
(1995) 09 AHC CK 0124
In the Allahabad High Court
Case No : C.M.W.P. No. 4594 of 1991

Vijaya Shanker Tewari

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 06-09-1995

Acts Referred:

Constitution of India, 1950 — Article 311, 311(2)
Criminal Procedure Code, 1973 (CrPC) — Section 389, 389(1)
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 323
Uttar Pradesh Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 — Rule 8
Uttar Pradesh Police Regulations, 1948 — Regulation 492

Citation : (1995) 09 AHC CK 0124

Hon'ble Judges : R.A. Sharma, J; I.M. Quddusi, J

Bench : Division Bench

Advocate : Shushil Kumar Srivastava, for the Appellant;

Final Decision : Dismissed

Judgement

R.A. Sharma, J.—Petitioner, who was a constable in U.P. Police, was convicted and sentenced to life imprisonment for offences Under Sections 302/147/148/149/307 and 323 of the Indian Penal Code in 1979 by the trial court. Against his conviction, the Petitioner has filed an appeal before this Court, which is still pending. While entertaining the appeal, this court granted the following interim order on 22.6.1979 suspending the sentence:

Execution of sentence awarded to the Appellants shall remain suspended during the pendency of this appeal and they shall be released on bail on their furnishing security to the satisfaction of the Chief Judicial Magistrate, Mirzapur.

Earlier in 1976, Petitioner was suspended and after his conviction he was dismissed from service on 29.1.1991. Being aggrieved by it, he has filed this writ petition.

2. Under Clause (a) of second proviso to Article 311(2) of the Constitution, no

reasonable opportunity of being heard is required to be given to a Government servant, who is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge, because in such a case, Clause (2) of Article 311 which provides for such an opportunity, is not applicable. Following decision of Supreme Court in *Union of India and Another Vs. Tulsiram Patel and Others*, a Division Bench of this Court in *Shyam Narain Shukla v. State of U.P.* 1989 (2) UPLBEC 418, has held that a Government servant who has been convicted by a criminal court cannot be dismissed from service merely on the ground of conviction, but the appropriate authority has to consider the conduct of such an employee, which has led to his conviction on a criminal charge. Similar view was taken by a Division Bench in Writ Petition No. 1701 of 1985, *Jamuna Prasad Shukla v. State of U.P.* Learned single Judge was, however, of the view that conviction u/s 302, I.P.C. is so serious that no further consideration is required and mere conviction is sufficient to dismiss a Government servant. Relevant passage from the judgment of learned single Judge is as Under:

However, where a conviction is u/s 302, I.P.C. this itself is so serious that no further consideration is required and, in my opinion, a person who is convicted u/s 302, I.P.C. cannot get reinstatement until the conviction is set aside in appeal. A case u/s 302, I.P.C. is so serious that no further consideration is required and the mere conviction is enough.

Learned Judge, therefore, held that two decisions of Division Bench in *Shyam Narain Shukla v. State of U. P.* and *Jamuna Prasad Shukla v. State of U.P.* referred to above, require reconsideration. Learned Judge, accordingly referred the following matter for decision by a larger Bench:

"In view of the above, I am of the opinion that the decision in Writ Petition No. 1701 of 1985 as well as Writ Petition Nos. 3871 and 6759 of 1986 reported in 1989 (2) UPLBEC 418 require reconsideration. The impact of Rule 8 of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 as well as paragraph 492 of the U.P. Police Regulations needs also to be considered. Let the papers of this case be laid before the Hon'ble Chief Justice for constituting a larger Bench."

