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(2011) 08 PAT CK 0184

In the Patna High Court

Case No : CWJC No. 3349 of 2007

Vyasmuni Tripathy Tripathy — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:
Constitution of India, 1950 — Article 14, 185, 226, 311, 311(2)
Penal Code, 1860 (IPC) — Section 302, 307, 325, 34, 441

Citation : (2012) 2 PLJR 449

Hon'ble Judges : Mihir Kr. Jha, J

Bench : Single Bench

Advocate : J.P. Shukla and R.K. Shukla, for the Appellant; J.P. Karn and A.K. Dubey for the State, for the Respondent

Judgement

Mihir Kumar Jha, J.—Heard Mr. J.P. Shukla, learned Senior Counsel for the petitioner and learned counsel for the State. The prayer of the petitioner in this writ application reads as follows:-

(i) For quashing the office order issued by the Director, Secondary Education, Bihar, Patna vide his Memo No. 2780 dated 2.12.2004 whereby and whereunder the petitioner has been dismissed from the Government service illegally taking recourse of the above circular retrospectively and to provide all consequential reliefs.

2. Mr. Shukla would submit that there can be no dispute that the petitioner, a teacher in the Government school having been subjected to criminal charge for the offences punishable u/s 302/34 IPC had been held guilty and sentenced to life imprisonment by the trial Court in judgment dated 31.7.2002, whereafter when he was taken into custody on 1.8.2002 and remained in jail till 4.10.2002. He has also submitted that the petitioner was subsequently placed under suspension on 11.2.2003 w.e.f. 1.8.2002 on the ground of giving a false information of his being ill in the aforementioned period, i.e. 1.8.2002 to 4.10.2002 in contemplation of departmental proceeding but all of a sudden the

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petitioner was sought to be dismissed from service on the ground that he was a convicted person for offences punishable u/s 302/34 IPC, wherein, he had been sentenced to rigorous imprisonment for life as also subjected to fine of Rs. 2,000/-. According to Mr. Shukla the basis for such an order of dismissal from service of the petitioner was the Government circular dated 28.10.2003 requiring removal of convicted person from service without undergoing any departmental proceeding. It is this order of dismissal of the petitioner from service which has been assailed in this writ application on the ground that the petitioner was not given any show cause notice and yet was inflicted a major punishment without holding any departmental proceeding. Mr. Shukla, learned counsel for the petitioner in this context has placed reliance on a judgment of this Court in the case of Suryadeo Singh vs. The State of Bihar and Ors., 2011(1) PLJR 28.

3. Mr. Dubey, learned counsel for the State on the other hand would submit that when the petitioner had suppressed the information about his being convicted and taken into custody, he had been placed under suspension but then as the petitioner was also a convicted person having been sentenced to rigorous imprisonment for life there was no requirement of undergoing a departmental proceeding or even affording show cause notice before dismissing him from service. To that extent he has not only placed reliance on the Government circular dated 28.10.2003, but has also referred to two judgments of the Apex Court in the case of Viveka Nand Sethi vs Chairman, J&K Bank Ltd. & Ors. reported in 2005(3) PLJR (SC)55 and Surendra Prasad Singh Vs. The State of Bihar and Others,

4. In the considered opinion of this Court the dismissal of the petitioner from service without any show cause notice is bad and cannot be upheld by this Court. It is not in doubt that the petitioner is an employee whose service conditions are governed by Bihar Rajkiyakrita Madhyamik Vidyalaya Sewa Shart Niyamawali 1983 hereinafter referred to as the 1983 Rules under which services of a teacher governed by the aforesaid 1983 Rules can be dispensed with only in the manner prescribed therein. Under Chapter-V of the aforementioned Rule 9(1) lays down as follows:-

5. Admittedly on the date on which the impugned order came to be passed, the petitioner was to be governed by the provisions of Bihar Subordinate Civil Services (Classification, Control and Appeal) Rules which was the relevant Rule for the State Government employees as made applicable to the teachers under 1983 Rules. Under Rule 2 of the aforesaid Discipline and Appeal Rule of 1935, it has been specifically provided that the penalty of removal from service or dismissal from service could be made only after following the prescribed procedure laid down for dismissal, removal or reduction as per Rule 55 of the Civil Services (Classification) Control and Appeal) Rules and to that extent it would be relevant to quote Rule 2 of the Bihar and Orissa Subordinate Services (Discipline and Appeal) Rules, 1935 which reads as follows:-

