

(2009) 04 AHC CK 0340
In the Allahabad High Court

Malti Tiwari and others

APPELLANT

Vs

State of U.P.and others

RESPONDENT

Date of Decision : 15-04-2009

Acts Referred:

Citation : (2009) 04 AHC CK 0340

Hon'ble Judges : Rajiv Sharma, J

Final Decision : Dismissed

Judgement

Rajiv Sharma, J.

Heard learned counsel for the petitioners and learned Standing Counsel for the State.

Janardhan Prasad alias Janardan Tiwari has filed the instant writ petition assailing the validity and correctness of the order dated 11.11.2003 passed by the Senior Superintendent of Police, Lucknow dismissing the petitioner from service invoking the provisions of Rule 8(2)(b) of the U.P. Subordinate Police Officers Punishment & Appeal Rules, 1991 [hereinafter referred to as the Rules, 1991 for the sake of brevity]. During the pendency of the writ petition, Janardan Prasad died and in his place, legal heirs have been substituted.

Learned counsel for the petitioners has submitted that Janardhan Prasad alias Janardan Tiwari was always appreciated by the higher authorities for his good character, utmost devotion and dedication in the department but the impugned orders of dismissal of Janardhan Prasad are not based on the correct facts of the case visavis the same are violative of Article 311(2) of the Constitution of India. He submits that the impugned order is not only contrary to the procedure as transcribed under Rules, 1991 but it also clearly contrary to the provisions of Article 311 as provided under the Constitution of India.

He has further submitted that several writ petitions of identical nature have been allowed by this Court and the order of dismissal has been quashed. The case of Janardhan Prasad is on same footing. The legal proposition and the judgment of

this Court in various writ petitions of identical nature has not been disputed by the Standing Counsel.

I have heard learned counsel for the parties and perused the record, which reveals that the nature of the misconducts committed by the petitioner are of a very grave in nature and bring a bad name to the police force of the State on the whole but it is not in dispute that in awarding the punishment of dismissal from service, no formal inquiry was held purportedly on the ground that the same enquiry could be dispensed with under proviso (b) appended to Clause (2) of Article 311 of the Constitution of India read with Rule 8(2)(b) of the U.P. Police Officers of the Subordinate Ranks (Punishment & Appeal) Rules, 1991, which reads as under :

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

(1) No person who is a member of a civil service of the Union or an allIndia 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) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(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. If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as it referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

Rule 8(2) of the U.P. Police Officers of the Subordinate Ranks (Punishment & Appeal) Rules, 1991 reads as under:

"(8) (2) No Police Officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these rules:

Provided that this rule shall not apply

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(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 enquiry; or

(c) Where the Government is satisfied that in the interest of the security of the State, it is not expedient to hold such enquiry."

The scheme of the aforesaid provision guarantees an inquiry into the alleged misconduct of the government servant as a rule whereas dispensing with the same is an exception. Sub clause 2 of Article 311 specifically prohibits dismissal, removal or reduction in rank of a government servant without holding any inquiry and without giving him any opportunity of being heard in respect of the charges on which he may be subjected to any of the major punishment. Explanation to the aforesaid rule is given in the second proviso wherein subclause (a), (b) and (c) do envisage a possibility when a person is dismissed, removed or reduced in rank on the ground of misconduct which has led to his conviction on a criminal charge or where the authority empowered to dismiss or remove or reduce in rank, is satisfied that for some reason, to be recorded by the authority in writing, it is not reasonably practicable to hold such inquiry; or where the President or the Governor, as the case may be, is satisfied that in the interest of the security by the State, it is not expedient to hold such inquiry.

In the instant case, the impugned order of dismissal from service has been passed purportedly in exercise of power under subclause (b) and (C). For attracting subclause (b), it is essential that the authority empowered to inflict major punishment must feel satisfied that for some reason or the other, the inquiry cannot be held but that reason also has to be recorded in writing which should indicate that it was not reasonably practicable to hold such inquiry unless such a finding is recorded, the order passed under the said provision would become bad.