3. We have heard learned Counsel for the parties.

4. In view of the provisions of Clause (2) of Article 311 of Constitution of India, no Government servant can be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges levelled against him and given reasonable opportunity of being heard in respect of those charges. This clause, however, is not applicable to three types of cases mentioned in second proviso to Clause (2), with the result that no opportunity is required to be given to the Government servant if his case falls within those three exceptions mentioned in second proviso. Clause (a) of second proviso, which is relevant for this case, is as Under:

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. What is relevant in the above proviso is the conduct of the employee which has led to his conviction on a criminal charge and not the mere conviction. Government servant as such cannot be dismissed under Clause (a) of second proviso merely on the ground of his conviction on a criminal charge, Supreme Court in *Union of India and Another Vs. Tulsiram Patel and Others*, has, in this connection, laid down as under:

Not much remains to be said about Clause (a) of the second proviso to Article 311(2). To recapitulate brief, where a disciplinary authority comes to know that a Government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose, it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in *The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others*. This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the Government servant's conduct was such as to require his dismissal or removal from service or reduction in rank, he must decide which of these three penalties should be imposed on him. This too, it has to do by itself and without hearing the concerned Government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned Government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order.

In paragraph 62 of the same judgment, the Supreme Court observed as under:

in the case of Clause (a) a Government servant must be guilty of conduct deserving the penalty of dismissal, removal or reduction in rank which conduct has led to him being convicted on a criminal charge.

The paramount thing, however, to bear in mind is that the second proviso will apply only where the conduct of a Government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. Therefore, before denying a Government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned Government servant is such as Justifies the penalty of dismissal, removal or reduction in rank.

Following the above decisions of Supreme Court, a Division Bench of this Court in *Shyam Narain Shukla v. State of U.P.* 1989 (2) UPLBEC 418, (supra) has held that a Government servant, who has been convicted, cannot be dismissed from service merely on the ground of conviction, but the authorities have to consider his conduct, which has led to his conviction on a criminal charge. Same was the view taken in another Writ Petition No. 1701 of 1985, *Jamuna Prasad Shukla v.*

State of U.P. (supra). The orders of dismissal in those cases were quashed by this Court on the ground that they were passed only on the basis of conviction of the Petitioners and not on the basis of the conduct which has led to their conviction on the criminal charge. However, the decision of this Court in Writ Petition No. 1701 of 1985, on other issues regarding holding of full fledged disciplinary inquiry and giving of opportunity of being heard to the Petitioner therein before passing the order of dismissal under Clause (a) of the second proviso to Article 311(2) of the Constitution, was declared by this Court in the aforesaid case of Shyam Narain Shukla v. State of U.P. (supra), as not binding and enforceable in view of decision of Supreme Court in Tulsi Ram Patel's case (supra).

5. Recently the Supreme Court in Deputy Director of Collegiate Education (Administration), Madras Vs. S. Nagoor Meera, , has reiterated the same principle when it held as under:

It should be remembered that the action under Clause (a) of the second proviso to Article 311(2) will be taken only where the conduct which has led to his conviction is such that it deserves any of the three major punishments mentioned in Article 311(2).

What is really relevant thus is the conduct of the Government servant which has led to his conviction on a criminal charge.

What is relevant for Clause (a) of the second proviso to Article 311(2) is the "conduct which has led to his conviction on a criminal charge" and there can be no question of suspending the conduct. We are, there fore, of the opinion that taking proceedings for and passing orders of dismissal, removal or reduction In rank of a Government servant who has been convicted by a criminal court is not barred merely because the sentence or order Is suspended by the appellate court or on the ground that the said Government servant accused has been released on bail pending the appeal.

6. For the purpose of taking action under Clause (a) of second proviso to Article 311(2) of the Constitution, what is relevant is the conduct of the Government servant which has led to his conviction on a criminal charge. it is not open to the authorities to pass on order of dismissal or removal or reduction in rank of the Government servant merely on the basis of conviction. Even in those cases where offence for which a Government servant is convicted is serious, he cannot be dismissed from service merely on the basis of his conviction. In such a case also, his conduct which led to his conviction on a criminal charge, has to be examined by the appropriate authority before imposing any penalty Under Clause (a) of second proviso. As held by Supreme Court In Tulsi Ram Patel's case (supra) in such cases before imposing any penalty under Clause (a) of the second proviso, the appropriate authority "will have to persue the judgment of the criminal court and consider all the facts and circumstances of the case and various factors set out in Challappan's case, AIR 1975 SC 2216. This, however, has to be done by it ex prate and by itself. Supreme Court in Challappan's case

