

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WA No. 198 of 2016****Reserved on 23.1.2019****Judgment Delivered on 20.3.2019**

- Nilesh Tiwari S/o Shri Ramji Tiwari, Aged About 28 Years R/o Behind Police Thana, Police Line, Janjgir, Police Station Janjgir, District Janjgir Champa, Chhattisgarh, Chhattisgarh

---- Petitioner**Versus**

1. State Of Chhattisgarh Through The Secretary, Home Department, Mantralaya, Mahanadi Bhawan, New Raipur, P.S. Rakhi, District Raipur, Chhattisgarh, Chhattisgarh
2. The Director General Of Police, Police Headquarter, Civil Line, Raipur, Police Station & District Raipur (CG)
3. The Inspector General Of Police, Durg Region, Durg, Police Station & District Durg (CG)
4. The Superintendent Of Police, Rajnandgaon, Police Station & District Rajnandgaon (CG)

---- Respondents

For Appellant	:	Shri Prateek Sharma, Advocate
For Respondents	:	Smt. Fouzia Mirza, Additional Advocate General.

Hon'ble Shri Ajay Kumar Tripathi, CJ
Hon'ble Shri Parth Prateem Sahu, J

C A V Order**Per Parth Prateem Sahu, J****20/03/2019**

1. Present appeal has been filed by the petitioner/appellant challenging the order dated 20.11.2015 passed by the learned Single Judge in WPS No.1296/2013 thereby dismissing the writ petition filed against the order of termination dated 24.8.2009 passed by the competent authority i.e. respondent No.4, in exercise of powers under second proviso to the

Article 311 (2) of the Constitution of India.

2. Facts of the case, in brief, are that the appellant was a member of armed force and at the relevant point of time he was posted as Constable in the District Force, Rajnandgaon. The appellant and other members of the force were asked to report at the Police Line, Rajnandgaon on 10.8.2009 at 9 pm where all the members of the force were briefed to report at about 2.00 a.m. on 11.8.2009 for proceeding to Madanwada Camp for a special anti-naxal operation. It had been further informed that in case of genuine difficulty, the member concerned may seek exemption from their superior authority. Three police personnel came forward with their difficulties and sought exemption from participating in the anti-naxal operation, which was considered and granted to them. Rests of the members of District Force were handed over arms & ammunition and other necessary material required for anti-naxal operation. However, the appellant failed to appear at 2.00 a.m. in the intervening night of 10th & 11th August, 2009, without intimation to any of his superior officers. Accordingly, the appellant was placed under suspension. The Reserve Inspector, Rajnandgaon conducted preliminary enquiry in which statements of the employees, who were present on their duty, were recorded and on 18.8.2009 he submitted his report to the Additional Superintendent of Police, Rajnandgaon opining that the appellant and 14 other members were absent during the period of fall-in at 2.00 a.m. in the intervening night of 10th & 11th August, 2009 without there being any sufficient cause. On the basis of this preliminary report, the Additional Superintendent of Police, Rajnandgaon submitted his report to the Superintendent of Police, Rajnandgaon and recommended for imposition of hardest exemplary punishment upon the appellant and others in view of the fact the naxal

activities are spreading like fire not only in the State but also in the entire nation and the members of armed force are not expected to act like a coward. The appellant herein had exhibited an act of cowardice and wilful disobedience of the order of his superiors, which was unbecoming of member of armed force of the State. It not only tarnished the image of the police force but also made him unfit to be a member of the armed force. On the basis of this report, the Superintendent of Police, Rajnandagon terminated the service of the petitioner vide order dated 24.8.2009 by taking recourse to the second proviso to Article 311 (2) of the Constitution of India.

3. Feeling aggrieved by the order of termination dated 24.8.2009, the appellant preferred a departmental appeal which was dismissed by the Inspector General of Police, Durg vide order dated 24.6.2010. While affirming the reasons assigned by the Superintendent of Police in his order of termination, it has been recorded that the act of cowardice shown by the appellant would affect the mental status of other members of the police force. Further, the act on the part of appellants shows that in any dangerous situation to be faced by the troop, members of such mental attitude instead of discharging their duties by facing adverse & dangerous situation, may run away keeping the life of other members of troop in danger. It has also been recorded that anti-naxal operation is like a war and for that purpose the members of armed force should be brave.
4. The order of dismissal of departmental appeal was assailed by the appellant before the learned Single Judge by filing a writ petition and the same was heard and decided along with other writ petitions preferred by other Constables whose services were also terminated under second

proviso to Article 311 (2) of the Constitution of India by the order dated 24.8.2009.

