

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2493 OF 2006

Satish L. Gawte ...Petitioner
Versus
The State of Maharashtra and anr. ...Respondents

Mr. Jaydeep S. Deo for the Petitioner.
Mr. N.C. Walimbe, AGP for Respondent No.1 and 2/State.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

DATE : 20th MARCH 2018.

ORAL JUDGMENT:

1] Heard learned counsel for the parties.

2] The challenge which now survives in this petition is to the judgment and order dated 30th July 1999 made by the Maharashtra Administrative Tribunal (MAT), Mumbai in O.A. Nos.192 of 1999 & 242 of 1999 instituted by the petitioner upholding the order dated 7th October 1998, dismissing the petitioner from the services under sub-clause (b) of the second proviso to Article 311 (2) of the Constitution of India.

3] After the petitioner's dismissal from the service by order dated 7th October 1998, the conviction and sentence imposed upon the petitioner by the Sessions Judge on 20th August 1999 was set aside by this court in Criminal Appeal No. 406 of 1999 on 27th October 2004. The petitioner, on the basis of such acquittal, addressed representation dated 1st October 2005 to the respondents seeking for recall of dismissal order dated 7th October 1998 and for reinstatement in service. Such representation was rejected on 31st January 2006. The petitioner instituted yet another O.A. No. 905 of 2006 to question the order dated 31st January 2006 and this O.A. No. 905 of 2006 was dismissed by the MAT on 18th October 2006. The petitioner instituted Writ Petition No. 849 of 2006 to question the MAT's order dated 18th October 2006, which dismissed on 16th March 2006.

4] This court, by order dated 13th November 2006 took cognizance of the aforesaid and observed that the dismissal order dated 7th October 1998 has attained finality and the challenge to the same in the present petition is rendered stale. Learned counsel for the petitioner then

sought leave to withdraw this petition and to file a review petition in Writ Petition No. 849 of 2006. Such leave was granted and the present petition was disposed of as withdrawn.

5] However, the petitioner instituted Review Petition no. 185 of 2006 seeking review of the order dated 13th November 2006 made in this petition. This review petition was allowed by order dated 22nd December 2006. The operative portion of the order dated 22nd December 2006 reads as follows:

"6. Having heard Mr. Dhakephalkar the learned Senior Counsel and the learned AGP, we recall the order of withdrawal of Writ Petition No. 2493 of 2006 and correct our order dated 13/11/2006 so far as the last paragraph is concerned in the following terms:-

"This petition will, therefore, survive only to the limited extent of the petitioner's challenge to the Judgment and Order dated 30/7/1999 rendered by the MAT confirming the order of dismissal dated 7/10/1998. Petition be listed for final hearing only for this limited adjudication, in normal course."

7. Review Petition is partly allowed.

8. Issue fresh writ and a copy of this order shall be placed on record in Writ Petition No. 2493 of 2006."

6] As noted earlier, the impugned dismissal order dated 7th October 1998 was made under sub-clause (b) of the second proviso to Article 311 of the Constitution of India. In the impugned order, the disciplinary authority has recorded satisfaction in writing that it was not reasonably practicable to hold inquiry. The CAT, in the impugned judgment and order dated 30th July 1999, has also held that there was no case made out to interfere with the satisfaction recorded by the disciplinary authority that it was not reasonably practicable to hold an inquiry before dismissing the petitioner from the service. Primarily, it is this view of the MAT, which is questioned by the petitioner in the present petition. In addition, the petitioner also contends that after his acquittal in the criminal proceedings, the charges in the impugned dismissal order have no legs to stand now and therefore, the impugned dismissal order is required to be set aside.

7] Mr. Jaydeep Deo, learned counsel for the petitioner, submits that in the criminal prosecution launched against the petitioner for the very same charge, which is reflected in the impugned dismissal order, the prosecution examined