2. The following penalties may, for good and sufficient reasons, be Imposed upon

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any member of a Subordinate Service, viz.;

(i) Censure;

(ii) Withholding of increments or promotion, including stoppage at an efficiency bar;

(iii) Reduction to a lower post or time-scale or to a lower stage in a time scale;

(iv) Recovery from pay of the whole or part of any pecuniary loss caused to Government by the negligence or breach of order;

(iv-a) Compulsory retirement;

(v) Fine;

(vi) Suspension;

(vii) Removal from the Civil Service of the crown, which does not disqualify from future employment;

(viii) Dismissal from the Civil Services of the Crown which ordinarily disqualifies from future employment:

Provided that the penalty of fine shall be imposed only on menials and inferior servant.

Explanation 1.-The discharge-

(a) of person appointed on probation, during or at the end of the period of probation, on grounds arising or at the specific conditions laid down by the appointing authority, e.g. want of vacancy, failure to acquire prescribed special qualification or to pass prescribed test.

(b) of a person appointed, otherwise, than under contract, to hold a temporary appointment, on the expiration of the period of the appointment.

(c) of a person engaged under contract in accordance with the term of his contract does not amount to removal or dismissal within the meaning of this rule.

Explanation 2.-The discharge of a probationer, whether during or at the end of the period of probation for some specific fault or on account of his un-suitability for the service amounts to removal or dismissal within the meaning of the rule.

Explanation 3.-Compulsory retirement of a Government servant in accordance with the provisions relating to his superannuation or retirement does not amount to a penalty within the meaning of this rule.

Note 1-For the procedure to be followed before an order of dismissal. removal, compulsory retirement or reduction can be passed, see Rule 55 of the Civil Services (Classification. Control and Appeal) Rules. In drawing up proceedings and conducting departmental enquiries, the instructions contained in Rules 160 to 170 of the Bihar and Orissa Board''s Miscellaneous Rules, 1939] are to be

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followed, except where more detailed instructions have been framed by the department concerned.

Note 2.-For the procedure to be followed before an order imposing the following penalties can be passed, see Rule 55-A of the Civil Services (Classification, Control and Appeal) Rules, published with notification no. 5172-A, dated the 3rd June, 1950:-

(i) Censure.

(ii) Withholding of increment or promotion, including stoppage at an efficiency bar.

(iii) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of order.

6. In view of the above, it would be also necessary to refer to Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930 which reads as follows:-

Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal, compulsory retirement [or reduction] shall be passed on a member of a service (other than an order based on facts which have led to his conviction in a criminal Court or by a Court-Martial) unless he has been informed in writing of the grounds on which It is proposed to take action and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and on any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires of if the Authority concerned so direct an oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer, conducting the inquiry may, for special and sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof.

This rule shall not apply where the person concerned has absconded or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing be waived, where there is a difficulty in observing exactly the requirement of the rule and those requirements can be waived without injustice to the person charged.

The full procedure prescribed in this rule not be followed in the case of a probationer discharged in the circumstances described in the circumstances

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described in Explanation-II to Rule 49. In such cases, it will be sufficient if the probationer is given an opportunity to show cause in writing against the discharge after being apprised of the ground on which it is proposed to discharge him and his reply duly considered before orders are passed.

7. As would be found from the perusal of aforementioned Rules that no person can be removed from Government service without holding departmental proceeding but then an exception is also provided therein, under which such departmental proceeding will not be required if the order of removal is based on conviction by criminal Court or by Court martial.

8. In nutshell the perusal of aforementioned statutory provisions would lead to an automatic and inevitable conclusion that the services of a teacher governed by 1983 Rules can be dispensed with only by holding departmental proceeding and in fact the same would be absolutely in keeping with the mandate of the proviso to Article 311 of the Constitution of India laying down as follows:-

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) 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 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 is 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.

