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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 21.11.2019

+ W.P.(C) 12248/2019

CHANDRA MOHAN SHARMA

..... Petitioner

Through: Mr. Ajit Kakkar & Mr. Puru
Mudgal, Advs. with petitioner
in-person.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mrs. Bhrathi Raju, CGSC with
Ms.Niddhi Raman (G.P.) &
Mr.Bhagirath Jha for R1 to 4.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

The present petition is directed against order dated 01.03.2019 passed by the Central Administrative Tribunal ('Tribunal'). Considering the nature of the matter and since there is reference in the Tribunal's order to the record of confidential intelligence reports and papers relating to the petitioner, the original record has been produced by the respondents ; the same has been perused and handed back to the officer, through counsel.

2. Some necessary facts which are required to be noticed are that the petitioner was recruited as Deputy Field Officer in the Junior

Executive Cadre, Cabinet Secretariat, Government of India on 01.04.1986. The petitioner was thereafter promoted to the rank of Field Officer in the year 1995 and was posted to the Special Bureau in Leh (Ladakh) between 1998 and 2001. In the year 2000, the petitioner was selected for foreign assignment and transferred back to the headquarters for training ; whereafter on 23.05.2001, the petitioner was posted as Assistant Consular Officer in the Consular Wing of the Embassy of India, Brussels (Belgium) till 01.08.2004.

3. Subsequently, the petitioner was transferred back to the headquarters and was posted as Field Officer on deputation in the Aviation Research Centre (ARC) for a period of three years commencing 05.04.2006 till 02.04.2009. Thereafter, in the year 2013 the petitioner was promoted to the rank of Deputy Commissioner and was posted as Head, Special Bureau, Shimla-Sector. The petitioner was then interviewed for a second assignment as a diplomat by the Joint Secretary of the concerned desk in the Ministry of External Affairs and proceeded to assume charge of the post of Consul at the Consulate of India at Zahidan, Iran on 26.04.2016.

4. The petitioner was however recalled on 26.05.2017 and was served with an order of dismissal under Article 311 (2)(c) of the Constitution of India on 14.09.2017, which led to the filing of an O.A. ; which has been dismissed by the Tribunal and has led to the filing of the present writ petition.

5. Learned counsel for the petitioner submits that the order of dismissal is bad in law as it suffers from legal infirmities. It is

contended *inter-alia* that no reasons or details have been shared with the petitioner for his dismissal ; and accordingly the order of dismissal as also the order of the Tribunal are liable to be set-aside.

6. Learned counsel further submits that if there were any allegations against the petitioner, a memo of charge should have been issued and an independent departmental inquiry ought to have been conducted. He submits that the whole objective was to remove the petitioner from service. It is submitted that the action of respondents is *mala fide* and suffers from arbitrariness and bias.

7. Learned counsel for the petitioner also relies upon a judgment titled **A.K. Kaul & Anr. vs. Union of India & Anr.** reported as (1995) 4 SCC 73, relevant paras of which are reproduced below :

“29. This would show that the court did go into the question whether the impugned orders were vitiated by mala fides. As noticed earlier in Tulsiram Patel also the Court, while dealing with the Madhya Pradesh Police Forces' matters, did examine the question whether the impugned orders of dismissal passed under Article 311(2)(c) were vitiated by mala fides or were based on irrelevant considerations and after considering all the materials that were produced before the Court by the State Government, the Court recorded the finding that the facts leave no doubt that the situation was such that prompt and urgent action was necessary and the holding of inquiry into the conduct of each of the petitioners would not have been expedient in the interests of the security of the State.

30. We are, therefore, of the opinion that an order passed under clause (c) of the second proviso to Article 311(2) is subject to judicial review and its validity can be examined by the court on

the ground that the satisfaction of the President or the Governor is vitiated by mala fides or is based on wholly extraneous or irrelevant grounds within the limits laid down in S.R. Bommai.

31. In order that the Court is able to exercise this power of judicial review effectively it must have the necessary material before it to determine whether the satisfaction of the President or the Governor, as the case may be, has been arrived at in accordance with the law and is not vitiated by mala fides or extraneous or irrelevant factors. This brings us to the question whether the Government is obliged to place such material before the court. It is no doubt true that unlike clause (b) of the second proviso to Article 311(2) which requires the authority to record in writing the reason for its satisfaction that it is not reasonably practicable to hold such inquiry, clause (c) of the second proviso does not prescribe for the recording of reasons for the satisfaction. But the absence of such a requirement to record reason for the satisfaction does not dispense with the obligation on the part of the Government concerned to satisfy the court or the tribunal if an order passed under clause (c) of the second proviso to Article 311(2) is challenged before such court or tribunal that the satisfaction was arrived at after taking into account relevant facts and circumstances and was not vitiated by mala fides and was not based on extraneous or irrelevant considerations. In the absence of the said circumstances being placed before the court or the tribunal it may not be possible for the employee concerned to establish his case that the satisfaction was vitiated by mala fides or was based on extraneous or irrelevant considerations. While exercising the power under Article 311(2)(c) the President or the Governor acts in accordance with the advice tendered by the Council of Ministers. (See : Samsher Singh v. State of