The reason so recorded must also be valid and relevant and not merely a camouflage. It is not pure subjective satisfaction of the authority to dispense with the inquiry but his discretion is circumscribed by the requirement of recording such a reason which, of course, has to be a valid reason for which the inquiry cannot be practicably held. For example, if a government servant is available, the documents, witnesses or the material on which the inquiry is to be conducted and there is no other legal or practical impediment, there would be no reason to dispense with the inquiry and pass the order of major punishment.

Subclause (2) of Article 311, which is the substantive provision, does not lay

down any exception nor confers any discretion upon the empowered authority of not holding an inquiry into the charge of misconduct against a government servant and to pass order without affording any opportunity. It is only in the second proviso that an exception is carved out but an exception cannot take a place of rule and has to be applied only in the circumstances given therein and as may be permissible under the said Article.

The impugned order of dismissal from service does not record any reason as to how it was not reasonably practicable to hold an inquiry but even then, such a recital has been made in the impugned order.

The Apex Court in the case of Union of India vs. Tulsiram Patel, reported in (1985) 3 SCC 398 observed as under :

"The recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty. The reason for dispensing with the inquiry need not, therefore, find a place in the final order though it would be better to do so in order to avoid the allegation that the reason was not recorded in writing before passing the final order but was subsequently fabricated. The reason need not contain detailed particulars, but must not be vague or just a repetition of the language of clause (b) of the second proviso. Sometimes a situation may be such that it is not reasonably practicable to give detailed reasons for dispensing with the inquiry. This would not, however, per se invalidate the order. Each case must be judged on its own merits and in the light of its own facts and circumstances."

Nothing has been brought on record nor produced before me to establish, that any reason making the holding of enquiry impracticable has been mentioned in the record. Thus it can safely be concluded; that neither any such reasons were recorded elsewhere in the record, nor they find mention in the impugned order.

In regard to the applicability of subclause (c) which can be said, in no unambiguous terms that the said proviso would be attracted only if the President or the Governor, as the case may be, is satisfied, that holding of an inquiry would not be in the interest of security of the State. The satisfaction of the President or the Governor has to be on objective consideration of the issues involved and the material placed though the satisfaction has to be subjective. The satisfaction has to be on the point that it would not be expedient to hold an inquiry in the interest of the security of the State.

The facts of the case on the basis of which charges have been framed or levelled or found mentioned in the order of punishment, namely; on the basis of which the major punishment order has been passed, would be a relevant consideration for considering as to whether the inquiry if so held, would not have been in the interest of the security of the State.

On a challenge being made to the order passed under subclause (c), the question that it was not expedient to hold enquiry in the interest of security of the State,

would be open to judicial review on the same principles which are available for challenging the satisfaction of the President or the Governor under other provisions of the Constitution and on which any other order can be challenged.

In the case of *Jaswant Singh v. State of Punjab* [AIR 1991 Supreme Court 385], the Apex Court has held that 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.

The Apex Court in the case of *A.K. Kaul and another vs. Union of India* and another reported in (1995) 4 SCC 73, had an occasion to consider the order of dismissal of an officer in the Indian Intelligence Bureau in the Ministry of Home Affairs of the Government of India, passed under clause (C) held that there is nothing in the provision of Clause (C) of the second proviso to Article 311 of the Constitution which compels a departure from the principles laid down in *S. R. Bommai vs. Union of India* reported in (1994) 3 SCC 1 governing justiciability of the satisfaction of the President in the matter of exercise of power under Article 356.

The Apex Court also compared the proviso of sub clause (b) and (c) in the case of *S.R. Bommai* (supra) and observed that clause (b) the competent authority is required to record in writing the reasons for its satisfaction and there is no such requirement in clause (c). This difference does not mean that the satisfaction of the President or the Governor under clause (C) is immune from judicial review and is not justiciable. It only means that the provisions contained in clause (c) are more akin to those contained in Article 356 (1), which also does not contained any requirement to record the reasons for the satisfaction of the President.

Since the satisfaction of the President in the manner of making a proclamation under Article 356 (1) is justiciable within the limits indicated in *S.R. Bommai* (supra), the satisfaction of the President or the Governor, which forms the basis for passing an order under clause (c) of the second proviso to Article 311 (2), can also be justiciable within the same limits.

