

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.19765 of 2016

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Arun Kumar, Son of Sri Indradev Singh, Resident of Village- Bishunpur, P.S.- Bind, District- Nalanda.

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Dept. of Registration, Excise and Prohibition, Government of Bihar, Patna.
3. District Magistrate, Kaimur.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Prabhakar Singh, Advocate
For the Respondent/s : Mr. Vivek Prasad, GP-7

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 30-04-2018

It is feeling aggrieved by the order of dismissal dated 25.5.2016 bearing Memo No.2673 dated 31.5.2016 of the Principal Secretary, Department of Registration, Excise and Prohibition, Government of Bihar passed in purported exercise of powers vested under Article 311(2) (b) of the Constitution of India that the petitioner is before this Court invoking the extraordinary jurisdiction under Article 226 of the Constitution of India.

With the consent of the parties the writ petition is heard with a view to its final disposal at the stage of admission itself.

The allegations are rather serious and draw its foundation from an FIR arising from Durgawati P.S. Case No.137 of 2016 registered for the offences punishable under sections 341, 342, 166, 379, 384, 386, 389, 506/34 of the Indian Penal Code and section



65(b) (c) of the Bihar Excise Act, 2016.

The prosecution case briefly stated is that one Satnam Singh, a resident of Village Khurda, District- Hoshiyarpur in the State of Punjab has alleged that while he was travelling in his Swift Dezire car bearing registration no.PB-12L- 2021 and crossed the Toll Plaza in the district of Kaimur that he was stopped by some police officials on the pretext of search of the vehicle. According to the informant, some of the officials were in civil dress while others were in the uniform. It is alleged that some of the officials took the informant and other occupants to a distance from the car while the others drew a bottle of liquor and alleged that it was found in the car. It is the allegation of the informant that he is a Teetotaler and no liquor was present in the car but his statement was not believed under the threat of serious prosecution, fine and imprisonment. A demand of Rs.1,00,000/- was made for a let of. It is stated that ultimately these officials coerced him to pay Rs.25,000/-. The informant was forced into a Sumo vehicle bearing registration no.UP65AC-3461 and brought to station road, Mohaniya where the ATM was closed. The informant was thereafter taken to Bhabhua and under threat of encounter, forced to draw Rs.20,000/- at about 1.00 AM from an A.T.M. located near the S.P. residence. It is alleged that when the car suffered problem, the informant was shifted to another Sumo car bearing registration no.JH-01M-0744



and brought to the Toll Plaza and in between also made to fill up petrol. After the return at the Toll Plaza, the informant gave Rs.20,000/- which he had drawn from the ATM and Rs.5000/- from his own possession. It is alleged by the informant that later on he discovered that a sum of Rs.25,000/- which was kept in the dashboard of the car was also removed by these Policemen. It is alleged that since he had to go to Kolkata for looking up his driver who had suffered accident that there was a delay in lodging the FIR, a copy of which is at Annexure 1 to the writ petition.

As I have observed, the allegations are rather serious and confirm to the level of misuse of the Prohibition Law enforced in the State w.e.f. 1.4.2016 by those who have been given the responsibility of its enforcement.

Reverting back to the issue in hand, on institution of the FIR on 23.5.2016 that the District Magistrate, Kaimur after holding preliminary enquiry, recommended for initiation of disciplinary proceeding against the accused which obviously included the petitioner as well, vide his letter dated 25.5.2016 addressed to the Principal Secretary, Department of Registration, Excise and Prohibition, a copy of which is at Annexure-3 to the writ petition. Rather interestingly, it is on mere receipt of the recommendation from the District Magistrate, Kaimur for initiating disciplinary proceeding against the accused that the impugned order of dismissal



has been passed by the Principal Secretary in purported exercise of powers vested under Article 311(2)(b) of the Constitution of India and feeling aggrieved the petitioner is before this Court.

I have heard Mr. Prabhakar Singh, learned counsel appearing for the petitioner and Mr. Vivek Prasad, learned Government Pleader No.7 for the State and I have perused the records.

The only issue which arises for consideration in this writ petition is whether the power exercised by the Principal Secretary to dismiss the petitioner is in tune with the stipulation present in Article 311(2) (b) of the Constitution of India.

While it is the argument of Mr. Singh, learned counsel appearing for the petitioner that such powers have to be exercised with due care and caution and not in a whimsical manner as having been done in the present case where it is within two days of the institution of the FIR and on the very date of receipt of recommendation of the District Magistrate, Kaimur for initiation of disciplinary proceeding that the Principal Secretary recording the opinion that it was not practicable to hold enquiry, has decided to exercise the powers vested under Article 311(2)(b) of the Constitution of India which does not record any subjective satisfaction nor is supported by the facts accompanying, the arguments have been contested by the learned State Counsel in



reference to the circumstance that, since the petitioner was absconding hence it was not practicable to hold any proceeding. According to the learned State Counsel it is taking note of the unimpeachable evidence against the petitioner that the power has been exercised which suffers no infirmity.