Punjab.) Article 74(2) and Article 163(3) which preclude the court from inquiring into the question whether any, and if so, what advice was tendered by the Ministers to the President or the Governor enable the Government concerned to withhold from the court the advice that was tendered by the Ministers to the President or the Governor. But, as laid down in S.R. Bommai the said provisions do not permit the Government to withhold production in the court of the material on which the advice of the Ministers was based. This is, however, subject to the claim of privilege under Sections 123 and 124 of the Evidence Act in respect of a particular document or record. The said claim of privilege will have to be considered by the court or tribunal on its own merit. But the upholding of such claim for privilege would not stand in the way of the Government concerned being required to disclose the nature of the activities of the employee on the basis of which the satisfaction of the President or the Governor was arrived at for the purpose of passing an order under clause (c) of the second proviso to Article 311(2) so that the court or tribunal may be able to determine whether the said activities could be regarded as having a reasonable nexus with the interest of the security of the State. In the absence of any indication about the nature of the activities it would not be possible for the court or tribunal to determine whether the satisfaction was arrived at on the basis of relevant considerations. The nature of activities in which employee is said to have indulged in must be distinguished from the material which supports his having indulged in such activities. The non-disclosure of such material would be permissible if the claim of privilege is upheld. The said claim of privilege would not extend to the disclosure of the nature of the activities because such disclosure would not involve disclosure of any information connecting the employee with such activities

or the source of such information.

32. In our opinion, therefore, in a case where the validity of an order passed under clause (c) of the second proviso to Article 311(2) is assailed before a court or a tribunal it is open to the court or the tribunal to examine whether the satisfaction of the President or the Governor is vitiated by mala fides or is based on wholly extraneous or irrelevant grounds and for that purpose the Government is obliged to place before the court or tribunal the relevant material on the basis of which the satisfaction was arrived at subject to a claim of privilege under Sections 123 and 124 of the Evidence Act to withhold production of a particular document or record. Even in cases where such a privilege is claimed the Government concerned must disclose before the court or tribunal the nature of the activities in which the government employee is said to have indulged in.”

8. Learned counsel for the respondents has opposed this petition. She submits that having regard to the facts of this case and the serious and specific allegations against the petitioner as reflected in confidential intelligence reports and papers shown to the court, the matter was taken-up at the highest level and the provisions of Article 311 (2)(c) were invoked.

9. Counsel for the respondents has relied upon a judgment titled ***Union of India vs. Tulsiram Patel*** reported as (1985) 3 SCC 398, where Article 311(2)(c) was considered by a Constitution Bench of the Supreme Court, relevant paras of which we reproduce below:

“139. During the course of the argument a reference was made to certain High Court decisions and their citations were given. We have carefully gone through those decisions.

It is, however, unnecessary to refer to them. Insofar as what was held in those decisions or any of them is contrary to or inconsistent with what has been held by us, those decisions are not correct and are to that extent hereby overruled.

140. We now turn to the last clause of the second proviso to Article 311(2), namely, clause (c). Though its exclusionary operation on the safeguards provided in Article 311(2) is the same as those of the other two clauses, it is very different in content from them. While under clause (b) the satisfaction is to be of disciplinary authority, under clause (c) it is to be of the President or the Governor of a State, as the case may be. Further, while under clause (b) the satisfaction has to be with respect to whether it is not reasonably practicable to hold the inquiry, under clause (c) it is to be with respect to whether it will not be expedient in the interest of the security of the State to hold the inquiry. Thus, in one case the test is of reasonable practicability of holding the inquiry, in the other case it is of the expediency of holding the inquiry. While clause (b) expressly requires that the reason for dispensing with the inquiry should be recorded in writing, clause (c) does not so require it, either expressly or impliedly.