5. Relying on the number of judgements of the Hon'ble Supreme Court including the judgment rendered in Union of India & another vs. Tulsiram Patel reported in (1985) 3 SCC 398, the learned Single Judge dismissed all the writ petitions by observing thus:-

“23. The common thread arising from the constitution Bench Judgment of the Supreme Court in Tulsiram Patel (supra) and other judgments subsequent thereto is that while the second proviso to Article 311 (2) confers power to the appointing authority to dismiss a government servant without holding enquiry on being satisfied that it is not reasonably practicable to hold the enquiry and that the order of dismissal should clearly speak as to why it is not reasonably practicable to hold the enquiry and that the reasons so assigned should not be irrelevant or extraneous or perverse. It also emerges that when reasons have been assigned, clause(3) of Article 311 accords finality of such reasons, however, it is subject to judicial review by the Court to a limited extent. At the same time, it is held that while considering the relevance of the reasons by the disciplinary authority, the Court will not sit in judgment over them like the Court of First Appeal and while deciding as to whether the reasons are germane, 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.”

28. In the backdrop of the above stated facts and situation and keeping in mind the observations of the constitution Bench of the Supreme Court in Tulsiram Patel (supra), this Court would not sit in over the reason assigned by the disciplinary authority as a court of appeal to hold that it was reasonably practicable to hold enquiry. The reasons assigned by the appointing authority are neither irrelevant nor extraneous. They emerge from the obtaining factual situation for which no outsider could have given any evidence. It is a case where interference is not called for even if two views are possible, although

this Court has reached to the conclusion that only one view is possible.”

6. Learned counsel for the appellant submits that on 9.8.2009 the appellant sustained some injury in his leg and as he was not permitted to make an entry in the register regarding his departure from the camp for the purpose of treatment, therefore, he alone left the camp for hospital. Looking at the nature of his injury, the doctor advised him to take complete bed rest. In these circumstances, the appellant was absent during the period of fall-in and therefore his absence could not be treated as wilful absence. Even as per law laid down by the Hon'ble Apex Court, when an employee was absent due to his medical condition, he cannot be treated to be on wilful absence. He further submits that as the appellant was absent on 10.8.2009 at about 9 p.m. due to injury sustained by him in his leg, therefore, there is no question of making prayer for exemption from joining the special anti-naxal operation. This apart, he submits that the appellant was not afforded proper opportunity of hearing before passing of the order of termination. The appellant was having genuine cause/ reason justifying his absence during the period of falling-in on 11.8.2009 at 2.00 a.m. but the disciplinary authority did not accept the genuineness of cause for absence of the appellant and passed the impugned order of termination. He further submits that second proviso to Article 311 (2) of the Constitution of India is to be invoked in the rarest of rare circumstances where there is compelling set of reasons to show that it is not possible to conduct an enquiry in accordance with the principles of natural justice. In the present case, the reasons mentioned by the Disciplinary Authority for dispensing with the inquiry are baseless and do not satisfy the mandatory requirements of Article 311 (2) of the Constitution of India. He has reiterated the submissions and relied on the same citations which he

made before the learned Single Judge and also taken into consideration by the learned Single Judge in the order impugned.

7. On the other hand, learned counsel appearing for the State supported the impugned order passed by the learned Single Judge and submitted that the members of armed forces should be brave and self-confident. She further submits that being a member of disciplined armed force, the prime and important duty of the appellant was to protect the citizens of the State, however, the appellant has shown an act of cowardice therefore he cannot be kept on his rolls. She further argued that for proceeding under second proviso to Article 311 (2) of the Constitution of India the only rider is that the authority should record his subjective satisfaction for dispensing with an enquiry while passing the order of termination/dismissal. In the case at hand, the disciplinary authority has recorded detailed reasons for arriving at his subjective satisfaction that the departmental enquiry was not reasonably and practicably possible to be held. She further submitted that satisfaction of an authority with respect to holding of an enquiry was not reasonably practical possible does not mean that it was impossible but it has to be considered on the basis of allegations, conduct of employee and facts & circumstances of the given case.
8. We have heard learned counsel for the parties and perused the record.
9. The Division Bench of this Court while dealing with a batch of writ appeals preferred by other writ petitioners of batch matters, leading case of which was Laxmikant Tiwari vs. State of CG, has held thus:-