no less than 20 witnesses. If such examination was possible in the criminal prosecution, surely, there could have been no real difficulty in holding an inquiry against the petitioner. Mr. Deo submits that resort to sub-clause (b) of second proviso to Article 311 (2) of the Constitution of India was only a short cut adopted by the respondents to avoid compliance with the constitutional mandate of providing reasonable opportunity in terms of Article 311 (2). Mr. Deo submits that there was absolutely no material before the disciplinary authority to record any satisfaction that it was not reasonably practicable to hold inquiry into the charges against the petitioner. Mr. Deo submits that since the incident involved escape of notorious criminal, the disciplinary authority, under pressure of media has made the petitioner a scapegoat by levelling reckless allegation of conspiracy and collusion with the criminals. Mr. Deo submits that there was not even any *prima facie* material on record in support of such charges. Mr. Deo submits that it is for this reason that ultimately, the petitioner, was acquitted in the criminal prosecution based upon the very same charge. Mr. Deo submits that the respondents were required to withdraw the impugned

dismissal order at least after the petitioner was honourably acquitted by the Division Bench of this court on 27th October 27th October 2004. Mr. Deo relies on ***Union of India and anr. vs. Tulsiram Patel - (1985) 3 SCC 398, Tarsem Singh vs. State of Punjab and ors. - (2006) 13 SCC 581*** and ***Reena Rani vs. State of Haryana and ors. - (2012) 10 SCC 215*** in support of the petition.

8] Mr. N.C. Walimbe, learned AGP for the respondents, submits that the petitioner's contention based upon his acquittal on 27th October 2004 cannot be considered in the present petition in the light of the order dated 16th March 2006 made in Writ Petition No. 849 of 2006 and the order dated 22nd December 2006 made in Review Petition No. 185 of 2006 in the present case itself. In any case, Mr. Walimbe submits that the parameters in respect of criminal prosecution and the departmental action are quite distinct and therefore, acquittal in criminal prosecution, does not, as a matter of right, entitle the petitioner to seek reconsideration of the impugned dismissal order. Mr. Walimbe points out that there is nothing honourable in the acquittal of the petitioner. He points out that in the

order of acquittal, upon which, reliance is placed by the petitioner, it is clearly stated that the petitioner was negligent in the discharge of his duties. He points out that the acquittal was mainly because witnesses were unable to depose in the criminal proceedings on account of the terror unleashed by the incident to which the charge relates. Mr. Walimbe, therefore, submits there was ample material on record on basis of which the disciplinary authority has recorded satisfaction that it was not reasonably practicable to hold an inquiry before issuance of dismissal order.

9] Mr. Walimbe submits that the disciplinary authority in the present case was the man on the spot and therefore, there is no reason to interfere with the subjective satisfaction recorded by the disciplinary authority based on the material available on record. Mr. Walimbe submits that the scope of judicial review in such matters is extremely limited and this court taking into consideration the magnitude of the incident and the material before the disciplinary authority, may not interfere with the record of subjective satisfaction, which is based upon overwhelming objective material on record. For all these reasons,

Mr.Walimbe submits that the present petition be dismissed with costs.

10] The rival contentions now fall for our determination.

11] The charge levelled against the petitioner concerns the escape of an under trial prisoner Firoz Kokani from J.J. Hospital, Mumbai on 6th May 1998. On this date, Firoz Kokani, who was alleged to be involved in Bombay blast case, killing of Ram Nayak and having links with Dawood Ibrahim gang was taken to the J.J. Hospital, Mumbai along with another under trial prisoner Salim Beg. In fact, on the said date, the some other prisoners were also to be taken to the J.J. Hospital. However, the other prisoners were not taken because there were no sufficient police personnel available to escort the prisoners. The police personnel were stated to be required for Moharrum Bandobast. There were court orders for administrating treatment to Firoz Kokani and Salim Beg and therefore, it was imperative that they were taken to the J.J. Hospital on 6th May 1998 itself.

12] On 5th May 1998 itself, the jail authorities requisitioned for a police escort. The police escort, comprised of PSI Shri. Gawate, i.e., the petitioner herein, Head Constable (H.C.) Shri. Sawant, H.C. Kardile, H.C. Shirsat, H.C. Parad and P.C. Awati. The petitioner, who was the senior most officer and who was heading the escort party carried a service revolver with him. H.C. Kardile and P.C. Awati were armed with carbines. At about 12.00 to 12.30 noon, Firoz Kokani was sent for IVP test on the 5th floor and Salim Beg was sent for O.P.D. Surgical Ward No.4 on some other floor. Thereafter, Firoz Kokani was taken to the police van, which was parked outside O.P.D. near Gate No.6. It is reported that Firoz Kokani was permitted to have talks with some strangers. At about 2.45 p.m., the petitioner, left Firoz Kokani in the police van along with H.C. Kardile, H.C. Sawant and P.C. Awati. The petitioner is alleged to have gone to see why treatment of the Salim Beg is taking so much time. Only H.C. Kardile had carbine because P.C. Awati had handed over his carbines to H.C. Shirsat, who was escorting Salim Beg.

