

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Date of decision: 11.03.2016

CWP No.13491 of 2014

Nirmaljit Singh & others

...Petitioners

Vs.

State of Punjab & others

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. A.K.Walia, Advocate, for the petitioners.

Mr. Vaibhav Sharma, DAG, Punjab, for the respondents.

1. To be referred to the Reporters or not?

2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

1. Invoking the provisions of Article 311(2) (b) of the Constitution of India, the petitioners were dismissed from service. They have approached this Court challenging the dismissal order dated 12th January, 2013 (Annex P-7/T) and all consequential orders passed thereon affirming the dismissal in appeal, revision etc.

2. Quite obviously, no enquiry was held to establish guilt or involvement in the misconduct alleged against them. The story goes like this: the petitioners were a posse of Jail Warders deputed to take two under-trials namely Gurjant Singh and Rashpal Singh to Civil Hospital, Ferozepur for medical checkup and treatment. The under-trials were lodged in Central Jail, Ferozepur for committing offences punishable under the Indian Penal Code. A female under-trial was also sent on the same day and time to Civil Hospital for check up with a woman Constable accompanying her. All the three under-

trials were taken in an official vehicle of the jail. The Medical Officer attached to the Jail had advised on 3rd January, 2013 that under-trials Gurjant Singh and Rashpal Singh should be shown at Civil Hospital, Ferozepur for treatment. Gurjant Singh complained of a pain in the chest, whereas Rashpal Singh complained of back pain. The Superintendent, Central Jail, Ferozepur dilly dallied on the medical advice and thought that the under-trials were feigning illness. He did not allow them to be taken.

3. However, on 11th January, 2013, the Deputy Superintendent (Jail), in the absence of the Superintendent (Jail) directed the petitioners-Jail Warders to take the two under-trials to Civil Hospital, Ferozepur for a medical check up on the basis of the stale medical advice given on 3rd January, 2013. The petitioners are not wrong when they say that they had to obey the orders of their superior. The under-trials were said to be dangerous criminals facing trials under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and Section 307 IPC. The Jail Department, Punjab has issued instructions on 5th May, 2000 (Annex P-1/T) dealing with the subject of under-trials lodged in jails sent to outside hospitals for treatment who are required to be accompanied under police guard. It is not the duty of the Jail Warders to take under-trials to hospital for treatment or for attending peshies in courts. Jail Warders are not given any formal training in handling weapons and for this important reason the above instructions and the further instructions dated 7th July, 2010 are designed to provide that only police guards should be deputed for such purposes.

4. Therefore, the very act of deputing the petitioners to take under-trials to Civil Hospital in the manner done was in utter violation of the instructions (Annex P-1 & P-2). The Deputy Superintendent of the Jail had provided a carbine to the first petitioner, whereas other two went unarmed

escorting the under-trials. The under-trials underwent medical check-up and in the meanwhile the female under-trial had been sent back to jail in the official vehicle. The petitioners say that the vehicle did not return to pick them along with the under-trials despite messages sent to the quarters concerned to collect them for safe passage to jail. In the force of circumstances they were compelled to bring back the under-trials on foot, as the hospital was just a walking distance away from jail. When the party reached near to the Dushera ground, three vehicles fell upon them from which about 20 persons alighted to help the under-trials escape from custody. The first petitioner, armed with the carbine was overpowered and immobilized by 7/8 persons, whereas the second and third petitioners offered resistance and in the ensuing fight they received injuries grappling with the assailants. The petitioners were outnumbered and the under-trials made good their escape along with their handcuffs. The trio returned to jail empty handed and informed the Assistant Superintendent (Jail) of the events of the day. The second and third petitioners were medically examined and injuries were found on their persons. Their medico legal reports are attached as Annex P-3 & P-4.

5. Following the incident, the Superintendent (Jail), addressed a letter on the same day to the Station House Officer, P.S. City, Ferozepur informing him of the incident, who were forcibly got freed by a group of criminals and action may be taken against such persons. However, the entire blame was foisted on the petitioners with registration of FIR No.4 dated 11th January, 2013 under Sections 223, 224, 225 & 120-B IPC, P.S. City, Ferozepur. The under-trials were tracked down by the police and returned to jail.