141. The expressions "law and order", "public order" and "security of the State" have been used in different Acts. Situations which affect "public order" are graver than those which affect "law and order" and situations which affect "security of the State" are graver than those which affect "public order". Thus, of these situations those which affect "security of the State" are the gravest. Danger to the security of the State may arise from without or within the State. The expression "security of the State" does not mean security of the entire country or a whole State. It includes security of a part of the State. It also cannot be confined to an armed rebellion or revolt. There are various ways in which security of the State can be affected. It can be affected by State secrets or information relating to defence production or similar matters being passed on to other countries, whether inimical or not to our country, or by secret links with terrorists. It is

difficult to enumerate the various ways in which security of the State can be affected. The way in which security of the State is affected may be either open or clandestine. Amongst the more obvious acts which affect the security of the State would be disaffection in the Armed Forces or para-military Forces. Disaffection in any of these Forces is likely to spread, for disaffected or dissatisfied members of these Forces spread such dissatisfaction and disaffection among other members of the Force and thus induce them not to discharge their duties properly and to commit acts of indiscipline, insubordination and disobedience to the orders of their superiors. Such a situation cannot be a matter affecting only law and order or public order but is a matter affecting vitally the security of the State. In this respect, the Police Force stands very much on the same footing as a military or a para-military Force for it is charged with the duty of ensuring and maintaining law and order and public order, and breaches of discipline and acts of disobedience and insubordination on the part of the members of the Police Force cannot be viewed with less gravity than similar acts on the part of the members of the military or para-military Forces. How important the proper discharge of their duties by members of these Forces and the maintenance of discipline among them is considered can be seen from Article 33 of the Constitution. Prior to the Constitution (Fiftieth Amendment) Act, 1984, Article 33 provided as follows:

“33. Power to Parliament to modify the rights conferred by this Part in their application to Forces.—Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.”

(emphasis supplied)

By the Constitution (Fiftieth Amendment) Act, 1984, this article was substituted. By the substituted article the scope of the Parliament's power to so restrict or abrogate the

application of any of the fundamental rights is made wider. The substituted Article 33 reads as follows:

“33. Power to Parliament to modify the rights conferred by this Part in their application to Forces, etc.—Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,—

(a) the members of the Armed Forces; or

(b) the members of the Forces charged with the maintenance of public order; or

(c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter-intelligence; or

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.”

(emphasis supplied)

Thus, the discharge of their duties by the members of these Forces and the maintenance of discipline amongst them is considered of such vital importance to the country that in order to ensure this the Constitution has conferred power upon Parliament to restrict or abrogate any of the fundamental rights in their application to them.

142. The question under clause (c), however, is not whether the security of the State has been affected or not, for the expression used in clause (c) is “in the interest of the security of the State”. The interest of the security of the State may be affected by actual acts or even the likelihood of such acts taking place. Further, what is required under clause (c) is not the satisfaction of the President or the Governor, as the case may be, that the interest of the security of the State is or will be affected but his satisfaction that in the interest of the security of the State, it is not expedient to hold an inquiry as contemplated by Article 311(2). The satisfaction of the

President or Governor must, therefore, be with respect to the expediency or in expediency of holding an inquiry in the interest of the security of the State. The Shorter Oxford English Dictionary, 3rd Edn., defines the word “inexpedient” as meaning “not expedient; disadvantageous in the circumstances, unadvisable, impolitic”. The same dictionary defines “expedient” as meaning inter alia “advantageous; fit, proper, or suitable to the circumstances of the case”. Webster's Third New International Dictionary also defines the term “expedient” as meaning inter alia “characterized by suitability, practicality, and efficiency in achieving a particular end: fit, proper, or advantageous under the circumstances”. It must be borne in mind that the satisfaction required by clause (c) is of the Constitutional Head of the whole country or of the State. Under Article 74(1) of the Constitution, the satisfaction of the President would be arrived at with the aid and advice of his Council of Ministers with the Prime Minister as the Head and in the case of a State by reason of the provisions of Article 163(1) by the Governor acting with the aid and advice of his Council of Ministers with the Chief Minister as the Head. Whenever, therefore, the President or the Governor in the constitutional sense is satisfied that it will not be advantageous or fit or proper or suitable or politic in the interest of the security of the State to hold an inquiry, he would be entitled to dispense with it under clause (c). The satisfaction so reached by the President or the Governor must necessarily be a subjective satisfaction. Expediency involves matters of policy. Satisfaction may be arrived at as a result of secret information received by the Government about the brewing danger to the security of the State and like matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite satisfaction whether holding an inquiry would be expedient or not. If the requisite satisfaction has been reached as a result of secret information received by the Government, making known such information may very often result in disclosure of the source of such information. Once known, the

particular source from which the information was received would no more be available to the Government. The reasons for the satisfaction reached by the President or Governor under clause (c) cannot, therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public.