Interestingly, both, learned counsel for the petitioner as well as the State have relied upon a Constitution Bench judgment of the Supreme Court rendered in the case of **Union of India vs. Tulsiram Patel** reported in **AIR 1985 SC 1416**.

Having heard learned counsel for the parties, in my opinion, the only issue which arises for consideration is whether in the circumstances discussed the recourse taken by the Principal Secretary, Department of Registration, Excise and Prohibition, to waive of the requirement of a regular departmental proceeding relying upon the provisions underlying Article 311(2) (b) of the Constitution of India requires an interference and/or whether the materials on record confirm to the satisfaction of the Principal Secretary to record the order of dismissal while exercising such powers.

It is taking note of the nature of dispute that this Court vide order passed on 29.3.2018 directed the Principal Secretary to file his affidavit and pursuant where to an affidavit is filed on behalf of the Principal Secretary through the Special Superintendent, Excise,



Headquarter, Patna on 19.4.2018 who while discussing the materials which persuaded the Principal Secretary to order for the dismissal of the petitioner, under Article 311(2) (b) of the Constitution of India, has mentioned in paragraphs 18 and 19 that since the petitioner was absconding without intimation, it was not practicable to provide him opportunity of hearing.

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;”

It is manifest from a plain reading of the provision that while the substantive part upholds the requirement of a departmental



proceeding, the exceptions are provided in the second proviso attached to Article 311(2) which inter alia empowers the Disciplinary Authority to dismiss or remove or reduce a person in rank if he is satisfied, for the reasons to be so recorded, that it was not practicable to hold such enquiry. The two pre-requisites for such exercise manifestly is that:

- (a) There must exist a situation which renders holding of any such enquiry reasonably not practicable; and
- (b) The Disciplinary Authority must record sound reasons in support of his satisfaction.

It is undisputed that the power vested in the Disciplinary Authority to waive of the necessity of a disciplinary proceeding under the second proviso to Article 311(2), is an extreme measure and has to be exercised in extreme circumstances for it forfeits a valuable legal right vested in a delinquent. It is not on mere ipse-dixit that such power is to be exercised rather it is after recording subjective satisfaction explaining why it was not reasonably practicable to hold an enquiry that such power can be exercised.

Since both the parties have relied on the same Constitution Bench judgment rendered by the Supreme Court in the case of **Tulsiram Patel** (supra), I am persuaded to reproduce the instances given by way of illustration by the Supreme Court to exercise such powers and which reads thus:



“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 not 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 it 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 opinion expressed by the Constitution Bench in **Tulsiram Patel** (supra) has been followed in a subsequent judgment of the Supreme Court reported in **AIR 1991 SC 385 (Jaswant Singh vs. State of Punjab)** and the observations are present at paragraph 5:

“5. It was incumbent on the respondents to disclose to the Court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent No.3 in the impugned order. Clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observation at p.270 (of 1985 (Supp) 2 SCR 131): (at p. 1479 of AIR 1985 SC 1416) of Tulsi Ram’s case:

“A disciplinary authority is not expected to dispense with a disciplinary authority 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 decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. 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 or caprice of the concerned officer.”

In yet another judgment reported in **(2006)13 SCC 581 (Tarsem Singh vs. State of Punjab)** the position has been reiterated



at paragraphs 10 and 11 which are reproduced hereunder:

“10. It is now a well-settled principle of law that a constitutional right conferred upon a delinquent cannot be dispensed with lightly or arbitrarily or out of ulterior motive or merely in order to avoid the holding of an enquiry. The learned counsel appearing on behalf of the appellant has taken us through certain documents for the purpose of showing that ultimately the police on investigation did not find any case against the appellant in respect of the purported FIR lodged against him under Section 377 IPC. However, it may not be necessary for us to go into the said question.

11. We have noticed hereinbefore that the formal enquiry was dispensed with only on the ground that the appellant could win over aggrieved people as well as witnesses from giving evidence by threatening and other means. No material has been placed or disclosed either in the said order or before us to show that subjective satisfaction arrived at by the statutory authority was based upon objective criteria. The purported reason for dispensing with the departmental proceedings is not supported by any document. It is further evident that the said order of dismissal was passed, inter alia, on the ground that there was no need for a regular departmental enquiry relying on or on the basis of a preliminary enquiry. However, if a preliminary enquiry could be conducted, we fail to see any reason as to why a formal departmental enquiry could not have been initiated against the appellant. Reliance placed upon such a preliminary enquiry without complying with the minimal requirements of the principle of natural justice is against all canons of fair play and justice.”