As regards the scope of judicial review of the President's satisfaction, the view of the majority in *S.R. Bommai* (Supra) was as follows :

"(i) the satisfaction of the President while making a proclamation under Article 356 (1) is justiciable;

(ii) it would be open to challenge on the ground of malafides or being based wholly on extraneous and/or irrelevant grounds;

(iii) even if some of the materials on which the action is take is found to be relevant material sustaining the action;

(iv) the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material and it will also not substitute its opinion for that of the President;

(v) the ground of malafides takes in inter alia situations where the Proclamation is found to be a clear case of abuse of power or what is sometimes called fraud on power;

(vi) the court will not lightly presume abuse or misuse of power and will make allowance for the fact that the President and the Union Council of Ministers are the best judge of the situation and that they are also in possession of information and material and that the Constitution has trusted their judgment in the matter; and

(viii) this does not mean that the President and the Council of Minister are the final arbiters in the matter or that their opinion is conclusive.

On the question of justiciability of the President's satisfaction in the interest of the security of the State, the Court made following observation :

"Under clause (c) of the second proviso to Article 311 (2) the President or the Governor has to satisfy himself about the expediency in the interests of the security of the State to hold an enquiry as prescribed under Article 311 (2). But the consideration involving the interest of the security of the state cannot be said to be of such a nature as to exclude the satisfaction arrived at by the President or the Governor in respect of the matters from the field of justiciability. Article 19(2) of the Constitution permits the State to impose, by law, reasonable restrictions in the interest of the security of the State on the exercise of the right to freedom of speech and expression conferred by subclause (C) of the clause (1) of Article 19. the validity of the law imposing such restrictions under Article 19(2) is open to judicial review on the ground that the restrictions are not reasonable or they are not in the interests of the security of the State. Therefore, the courts can be said to be competent also to go into the question whether the satisfaction of the President or the Governor for passing an order under Article 311 (2) (C) is based on considerations having a bearing on the interests of the security of the State. In various cases, the Supreme Court has emphasized the distinction between security of the State and maintenance of the public order and has observed that only serious and aggravated forms of public order which are calculated to endanger the security of the State would fall within the ambit of the security of the State. The President or the Governor while exercising the power under Article 311 (2) (C) has to bear in mind this distinction. The satisfaction of the President or the Governor for passing an order under Article 311 (2) (C) would vitiate if it is based on circumstances having no bearing on the security of the State."

Applying the said principles in the case in hand, if I examine the order of dismissal from service it makes evident that no reasons at all have been recorded saying that it was not reasonably practicable to hold inquiry. The

mandatory requirement under sub clause (b) has been apparently complied with by making a mere recital in the order, that it is not reasonably practicable to hold such inquiry.

Even in the counter affidavit filed by the State, no reasons have been shown nor there is any statement of fact that any such reasons have been recorded separately or find place on the record. The dictum of the Supreme Court in the case of Tulsi Ram (Supra) also does not support the State's action. The only averment in the counter affidavit is that the facts and circumstances, of the instant case unambiguously establish that holding enquiry in the instant case, was not reasonably practicable, neither it was expedient to hold such an inquiry in the interest of security of the State.

This is hardly any reason in terms of the provisions of the subclause (b) and (c). Though there is no requirement to record any reason while applying sub clause (c) but the satisfaction of the Governor can be judicially reviewed as there has to be a reason for applying the exceptional rule.

Rule 8 (2) of 1991 Rules and proviso to Clause (2) of Article 311 of the Constitution are akin and it is now a wellsettled principle of law that a constitutional right conferred upon a delinquent cannot be dispensed with lightly or arbitrarily or out of ulterior or merely in order to avoid to holding of an enquiry.

In view of the fact that no material had been placed by the opposite parties herein to satisfy the Court that it was necessary to dispense with a formal enquiry in terms of proviso (b) appended to Clause (2) of Article 311 of the Constitution of India, I am of the opinion that the impugned order cannot be sustained and liable to be setaside.

Accordingly, the writ petition is allowed. The order of dismissal dated 11.11.2003 is hereby setaside. Since Janardhan Prasad Tiwari alias Janardan Tiwari has already expired during the pendency of the writ petition, the mandatory benefits for which he is entitled, shall be paid to his legal heirs.

No order as to costs.