6. The question to be asked is; when the Superintendent (Jail) had turned down the request for medical check up on 3rd January, 2013, then why

in his absence did the Deputy Superintendent (Jail) and Assistant Superintendent (Jail) permit the under-trials to be taken for a medical check up on the strength of stale medical advice without recording reasons for sending them for medical check up after 8 days of the advice of the jail doctor and that too behind the back of the Superintendent (Jail) who had earlier refused permission on 3rd January, 2013 for a check up. This crucial part remains unexplained and rather significantly changes the complexion of the case, as it makes both Daljit Singh Bhatti, Deputy Superintendent (Jail) and Jugraj Singh, Assistant Superintendent (Jail) open to criticism of gross negligence in performance of duties throwing caution to the winds besides casting doubt on their connivance, permitting dangerous under-trials to be accompanied by Jail Warders outside jail without armed police escort as required by the instructions of the Punjab Government. Then the petitioners may not be wrong to plead that they were under directions to obey orders of their Superiors. Had they refused to accompany the under-trials or insisted on police escort or had been armed with a weapon each, even then they would have been charged with disobeying orders of superiors and could be charge-sheeted for that reason. The superiors have got away without enquiry and the petitioners have been dismissed without even asking for their explanations.

7. The petitioners were dismissed from service on the very next day of the incident i.e. 12th January, 2013 invoking Article 311 (2) (b) of the Constitution. They were attributed connivance with each other which helped the under-trials escape. The petitioners are accused of lack of complete supervision over dangerous under-trials in transit from jail to hospital and of aiding the escape and thus, the petitioners have defamed the Government and the Department and the incident has spoiled the image of the Jail Department and the Government. The disciplinary authority thought it will not be in

Government interest to retain such officials in the Department. The Superintendent, Headquarter Jail, Ferozepur held that it was the primary duty of the jail officials to maintain watch and ward and security, but these officials have failed to perform their primary duty. For these reasons, the Officer has held that it will be very difficult to prove guilt of the delinquent officials if a regular departmental enquiry was held. The primary duty could not be simplistically put on watch and ward or security. What is begun wrong can go wrong. Nevertheless, the Superintendent (Headquarter) Jail, Ferozepur exercised his authority to dismiss under Appendix B 4(b) of the Punjab Jails Department State Services (Class-III Executive) Rules, 1963 and the extraordinary power vested under Article 311(2)(b) of the Constitution being the competent authority to dismiss the petitioners while maintaining that it was not necessary to hold an enquiry in the circumstances.

8. The expression “*it is not reasonably practicable to hold such enquiry*” has been put in brackets in the impugned order paying only lip service to the provisions of Article 311. The incident took place in the City where there may have been witnesses and bystanders. The distance between the Civil Hospital, Ferozepur and the Central Jail is indisputably walking distance. There must have been number of persons in the public, who may have witnessed such an incident and may have come forward to depose on the occurrence. In such circumstances, it is not possible to agree or believe that it would not be reasonably practicable to hold an enquiry into the incident, or the misconduct, if any, of the petitioners. Moreover, no harm was visited upon the Deputy Superintendent (Jail) and Assistant Superintendent (Jail), Ferozepur for their remissness in breaching the protocol in Government instructions when under-trials are sent for a medical examination by throwing caution to the winds.

9. I had occasion to deal with a somewhat similar situation in CWP No.26911 of 2013 (O&M) titled 'Manjit Singh Vs. The State of Punjab & others' decided on 12th December, 2014 and connected matters, arising out of a common incident involving a jail break by some under-trials from Central Jail, Gurdaspur, Punjab resulting in dismissal of jail officials by invoking Article 311(2)(b). In the said case, I observed as below:

“9. Article 311(2)(b) is an extraordinary power which has to be used in extraordinary situations for extraordinary reasons that demand and justify a man to be sent home without pension, without holding an inquiry and leaving him to despair and to live with a terrible stigma throughout his waking life watching the life of his family completely destroyed.

10. A reasonable opportunity of hearing enshrined under article 311(2) of the Constitution would include a reasonable opportunity of defence and for a person charged even with the gravest act of misconduct to establish his innocence in a domestic trial. The mandate of article 311(2)(b) has been flagrantly violated in this case depriving the petitioner/s of a reasonable opportunity of being heard and dealt with fairly.

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12. Article 311(2) (b) only provides for dispensing with a regular departmental inquiry where the same is considered not reasonably practicable to be conducted. However, it does not make it mandatory to award the extreme penalty of dismissal from service in one fell swoop. Neither the punishing authority nor the appellate authority has assigned any special reason for not awarding a lesser penalty even if no inquiry was held. The provisions of rule 3(ii) of the Punjab Jail Department Executive Staff (Punishment & Appeal) Rules ensure that the penalty of dismissal should only be inflicted for the gravest misconduct or as the culminating

result of continued misconduct, indicating complete unfitness of the public service... In inflicting this penalty, regard should be paid to the length of service of the offender and his claim for pension.” Sadly, the petitioner had been promoted as Head Warder in the same year as the incident.