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9. Precisely this was the question which led the State Government, to in fact reconsider its earlier executive instruction which was prevailing prior to 2003, inasmuch as, in paragraph no. 9 of the executive instructions dated 23.8.1963, it was provided that:-

Under proviso (a) to Article 311(2) of the Constitution a Government servant may be dismissed or removed or reduced in rank without being put through departmental proceedings on the ground of conduct which has led to his conviction on a criminal charge. Government desire that this proviso should be fully utilised. But an appeal being continuation of the trial, action under this proviso should not be taken until- (1) the criminal appeal has been disposed of, or (2) the time limit for filing an appeal has expired.

10. Such provision made in the year 1963 by an executive instruction, it was required to be reconsidered in view of the amendment made by 42nd Amendment in the Constitution, of India dispensing the requirement of second show cause notice and consequently the State Government by an executive instruction dated 28.10.2003 had substituted the aforementioned Clause 9 of the circular dated 23.8.1963 by making following provisions:-

But an appeal being continuation of the trial, action under this proviso should not be taken until-(1) the criminal appeal has been disposed of, or (2) the time limit for filing an appeal has expired.

(9) Under proviso (a) to Article 311(2) of the Constitution a Government servant may be dismissed or removed or reduced in rank without being put through departmental proceedings on the ground of conduct which has led to his conviction on a criminal charge. Government desire that this proviso should be fully utilised. But an appeal being continuation of the trial, action under this proviso should not be taken until-(1) the criminal appeal has been disposed of, or (2) the time limit for filing an appeal has expired.

(9) Under proviso (a) to Article 311(2) of the Constitution a Government servant may be dismissed or removed or reduced in rank without being put through departmental proceedings on the ground of conduct which has led to his conviction on a criminal charge. Government desire that this proviso should be fully utilised.

11. A question therefore, would arise as to whether in view of Article 311(2) or in terms of Service Rules as applicable in the cases of Government servant in the State of Bihar, including teachers in Government School, an employee who is convicted on a criminal charge can be removed from service even without issuance of a show cause notice? Let it be made clear, that there is no dispute on the issue that no departmental proceeding would be required to be conducted in a case where the person is sought to be removed on the ground of being convicted on a criminal charge but can such a convicted employee be removed by way of dismissal from service even without giving a notice is the only base of contention. It was this aspect which was gone into by this Court in the light of

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the provisions made in the service Rules in the case of Suryadeo Singh vs. The State of Bihar and Ors., 2011(1) PLJR 28. wherein, it was held as follows:-

14. The next question would be as to whether the order of removal from service of the petitioner on the ground that they had been convicted in criminal cases can be passed against them without giving any notice and/or opportunity of hearing. It is quite elementary and in fact also well settled that any order visiting the persons with civil and evil consequences must be preceded by strict observance of the principle of natural justice. This has been the consistent view of the Apex Court and this Court, and reference in this connection may be made to the judgment of the Supreme Court in the case of S.L. Kapoor Vs. Jagmohan and Others, where the subject with regard to the compliance of the principle of natural justice has been dealt with quite exhaustively with a conclusion that compliance of principle of natural justice is an integral part of rendering justice and ante-thesis of arbitrariness in any form, an avowed object and guiding principle of Article 14 of the Constitution of India.

12. This Court further considering the scope of Bihar Government Servants (Classification, Control and Appeal) Rules 2005 which came by way of substituting the earlier 1935 Rules had held that there would be a requirement of issuing a show cause notice and in this regard it was held as follows:-