13] The position near the police van at about 2.45 p.m. was, therefore, that Firoz Kokani was left with H.C. Sawant, who had no weapon, P.C. Awati, who again had no weapon and H.C. Kardile who had a carbine. The petitioner, despite having a service revolver, chose to himself go to see what was taking Salim Beg so long. The petitioner, did not bother to assign his duties to P.C. Awati or H.C. Sawant, but chose to walk away from the scene himself.

14] Firoz Kokani was then taken to the toilet and on his return allowed to remain outside the police van without handcuffs. It is at this stage that one unknown assailant fired upon H.C Kardile and shot him dead. H.C. Sawant took shelter behind the van once the firing started. P.C. Awati took the carbine from H.C. Kardile and fired at the assailant but missed. In the melee which followed, Firoz Kokani escaped. All this took place at about 3.45 pm. and that is the crucial movement when the petitioner left the spot.

15] The impugned dismissal order makes reference to the material available before the disciplinary authority which suggested a conspiracy between the petitioner and the

assailants with whose help Firoz Kokani was able to flee from the J.J. Hospital. In the incident, H.C. Kardile who was fired upon, lost his life. There is reference to confidential report, submitted to the disciplinary authority. Based upon all such material, the impugned dismissal order came to be made. The disciplinary authority has recorded reasons in writing as to why it was not practicable, in such circumstances, to hold an inquiry against the petitioner before dismissing him from service by invoking sub-clause (b) of the second proviso to Article 311 (2) of the Constitution of India.

16] On the basis of objective material before it, the disciplinary authority has recorded satisfaction as regards the links of the petitioner with the underworld gangsters and his complicity in the escape of Firoz Kokani. The disciplinary authority has recorded satisfaction that holding of any enquiry in such circumstances will neither be reasonable nor practicable. The disciplinary authority has recorded the satisfaction that holding of enquiry in such circumstances, would require sharing with the petitioner confidential information, vital to tackling the underworld

gangsters. The disciplinary authority has recorded that this will endanger the security of the State and will not be in public interest. The disciplinary authority has also recorded satisfaction that taking into consideration the objective material which establishes links with the underworld coupled with the magnitude of the incident leading to shooting down of H.C. Kardile and the consequent escape of Firoz Kokani, witnesses would fear to depose should any enquiry be held in the matter. The MAT, upon examination of the record, has held that there is objective material on record for subjective satisfaction expressed by the disciplinary authority.

17] The scope of judicial review in such matters is quite limited. In this case, there is sufficient material on record on basis of which, the disciplinary authority has recorded subjective satisfaction with regard to reasonability and practicability of holding an inquiry against the petitioner. It is not permissible for the MAT or for that matter this court to reassess or re-appreciate such materials as if, they were appellate courts. The issue of sufficiency of evidence is also, to a great extent, irrelevant in a matter of this nature.

There are no *mala fides* as such alleged. Once, we come to the conclusion that there was enough material before the disciplinary authority to arrive at a reasonable conclusion that it was not reasonably practicable to hold an inquiry as contemplated by Article 311 (2) of the Constitution of India, there is no good reason to fault the invocation of powers conferred by sub-clause (b) of the second proviso to Article 311 (2) of the Constitution of India.

18] Besides, it is necessary to appreciate that disciplinary authority, was man on the spot and was required to satisfy himself as to the reasonability and practicability of holding an inquiry into incident and the involvement of the petitioner therein. As long as no *mala fides* have been alleged or proved, normally it is not for this court to re-appreciate or reassess the material available before such authority as if, this court were exercising any appellate jurisdiction.

19] In *Tulsiram Patel (supra)*, the Constitution Bench of the Supreme Court has held that *the condition precedent for the application of clause (b)* is the satisfaction of the

disciplinary authority that *"it is not reasonably practicable to hold"* the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are *"not reasonably practicable"* and not *"impracticable"*. According to the Oxford English Dictionary *"practicable"* means *"Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible"*. Webster's Third New International Dictionary defines the word *"practicable"* *inter alia* as meaning *"possible to practice or perform : capable of being put into practice, done or accomplished : feasible"*. Further, the words used are not *"not practicable"* but *"not reasonably practicable"*. Webster's Third New International Dictionary defines the word *"reasonably"* as *"in a reasonable manner : to a fairly sufficient extent"*. 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 intimidate 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, it needs to be borne that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry 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.

