/T) of the present petitioner as well as petitioners in **CWP No.8865 of 2014** and the order dated 14.08.2013 (Annexure P-6/T) passed in the appeal are hereby quashed.

However, the respondents are at liberty, if so advised, to hold a departmental inquiry against the petitioner(s) by affording them a 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 petitions are accordingly allowed.

(DAYA CHAUDHARY)
JUDGE

15.12.2016
gurpreet

Whether speaking/reasoned

Yes

Whether Reportable

Yes