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14. In Indian Railway Construction Company Limited v. Ajay Kumar; (2003) 4 SCC 579, the Supreme Court held that the power to dismiss an employee by dispensing with an inquiry is not to be so exercised as to circumvent the prescribed rules. The satisfaction as to whether the facts exist to justify dispensing with an inquiry has to be of the disciplinary authority. Where two views are possible as to whether holding of an inquiry would have been proper or not, it would not be within the domain of the Court to substitute its view for that of the disciplinary authority as if the Court is sitting as an appellate authority over the disciplinary authority.

15. The question then rests on the principle; if two views are possible. The examination of this question is for the Court, where two views are possible. The cases which could fall within the meaning of “two views are possible” are those where there is a serious doubt in the mind of the Court, looking to the gravity of the case, where witnesses will never come forward to depose, where there is a sufficient prima facie evidence that it would not be reasonably practicable or possible to hold an inquiry; where past conduct is res gestae or where one incident is such which shakes the conscience of the society and the community; where in one voice all reasonable men might say: this man should not continue in service as he poses a danger to the administration of jail justice, then the Court will be shy of interfering while going by the principles of; “two views are possible”. The Court exercises secondary review over the orders of the

punishing authority and of the appellate authority and secondary review is on Wednesbury principles which come into play where the action has to be measured in terms of arbitrariness and proportionality. When these tests are applied, then the State's case appears to fade away and the case of the petitioner becomes clearer and stronger to support a conclusion that he was wronged and dismissed without giving him a fair and reasonable opportunity to prove his innocence or plead mitigating circumstances for a reduced punishment. It is well embodied principle of criminal law that a man is innocent till he is proved guilty. Even in its most diluted form, this principle applies to domestic inquiries and when the sledgehammer of article 311(2)(b) is used, it must be used with the best intentions, with the best public interest in view, in the best interest of jail administration by a decision resting on the cornerstone of an opinion recorded in writing that it is not reasonably practicable to hold an inquiry and justify it on a practical and prudent principle based on non-availability of true facts which will be hard to obtain in the circumstances. In Tulsi Ram Patel case, the Supreme Court observed that the decision of the President or Governor formed under article 311(2)(c) in cases where they are satisfied that in the interest of the security of the State, it is not expedient to hold such an inquiry, have in the scope of the most aggravated form in clause (c) of article 311 opined that although the administrator's decision is 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 inquiry.

16. *In Jaswant Singh v. State of Punjab; AIR 1991 SC 385, the Supreme Court observed:*

“The decision to dispense with the departmental inquiry 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.

17. In short, in the facts and circumstances of this case, it is not possible to sustain the impugned orders which do not disclose any reason whatsoever for dispensing with a departmental inquiry and for reaching this conclusion no worthy material is found placed on the writ papers. If one is to go by the literal words in the impugned order, then all that it says is that a departmental inquiry is not 'necessary'. This does not satisfy Article 311(2)(b) of the Constitution which casts a burden on the authority empowered to dismiss or remove a person to be satisfied for the reasons to be recorded in writing that it is not reasonably practicable to hold a departmental inquiry. Therefore, it is for the competent authority to apply its mind and then take a view in dispensing with the departmental inquiry by recording reasons to justify skipping it."

10. The position here is hardly any better or worse. One is a case of jail break while the present an escape of under-trials from the street while in transit from hospital to jail where they were lodged. In both cases an enquiry could have been held and it could not be said with any certainty that it was not reasonably practicable to hold an enquiry or two views were possible and thus it is not legally tenable to maintain the extreme punishment of dismissal from service when life and liberty is involved and protections in Article 21 kept in view. An enquiry deserved to be conducted to reveal the truth of the acts of commission or omission. Interference of court appears eminently called for to meet the ends of justice.

11. At this stage when affirmative order is under contemplation to be passed to avoid a monumental miscarriage of justice, Mr. Vaibhav Sharma appearing for the State enters caveat relying on the decision of the Supreme Court in State of Punjab & others Vs. Dr. Harbhajan Singh Greasy, (1996) SCC (L&S) 1248: JT 1996 (5) SC 403 to persuade the court urging that in case the dismissal order is to be set aside, it would not be proper to order reinstatement with all consequential benefits. The matter requires to be remitted to the disciplinary authority to follow the procedure from the stage at which the fault was pointed out and to take action according to law and in the meanwhile the services of the petitioners should be placed under suspension pending enquiry. The Supreme Court ruled in *Dr. Harbhajan Singh Greasy's case* that pending enquiry the delinquent must be deemed to be under suspension. The consequential benefits would depend on the result of the enquiry and administrative orders passed thereon. The Supreme Court held that the High Court committed an illegality in omitting to give the said direction while setting aside the punishment order. In the said case, the respondent had retired from service and therefore, no useful purpose was found to be served in directing the authorities to conduct enquiry afresh. The facts as noticed in the order were like this; "The respondent was charged for being absent from duty in the Emergency of attending on the flood victims between July 18, 1975 and July 21, 1975. He was further charged for other derelictions of duty. The details are not necessary. Suffice it to state that enquiry was conducted and the Enquiry Officer submitted his report that respondent No.1 had admitted that he was having a private practice at Moga during the period of his suspension in spite of the directions issued by the Government in the suspension order to remain at Head-quarter". The misconduct in the case was serious and