20] Further, in *Tulsiram Patil (supra)*, the Constitution Bench has held that a government servant who has been dismissed, removed or reduced in rank by applying to his case clause (b) or an analogous provision of a service rule is not wholly without a remedy. Such officer, can claim in a departmental appeal or revision that an inquiry be held with respect to the charges on which the penalty of dismissal, removal or reduction in rank has been imposed upon him unless the same or a similar situation prevails at the time of hearing of the appeal or revision application. In the present case, although, the petitioner does not appear to have availed the remedy of appeal or revision, the record indicates that after acquittal of the petitioner, the

petitioner, did make a representation for reconsideration of the impugned dismissal order. Such representation was rejected with reasons. Against the same, the petitioner thereafter instituted O.A. No. 905 of 2006, which was also rejected. The petitioner, thereafter instituted Writ Petition No. 849 of 2006 to question such rejection. This petition was also rejected on 16th March 2006.

21] In *Tulsiram Patel (supra)*, the Constitution Bench had held that the courts and tribunals exercising powers of judicial review in such matters, will not, however, sit in judgment over them like a court of first appeal. In order to decide whether the reasons are germane to clause (b) , the court must put itself in the place of the disciplinary authority and consider what in the then prevailing situation a reasonable man acting in a reasonable way would have done. The matter will have to be judged in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a court-room, removed in time from the

situation in question. Where two views are possible, the court will decline to interfere.

22] In *Tarsem Singh (supra)*, the Hon'ble Supreme Court noted that no materials had been placed or disclosed either in the order impugned before the court to show that subjective satisfaction arrived at disciplinary authority was based upon objective criteria. Further, the reasons stated in the dismissal order was that there was no need for regular departmental inquiry because, the preliminary inquiry had already been conducted in the matter. In these circumstances, the Hon'ble Supreme Court interfered with the order impugned on the ground that if a preliminary inquiry could be conducted, there was no valid reason for not conducting formal inquiry as contemplated by Article 311 (2) of the Constitution of India. No such circumstances exists in the present case. In particular, this is not a case where there was no material available before the disciplinary authority for arriving at the subjective satisfaction that the inquiry was required to be dismissed with.

23] In *Reena Rani (supra)*, the only allegation against the lady police officer was that she had developed close relationship with one Mustak who was involved in seven criminal cases. This is not a case where some police officer had assisted an accused involving in bomb blast or accused, who had links with under world to escape. In this case, the Additional Advocate General appearing for the State had in fact conceded that the order of dismissal does not contain the reasons as to why it was not reasonably practicable to hold regular departmental inquiry against the lady officer concerned. It is in these circumstances, that the order impugned was set aside. Again, this decision, turns on its own facts, not to mention concession made by the Additional Advocate General.

24] In ***Kuldip Singh vs. State of Punjab & Ors. - AIR 1997 SC 79***, a police head constable was dismissed from service without enquiry by invoking proviso (b) to clause 2 of Article 311 of the Constitution of India on the ground that it was not reasonably practicable to hold enquiry. The charge against the police head constable was that he had links with terrorists and was supplying secret information

of the police to them. The designated court under the Terrorist and Disruptive Activities (Prevention) Act (TADA) had in fact, acquitted the police head constable at the stage when his petition came up for hearing before the High Court. The High Court, however, upheld the dismissal order. The Hon'ble Supreme Court, after taking into consideration the acquittal by the designated court, held that once the High Court has opined that there was enough material before the appropriate authority upon which it could come to a reasonable conclusion that it was not reasonably practicable to hold an enquiry as contemplated by clause 2 of Article 311, there was no reason to interfere with the dismissal order. The Hon'ble Supreme Court held that once proviso (b) is held to have been validly invoked, the government servant concerned is left open no legitimate ground to impugn the action except perhaps to say that the facts said to have been found against him do not warrant the punishment actually awarded. In the case before the Hon'ble Supreme Court as well, the appellate authority and the High Court had held that the action of dismissal was legal and proper and further, no *mala fides*

were alleged. This authority is relevant in the facts and circumstances of the present case.