*143. In the case of clause (b) of the second proviso, clause (3) of Article 311 makes the decision of the disciplinary authority that it was not reasonably practicable to hold the inquiry final. There is no such clause in Article 311 with respect to the satisfaction reached by the President or the Governor under clause (c) of the second proviso. There are two reasons for this. There can be no departmental appeal or other departmental remedy against the satisfaction reached by the President or the Governor; and so far as the Court's power of judicial review is concerned, the Court cannot sit in judgment over State policy or the wisdom or otherwise of such policy. The Court equally cannot be the judge of expediency or in expediency. Given a known situation, it is not for the Court to decide whether it was expedient or inexpedient in the circumstances of the case to dispense with the inquiry. The satisfaction reached by the President or Governor under clause (c) is subjective satisfaction and, therefore, would not be a fit matter for judicial review. Relying upon the observations of Bhagwati, J., in *State of Rajasthan v. Union of India* [(1977) 3 SCC 592 : (1978) 1 SCR 1, 82] it was submitted that the power of judicial review is not excluded where the satisfaction of the President or the Governor has been reached mala fide or is based on wholly extraneous or irrelevant grounds because in such a case, in law there would be no satisfaction of the President or the Governor at all. It is unnecessary to decide this question because in the matters under clause (c) before us, all the materials, including the advice tendered by the Council of Ministers, have been produced and they clearly show that in those cases the satisfaction of the Governor was neither reached mala fide nor was it based on any extraneous or irrelevant ground.*

144. It was further submitted that what is required by clause (c) is that the holding of the inquiry should not be expedient in the interest of the security of the State and not the actual conduct of a government servant which would be the subject-matter of the inquiry. This submission is correct so far as it goes but what it overlooks is that in an inquiry into acts affecting the interest of the security of the State, several matters not fit or proper to be made public, including the source of information involving a government servant in such acts, would be disclosed and thus in cases such as these an inquiry into acts prejudicial to the interest of the security of the State would prejudice the interest of the security of the State as much as those acts would.

145. It was also submitted that the Government must produce before the court all materials upon which the satisfaction of the President or the Governor, as the case may be, was reached. So far as the advice given by the Council of Ministers to the President or the Governor is concerned, this submission is negated by the express provisions of the Constitution. Article 74(2) of the Constitution provides:

“(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.”

Similarly, Article 163(3) provides:

“(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.”

146. It was then submitted that leaving aside the advice given by the Ministers to the President or the Governor, the Government is bound to disclose at least the materials upon which the advice of the Council of Ministers was based so that the Court can examine whether the satisfaction of the President or the Governor, as the case may be, was arrived at mala fide or based on wholly extraneous and irrelevant grounds so that such satisfaction would in law amount to no

satisfaction at all. It was further submitted that if the Government does not voluntarily disclose such materials it can be compelled by the Court to do so. Whether this should be done or not would depend upon whether the documents in question fall within the class of privileged documents and whether in respect of them privilege has been properly claimed or not. It is unnecessary to examine this question any further because in the cases under clause (c) before us though at first privilege was claimed, at the hearing privilege was waived and the materials as also the advice given by the Ministers to the Governor of Madhya Pradesh who had passed the impugned orders in those cases were disclosed.”

10. Counsel for the respondents submits that in terms of Office Memorandum dated 26.07.1980 issued by the Ministry of Home Affairs, Department of Personnel and Administrative Reforms, after analyzing the complete issue, a proposal was forwarded to the Department of Personnel and Training for placing the proposal before the Advisory Committee. Counsel further submits that Advisory Committee comprises the Secretary (Ministry of Home Affairs), Secretary (Department of Personnel and Training), Secretary (Ministry of Law and Justice), Secretary of the concerned Ministry/Department and Director, Intelligence Bureau for proceeding under proviso (c) to Article 311 (2) of the Constitution of India. Counsel further points-out that thereafter the department of Personnel and Training arranged a meeting of the Committee of Advisors. The Committee of Advisors, after considering all the facts, recommended that action be taken for dismissal of the petitioner from service under Article 311(2)(c) of the Constitution. It is further stated that post the recommendation of the Committee of Advisors the matter was placed before the competent

authority for its approval. After approval of the competent authority, the Department of Personnel and Training communicated the same to the concerned department ; and only thereafter the order of dismissal under clause (c) of the proviso to Clause (2) of Article 311 of the Constitution was issued.

11. We have heard learned counsel for the parties and have carefully examined the original records which were produced before us in sealed cover.

12. Article 311(2)(c) of Constitution of India reads as under:-

“311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.—

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply—

(a) xxxxx

(b) xxxxx

(c) *where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.*

(3) xxxxx”

13. The question which arises for our consideration is whether, prior to passing of the impugned order, there was material and information on the basis of which the position of Article 311 (2)(c) could be invoked and whether proper procedure was followed.

14. We have carefully examined the original records which were produced before us in sealed cover and are satisfied that there was indeed substantial, specific material available before the department to take action against the petitioner under Article 311(2)(c) of the Constitution of India. Detailed procedure was followed and the material on the file shows proper application of mind. Considering what is disclosed in the material, the invocation of Article 311 (2)(c) can neither be said to be *mala-fide* nor arbitrary nor baseless.

15. In view of the aforesaid discussion, we find no merit in the petition and the same is dismissed.

G.S.SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

NOVEMBER 21, 2019/uj