sufficient to hold enquiry and place the medical doctor under suspension till conclusion.

12. The purpose and object of suspending an official is usually twofold; One, where his continuance in office will prejudice investigation, trial or any enquiry; Or where his continuance in office is likely to seriously subvert discipline in the office in which he is working. Suspension has been described as the state of being temporarily debarred from a function or privilege; temporary deprivation of one's office / position. It is an executive action whereby a Government servant is prevented from exercising the powers and discharging the duties of his office temporarily, pending final action being taken against him for acts of grave indiscipline, delinquency, misdemeanour etc. It is a tool in the hands of the Government to root out corruption or other grave misconduct.

13. There is no gainsaying that the employer State has every right to pass an order of suspension pending an inquiry, see R.P. Kapur Vs. Union of India, AIR 1964 SC 787: 1964 SCR (5) 431 [CB]. It is not that every disciplinary proceeding should inflexibly be preceded by suspension from service. Many factors would need to be weighed, whether to exercise the power and it is found reasonable to do so in public interest. As is often said; all power has to be exercised reasonably to preserve the rule of law and probity in administrative actions that visit a citizen with evil civil consequences, creating and destroying rights conferred by law. The empowered officer then in a case of suspension would have to examine whether the offence or conduct involves moral turpitude, misappropriation of government money, embezzlement, and possession of disproportionate assets or misuse of official power and position for personal gain in which cases suspension would be essential to maintain purity of governance. It is however not good to in the officer to jump at the

conclusion in a fickle manner because after all it is the Government and not the officer who passes an order of suspension is the one that pays the costs of deriving no labour from a delinquent placed under suspension with half pay and keep him suspended for years to come and the litigation which may follow. Hence enquiry in deserving cases is an emphatic yes but suspension is always optional, the power being ever available to the authority depending on the nature of the charge, changing from case to case, from fact to fact, from conduct to misconduct and so on and so forth. However, in the present case, the enquiry has not been initiated and thus conducted at all, and therefore it cannot be said that there is no flaw in the enquiry proceeding from where one could apply the law either in *Dr. Harbhajan Singh Greasy's case* (supra), relied upon by Mr. Sharma or in Managing Director ECIL Hyderabad Vs. B. Karunakar, AIR 1994 SC 1074: JT 1992 (3) SC 605. Disciplinary proceedings begin with a charge sheet as explained in K.V.Jankiraman Vs. Union of India, AIR 1991 SC 2010. The petitioners were dismissed the very next day of the occurrence departing from procedure of conducting a regular enquiry holding it to be not reasonably practicable to do so. There are no charge sheets in this case and in my view *B. Karunakar* would apply to cases of disciplinary proceedings after charge sheet is served and has little application to action taken under Article 311 (2) (b) for this court to issue mandamus or directions to the employer to suspend the petitioners as suggested by the Law officer in case the dismissal orders are found arbitrary and unconstitutional and therefore set aside. The decision making process to avoid enquiry and invoke Article 311 (2) (b) is arbitrary, irrational, whimsical and fundamentally flawed. The decision to dismiss summarily is highly excessive and disproportionate to the cause.

14. For the reasons recorded above and the observations more elaborately made in *Manjit Singh's case*, placed parallel with the present case,

the instant petition is allowed in the same terms by applying the common yardstick. The impugned order dated 12th January, 2013 (Annex P-7/T) and all consequential orders passed thereon are found legally unsustainable and are hereby quashed by issuing a writ of certiorari. As a fall out of the above, a mandamus is issued to the State to reinstate the petitioners to service forthwith with all consequential benefits flowing there from. However, the respondents are not precluded by this order from holding a departmental enquiry against the petitioner/s in accordance with law and passing such orders as are deemed fit on the administrative side as per rules.

[RAJIV NARAIN RAINA]
JUDGE

11.03.2016
Vimal