25] In ***Southern Railway Officers Association & Anr. vs. Union of India & Ors. - (2009) 9 SCC 24***, the issue involved before the Hon'ble Supreme Court was whether the disciplinary authority was justified in imposing penalty on delinquent employees without holding any enquiry, as provided in Article 311(2) second proviso clause (b) of the Constitution and Rule 14(ii) of the Railway Servants (Discipline and Appeal) Rules, 1968. The incident involved some railway employees who were alleged to have abused, threatened and assaulted a railway officer who was proceeding to his native place on retirement. The incident took place at the railway station itself from where the officer was to board train. The other officers who had come to the railway station to see him were also threatened. An FIR was also lodged as a result of which one of the delinquent employees was arrested on the same day and others were arrested later on. Besides, handwritten posters were displayed at the railway workshop and railway station that the officer in question would die on the

date he proceeded to his native place. The Hon'ble Supreme Court allowed the appeals and held that it is now well settled that reasons so recorded must be cogent and sufficient. Satisfaction to be arrived at by the disciplinary authority for the aforementioned purpose cannot be arbitrary. It must be based on objectivity. The court is required to consider what a reasonable man taking a reasonable view would have done in the situation then prevailing. An order of disciplinary authority in a case of this nature must be judged by a court exercising power of judicial review by placing itself in the disciplinary authority's armchair. The disciplinary authority was a man at the spot. He acted on the basis of a report made to him. He also knew about the handwritten posters having been displayed. The atmosphere which was prevailing in the workshop must be known to him. Not only the disciplinary authority but also the appellate authority, having regard to the materials brought on record, arrived at the said finding. This is a case where immediate action was absolutely essential.

26] In *Southern Railway Officers Association & Anr.* (*supra*), the Hon'ble Supreme Court has further held that acquittal in criminal case by itself cannot a ground for interfering with the order of punishment imposed by the disciplinary authority. In this case, the Hon'ble Supreme Court found that the revisional authority had in fact taken into consideration the ground for acquittal and therefore, this was not a case where the authorities were oblivious to the issue of acquittal or had failed to take this consideration into account. The Hon'ble Supreme Court went on to observe that it is now well settled principle of law that the order of dismissal can be passed even if a delinquent official had been acquitted of the criminal charge. This is a complete answer to Mr. Deo's contentions based upon the acquittal of the petitioner in the criminal prosecution.

27] In this case, it is really not necessary for us to once again revisit the issue of reinstatement, in pursuance of acquittal of the petitioner. This was the precise issue raised by the petitioner in Writ Petition No.849 of 2006, which has since been dismissed. In any case, on perusing the

judgment and order dated 27th October 2004, by which, the petitioner was acquitted of the criminal charges, we find that the acquittal is not really some honourable acquittal as urged by Mr. Jaydeep Deo. Basically, a benefit of doubt has been granted to the petitioner. In the said acquittal judgment, at several places, the Division Bench has commented on the negligence on the part of the petitioner, but held that such negligence may not be sufficient for conviction of the petitioner.

28] In this case, it is pertinent to note that the Sessions Judge by judgment and order dated 20th August 1999 had in fact convicted the petitioner under sections 120-B, 225 and 302 all read with section 34 of the Indian Penal Code, 1860. In a way, this is relevant because, in such circumstances, it can hardly be said that the subjective satisfaction recorded by the disciplinary authority, was such as no reasonable person could have ever arrived at, in the facts and circumstances of the present case. Besides, as noted earlier, the scope of criminal proceedings and departmental action is entirely different. Therefore, the petitioner, on the basis of his acquittal, cannot, attack the

impugned dismissal order which, in the present case, has been made under clause (b) of the second proviso to Article 311(2) of the Constitution of India.

29] Applying the aforesaid principles, there is no case made out to interfere with the impugned dismissal order. As noted earlier, there was objective material available before the disciplinary authority on the basis of which, the disciplinary authority, has recorded subjective satisfaction as to the reasonability and practicability of holding a formal inquiry. Taking into consideration the restricted parameters of judicial review in such matters and applying the principles as aforesaid, it will not be appropriate to interfere with the impugned judgment and order made by the MAT upholding the impugned dismissal order made by the disciplinary authority.

30] This petition is, therefore, dismissed. No order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)