In so far as the allegations which lie at the foundation of the impugned order is concerned, as I have observed at the outset that the same appears to be very serious but then even if the seriousness of an allegation can be a foundation for the nature of penalty to be imposed, it cannot be the reason for waiving of an enquiry by taking



recourse to the privilege of Article 311(2) (b) of the Constitution of India. In fact, the District Magistrate, Kaimur after holding a preliminary enquiry at his level has indeed recommended for holding a disciplinary proceeding against the accused persons through his letter dated 25.5.2016 addressed to the Principal Secretary but it appears that the Principal Secretary has got swayed with the allegations to pass the impugned order on the same date i.e. 25.5.2016 after observing that since the petitioner was unauthorisedly absent from the office he was incapable of service of notice and this conduct of the petitioner has given the impetus for the satisfaction drawn by the competent authority on the genuineness of the allegation.

The FIR was instituted on 23.5.2016, the District Magistrate, Kaimur sent his report on 25.5.2016 and on the same date the Principal Secretary has drawn satisfaction that it was not reasonably practicable to hold an enquiry since the petitioner was absconding and thus notice also cannot be served. According to him the allegations were found true for inviting an order of dismissal. The petitioner has enclosed an order of this Court passed in Criminal Miscellaneous No.29864 of 2016 at Annexure 2 to inform that since the petitioner apprehended his arrest that he had taken the judicial recourse for obtaining bail which was granted only on 6.9.2016 and hence the reason for the petitioner in not showing up.



While responding to the charge that since the petitioner was absconding, the notice was incapable of service, it is mentioned in the rejoinder that such satisfaction has been recorded without the botheration of issuance of show cause to the petitioner and which statement of the petitioner is uncontested because the Principal Secretary himself admits in the impugned order that no notice was issued to the petitioner because he was absconding. May be, there are materials present in the report of the District Magistrate, Kaimur which persuaded the Principal Secretary to record his satisfaction on the truthfulness of allegation for inviting the punishment of dismissal but then neither the seriousness of allegation nor the materials supportive thereof can be a foundation for waiving of the necessity of a regular disciplinary proceeding and/or to forfeit the valuable legal right in the petitioner of being heard in support of his defence.

Though oft repeatedly held by Courts that it is not on personal satisfaction that such mandatory exercise can be waived of rather satisfaction has to rest on cogent reasons and has to be subjective yet in the present case it is within 2 days of the institution of the FIR and on the same date on receipt of the recommendation of the District Magistrate, Kaimur for initiating disciplinary proceeding against the accused that the Principal Secretary has in a hurried manner proceeded to order for the dismissal of the petitioner



upholding the allegations and observing that due to unauthorized absence of 2 days, the department is incapable to serve notice on the petitioner. Such is not the mandate of Article 311(2) (b) of the Constitution of India and if such extreme powers vested, are permitted to be exercised in such routine matter, then in my opinion, not only it would give alarming results, there also would be no necessity of framing disciplinary rules, regulations or service conditions for the Government employees because every case can be disposed of simply on the basis of allegation, the materials connected therewith and the satisfaction recorded by the Disciplinary Authority for waiving the necessity of a regular proceeding.

There is nothing on record to suggest why there arose a need to waive of the disciplinary proceeding even when it was suggested by the District Magistrate, Kaimur. Certainly the 2 days alleged unauthorized absence of the petitioner in between the date of institution of FIR and the passing of the order cannot form a reason.

A hurriedly done exercise in a disciplinary matter apart from reflecting arbitrariness, has normally proved disastrous and the case in hand is no exception because despite absence of sound reasons to back the decision to waive of a proceeding yet the decision was taken only to be held unsustainable. In my opinion the sooner the authorities performing the duties of a disciplinary



authority would realize this, the better it would be because such whimsical action only gives a leeway to a delinquent facing misconduct.

For the reasons so discussed the order of dismissal passed by the Principal Secretary, Department of Registration, Excise and Prohibition dated 25.5.2016 at Annexure 4 in purported exercise of powers vested under Article 311(2) (b) of the Constitution of India, is held de hors the stipulation present thereunder and thus cannot be upheld and is accordingly quashed and set aside. The petitioner is reinstated.

As rightly suggested by the District Magistrate, Kaimur, the respondents would draw a formal proceeding against the petitioner under the provisions of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 and take it to its logical conclusion and in the nature of the allegation facing the petitioner, let the exercise be completed expeditiously and within 3 months of receipt/production of this judgment. It would be at the discretion of the Disciplinary Authority either to put the petitioner under suspension or to take him back on duty. The payment of back wages however, shall abide by the result of such proceeding.

The writ petition is allowed with the direction aforementioned.

(Jyoti Saran, J)

SKPathak/-

AFR/NAFR	AFR
CAV DATE	NA
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