“25. The provision finds elaborate consideration in *Tulsiram Patel* (supra) which also states that no exhaustive examples could be cited with regard to what may be reasonably practicable or not. The exigency of a

situation may require that prompt action should be taken as in absence of the same it may result in trouble spreading and the situation worsening and at times becoming uncontrollable. The absence of prompt action may be construed as sign of weakness on part of the authorities and encourage the concerned to persist with their deviant behaviour. The prompt action may have an element of deterrence which may be unavoidable and necessary committance of the action by the concerned leaving the authorities with no other option. The words 'not reasonably practicable to hold an enquiry' cannot be equated with it 'being impracticable to hold an enquiry'. It will always remain a question to be judged in the facts of each case whether it was reasonably practicable to hold an enquiry. There was a distinction between reasonable practicability and absolute impracticability. The standard of test would be the opinion of a reasonable man taking a reasonable view in the prevailing situation. No standard formula could be laid down when it would be reasonably not practicable to hold an enquiry and when it would be. If an atmosphere of general indiscipline and insubordination prevails, reasonable practicability of holding an enquiry is a matter of subjective assessment of the disciplinary authority on the spot who knows best what is happening. The finality attached to the opinion of the disciplinary authority under Article 311(3) of the Constitution will not bar judicial review to examine charge of mala fides, relevancy of the reasons and the taking into consideration of irrelevant materials. In examining the relevancy of the reasons, the fact situation obtaining when decision was taken will naturally have to be kept in mind. The Court would however not sit in judgment over the decision of the disciplinary authority like a Court of appeal. The issue would have to be judged in light of the then prevailing situation on the spot and if two views are possible, the Court would decline to interfere. To dispense with departmental enquiry in a given case had to be based on the subjective satisfaction of the authority concerned but the reasons must be based on objective criteria as observed in (2006) 13 SCC 581 (Tarsem Singh v. State of Punjab)."

10. Considering the judgment of the Hon'ble Supreme Court in State of UP vs. Ashok Kumar Singh reported in (1996) 1 SCC 302 the Division Bench of this Court has held thus:-

31. The Learned Single Judge has aptly relied on (1996) 1 SCC 302 (State of Uttar Pradesh v. Ashok Kumar Singh) highlighting the importance of the uniformed disciplined force requiring strict adherence to the norms of duty. Judicial precedents abound with regard to the standards

of conduct and discipline in service that would apply to a uniformed disciplined service vitally different from a normal civilian service as the very edifice of a uniformed disciplined force requires adherence to discipline, courage and devotion to duty. The situation would have been no better if the Appellants after having proceeded to Madanwada would have suddenly turned their back at the strategic tactical operation due to fear vitally affecting the very operation itself. It was a boon for the others that the Appellants displayed their cowardice without having caused major loss to the operation at an opportune time which prevented major loss and casualties to the operation.”

11. In the case in hand, although a defence has been raised by the appellant that on account of fracture of leg, he could not keep himself present during the period of fall-in, but no cogent and clinching material in support of such a plea has been brought on record by the appellant, except one OPD ticket. Defence and arguments raised by the learned counsel for the appellant do not match with the facts and circumstances of the case. At the first place, the appellant was residing in a camp and during this period if he had sustained any injury in his leg, he was supposed to inform this fact immediately to any of his superiors or colleagues, but the appellant neither gave intimation in this regard to his superior or colleagues nor made any entry in the register regarding his departure from the camp for the purpose of treatment. Even the appellant did not return back immediately after getting his leg plastered as per his defence, whereas as per submission of the counsel, the appellant was relieved from the hospital on the same day i.e. on 10.8.2009. The appellant after the date of march for the special anti naxal operation, on 12.8.2009 sent one application to the authorities through registered post in which also it has been mentioned that he has suffered injury in his leg and there is no mention about the date, time and place where he suffered such an injury and also the nature of injury. Fact of non-appearance of the appellant

clearly shows that the stand taken by him in his defence is an afterthought. Infact, the conduct of the appellant and the facts emerging from the record would clearly show that the appellant was present during the period of fall-in at 9 p.m. on 10.8.2009 and thereafter the appellant fled from the camp without informing any of his superior officers or the officer present on the spot.