(supra) has laid down that before imposing a penalty, the appropriate authority has to consider the entire conduct of the employee, the gravity of mis-conduct committed by him, the impact which his mis-conduct is likely to have on the administration and other extenuating circumstances and redeeming features, if any, in the case. Government servant, therefore, cannot be dismissed from service merely on the basis of his conviction howsoever serious or heinous the offence may be for which he has been convicted. The authority concerned has to consider his conduct which has led to his conviction on a criminal charge, along with all other relevant factors and circumstances including redeeming feature, if any. The decision of Division Bench of this Court in Shyam Narain Shukla (supra) lays down the correct law and does not require reconsideration. Decision of Writ Petition No. 1701 of 1985 is good only to the extent whereby it was held that an order of dismissal of a Government servant cannot be based on mere conviction. Other issue decided in the latter case (Writ Petition No. 1701 of 1985) has been rightly declared wrong and unenforceable by Division Bench in the case of Shyam Narain Shukla (supra) in view of decision of Tulsi Ram Patel's case (supra).

7. Here mention may also be made to Rule 8 of U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991, the relevant extract from which is as under:

"8. Dismissal and removal (1) No Police officer shall be dismissed or removed from service by any authority subordinate to the appointing authority.

(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 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 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 where the Government Is satisfied that In the interest of the security of the State, it is not expedient to hold such enquiry.

Proviso (a) to the said rule Is reproduction of Clause (a) of second proviso to Article 311(2) of the Constitution of India and, therefore, its interpretation would be the same as that placed by Supreme Court on Clause (a) of the second proviso to Article 311.

8. In this connection, reference may also be made to the Regulation 492 of the U.P. Police Regulations, which is reproduced below:

Whenever a police officer has been judicially tried, the Superintendent must await the decision of the judicial appeal, if any, before deciding whether further departmental action is necessary.

9. Clause (a) to second proviso to Article 311(2) speaks of conduct which has led to the conviction of a Government servant on a criminal charge. If a Government

servant has been convicted by the trial court, the appropriate authority will be fully Justified to take action under the said Clause (a) of the second proviso even after he has filed appeal against his conviction. Supreme Court in Deputy Director v. S. Nagoor Meera (supra) has. in this connection, laid down as under:

"The Tribunal seems to be of the opinion that until the appeal against the conviction is disposed of, action under Clause (a) of the second proviso to Article 311(2) is not permissible. We see no basis or justification for the said view. The more appropriate course in all such cases is to take action under Clause (a) of the second proviso to Article 311(2) once a Government servant is convicted of a criminal charge and not to wait for the appeal or revision, as the case may be. If however, the Government servant-accused is acquitted on appeal or other proceeding, the order can always be revised and if the Government servant is reinstated, he will be entitled to all the benefits to which he would have been entitled to have he continued in service. The other course suggested, viz. to wait till the appeal, revision and other remedies are over, would not be advisable since it would mean continuing In service a person who has been convicted of a serious offence by a criminal court, it should be remembered that the action under Clause (a) of the second proviso to Article 311(2) will be taken only where the conduct which has led to his conviction is such that it deserves any of the three major punishments mentioned in Article 311(2)."

10. Regulation 492, however, requires the Superintendent of Police to await decision of judicial appeal, of any, before deciding the question as to whether departmental action is necessary. This runs counter to Clause (a) of second proviso to Article 311(2). Supreme Court in Tulsi Ram Patels case (supra) has held that neither the Act nor the Rule nor the Government Instructions can alter or liberalise the effect of the second proviso to Article 311(2). in this connection. Supreme Court has laid down as Under:

Service rules may reproduce the provisions of the second proviso authorizing the disciplinary authority to dispense with the inquiry contemplated by Clause (2) of Article 311 In the three cases mentioned in the second proviso to that clause or any one or more of them. Such a rule, however, cannot be valid and constitutional without reference to the second proviso to Article 311(2) and cannot be read apart from it. Thus, while the source of authority of a particular officer to act as a disciplinary authority and to dispense with the inquiry is derived from the service rules, the source of his power to dispense with the inquiry is derived from the second proviso to Article 311(2) and not from any service rules. There is well established distinction between the source of authority to exercise a power and the source of such power.