12. Learned Single Judge took note of the defence tried to be raised by the appellant, considered it minutely and held thus:-

“26. In WPS No.1296/2013, it has been argued that the petitioner had suffered a fracture and was not supplied arms, therefore, he had reasonable grounds for not proceeding to attend the fall-in at the Reserved Line or to Madanwada Camp. In this context, it is to be considered that the petitioner allegedly attended the OPD at District Hospital Rajnandgaon on 10.08.2009, however, he did not submit any leave application before the competent authority on that date. In his letter/representation, the petitioner has nowhere stated that he did not receive the communication directing him to attend the falling-in at 9.00 pm on 10.08.2009. This petitioner appears to have suffered fracture on 09.08.2009, but there is no pleading as to what was he doing during the duty hours on 9th and 10th August, 2009. In this background, the report of the Reserved Inspector and the CSP to the effect that the petitioner did not attend the falling-in without any reasonable and sufficient cause appears to be justified. It is also pertinent to mention here that even after 10th or 11th August, 2009, the petitioner did not meet the superior officers, but had sent the letter along with OPD ticket by registered post on 12.08.2009. It is manifest that the petitioner having realized the grave indiscipline committed by him was preparing for an excuse. Thus, the contention of the petitioner that the enquiry in his case was necessary is not acceptable.”

The learned Single Judge also took note of the fact of critical situation of the surroundings of Madanwada area and held thus;-

“27. In the context of the fact that about a month back, the naxalites had killed the Superintendent of Police, the act of disobedience or cowardice becomes more grave. In a given situation, it may happen that the absconding

members of Police Force may provide confidential strategic information to the members of public, if not the members of naxal group, thereby putting the entire force at risk. It has been observed in the impugned order that combat with naxalite is like a war, wherein, the member of police force has to keep his self confidence and willpower at the highest level, otherwise, the force would be direction less and it will provoke/encourage/motivate other members of service to indulge in similar act of indiscipline and if the chain reaction occurs, the force engaged in anti-naxal operation in all other districts of the State would tend to defy the orders passed by the superior police officers creating a situation where the public at large would be left at the mercy of the naxalites. It would have such demoralizing effect on the entire governance and rule of law that people may loose faith in the constitutional scheme of governance, therefore, it is not such a trivial issue of remaining absence from duty but it is one of the gravest act of indiscipline which undoubtedly called for immediate action. As held in *Tulsiram Patel (supra)*, this Court has to examine the issue as if the disciplinary authority is acting in presenti and not in a cool atmosphere of the Court room. It has to think of a situation which occurred firstly at 9:00 p.m. on 10.08.2009 at Reserve Line, Rajnandgaon; during the course of assembly for falling-in at 2:00 a.m. in the intervening night of 10/11.08.2009 and that one hour when a search was made of the petitioners, but they were found absconding. If the news of absconsion is leaked and reaches to print and electronic media, it will be a cause of celebration for the naxalites and at the same time causing embarrassment and humiliation to the Government.”

13. So far as the reliance placed by learned counsel for the appellant on the judgment delivered in *Mohinder Singh Gill* reported in AIR 1978 SC 851 is concerned, the said decision was delivered in a completely different set of facts. In the case in hand, the order of termination itself has been passed in a very detailed and elaborative manner mentioning the circumstances under which the order of termination has been passed. Other judgements, which are relied upon by the counsel for the appellant, are the same which were relied before the writ court and taken into consideration by the learned Single Judge in the order impugned.

14. Case of the appellant is not different from the case of other 14 constables

who have been terminated from their service, and writ petitions filed by the those constables were also dismissed along with the petition of appellant in a batch. Writ appeals filed by other Constables were dismissed by the Division Bench of this Court vide order dated 25.2.2016 passed in a batch of writ appeals, so was the SLPs by the Apex Court.

15. From the above discussions, we are of the considered view that the order impugned fulfils all the requirements of second proviso to Article 311 (2) of the Constitution of India as the disciplinary authority has recorded subjective satisfaction for not holding of a departmental enquiry. He had also recorded his reason in detail in the order of termination itself.

16. In view of above, we do not find any infirmity in the order impugned passed by the learned Single Judge dismissing the writ petition. The appeal being meritless is liable to be dismissed and is hereby dismissed.

Sd/-
(Ajay Kumar Tripathi)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-