Supreme Court accordingly, in para 122 of its Judgment, held that last part of Rule 37 of the C.I.S.F. Rules which provides for a notice before Imposing penalty of dismissal to the delinquent Government servant, would be void as violating the second proviso to Article 311(2), "because It would whittle down the exclusionary effect of the second proviso". Supreme Court, however, did not

declare it ultra verse and treated it as directory and not mandatory. The reasons for treating the rules which are in conflict with second proviso to Article 311(2) as directory, as given by Supreme Court, are as under:

It is, however, a well-settled rule of construction of statutes that where two Interpretations are possible, one of which would preserve and save the constitutionality of the particular statutory provision while the other would render it unconstitutional and void, the one which saves and preserves its constitutionality should be adopted and the other rejected. Such constitutionality can be preserved by Interpreting that statutory provision as directory and not mandatory. It is equally well-settled that where a statutory provision is directory, the courts cannot interfere to compel the performance or punish breach of the duty created by such provision and disobedience of such provision would not entail any invalidity see Craies on Statute Law, Seventh Edition, at page 229. In such a case, breach of such statutory provision would not furnish any cause of action or ground of challenge to a Government servant for at the very threshold, such cause of action or ground of challenge would be barred by the second proviso to Article 311(2).

11. Regulation 492 whittles down the effect of Clause (a) of second proviso to Article 311(2) and, therefore, cannot survive being in conflict with it. But for the reasons given by Supreme Court in *Tulsa Ram Patel's* case, this Regulation can be saved by treating it directory and not mandatory. Regulation 492 is, therefore, declared directory only.

12. We, however, agree with the learned single Judge that a Government servant, who has been dismissed from service under Clause (a) of second proviso to Article 311(2) or under a corresponding service rule, is not entitled to reinstatement, merely because appellate court, in appeal filed by him against his conviction and sentence, has passed an interim order, staying the sentence or the conviction. He can get reinstatement only after his appeal is allowed. In this connection also, reference may again be made to decision of Supreme Court in *Deputy Director v. S. Nagoor Meera* (supra) wherein Supreme Court has laid down as Under:

"This clause, it is relevant to notice, speaks of "conduct which has led his conviction on a criminal charge." It does not speak of sentence or punishment awarded. Merely because the sentence is suspended and or the accused is released on bail, the conviction does not cease to be operative. Section 389 of the Code of Criminal Procedure, 1973 empowers the appellate court to order that pending the appeal "the execution of the sentence or order appealed against be suspended and also if he is in confinement, that he be released on bail or on his own bond." Section 389(1), it may be noted, speaks of suspending "the execution of the sentence or order", it does not expressly speak of suspension of conviction. Even so, it may be possible to say that In certain situations, the appellate court may also have the power to suspend the conviction-an aspect dealt with recently in *Rama Narang Vs. Ramesh Narang and Others*, .

We need not, however, concern ourselves any more with the power of the appellate court under the Code of Criminal Procedure for the reasons that what is relevant for Clause (a) of the second proviso to Article 311(2) is the "conduct which has led to his conviction on a criminal charge" and there can be no question of suspending the conduct. We are, therefore, of the opinion that taking proceedings for and passing orders of dismissal, removal or reduction in rank of a Government servant who has been convicted by a criminal court, Is not barred merely because the sentence or order is suspended by the appellate court or on the ground that the said Government servant-accused has been released on bail pending the appeal.

13. As the whole case has not been referred to the larger Bench, let the file of this case be returned to the appropriate learned single Judge for deciding the other issues involved in it.