23. The second limb of submission of the learned Government Advocate that in case the second proviso of giving an opportunity for making representation on the proposed penalty is read as "shall" and not "may" by treating it to be a mandatory, would thus be in the teeth of the provisions made in Article 311(2) of the Constitution of India is equally unsustainable. There infact appears to be no conflict between second proviso to Article 311(2) and first proviso to Rule 20 and in fact both can very well co-exist. Article 311(2) in fact stops after making a provision that in certain cases including conviction of a Government servant holding of departmental enquiry by framing of charge and giving an opportunity of hearing to the delinquent before inflicting punishment would not be necessary. Article 311(2) in fact does not lay down that when an order of punishment is to be passed against the Government servant for inflicting a penalty of dismissal, removal or reduction in rank on the ground of his being convicted on a criminal charge, it would also not require the Government servant to be informed of the proposed penalty and giving an opportunity to make representation against the proposed penalty. To that extent, the provisions made in first proviso to Rule 20 is only supplemental in nature and does not seek to supplant the provisions in Article 311 (2) of the Constitution of India. The submission of the learned Government Advocate that the expression "may" used in the English translation in the second proviso should mean that the provision is directory and can also be not expected for any ground, namely, such second proviso in clause 20 seeks to make the provision for compliance of the principle of natural justice in cases where the order of punishment is sought to be passed against a Government servant who has been convicted on a criminal charge. By now, it is well settled

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that the exclusion of the principle of natural justice has to be specifically provided in the Statute or else such provisions of natural justice will have to be read into it. Reference in this connection may be made not only to the aforementioned case of S.L. Kapoor (supra) wherein it has been held that:-

In our view the principles of natural justice know of no exclusively rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced.

Again in the case of Rash Lal Yadav vs. State of Bihar reported in 1994(2) P.L.J.R. (SC)76 it had been held as:-

What emerges from the above discussion is that unless the law expressly or by necessary implication excludes the application of the rule of natural justice, courts will read the said requirement in enactments that are silent and insist on its application even in cases of administrative action having civil consequences.

This view in fact gets a further support from the judgment of Apex Court in the case of Basudeo Tiwari vs. Sido Kanhu University reported in 1999(1) PLJR (SC)30:-

The law is settled that non-arbitrariness is an essential facet of Article 14 pervading the entire realm of State action governed by Article 14. It has come to be established, as a further corollary, that the audi alteram partem facet of natural justice is also a requirement of Article 14, for natural justice is the antithesis of arbitrariness. In the sphere of public employment, it is well settled that any action taken by the employer against an employee must be fair, just and reasonable which are the components of fair treatment. The conferment of absolute power to terminate the services of an employee is an antithesis of fair, just and reasonable treatment. This aspect was exhaustively considered by a Constitution Bench of this Court in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others,

In order to impose procedural safeguards, this Court has read the requirement of natural justice in many situations when the statute is silent on this point. The approach of this Court in this regard is that omission to impose the hearing requirement in the State under which the impugned action is being taken does not exclude hearing--it may be implied from the nature of the power--particularly when the right of a party is affected adversely. The justification for reading such a requirement is that the court merely supplies omission of the legislature [vide Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, and except in case of direct legislative negation Or implied exclusion [vide Juwarsingh and Others Vs. State of Madhya Pradesh, : S.L. Kapoor Vs. Jagmohan and Others,

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In the light of these principles of law, we have to examine the scope of the provision of Section 35(3) which reads as follows:

35(3) Any appointment or promotion made contrary to the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorised manner shall be terminated at any time without notice.

The said provision provides that an appointment could be terminated at any time without notice if the same had been made contrary to the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorised manner. The condition precedent for exercise of this power is that an appointment had been made contrary to the Act, rules, statutes and regulations or otherwise. In order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, statutes, rules or regulations, etc., a finding has to be recorded and unless such a finding is recorded, the termination cannot be made, but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was contrary to the provisions of the Act etc. If in a given case such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a finding necessarily enquiry will have to be held and in holding such an enquiry,- the person whose appointment is under enquiry will have to be issued a notice. If notice is not given to him, then it is tike playing Hamlet without the Prince of Denmark that is, if the employee concerned whose rights are affected is not given notice of such a proceeding and a conclusion is drawn in his absence, such a conclusion would not be just, fair or reasonable as noticed by this Court in D.T.C. Mazdoor Sabha case (supra). In such an event we have to hold that in the provision, there is an implied requirement of hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to the Act, statute, rule or regulation etc. and it is only on such a conclusion being drawn, the services of the person could be terminated without further notice. That is how Section 35(3) in this case will have to be read.

24. In the aforementioned context, when this Court examines the purport of the Rule 20 which supports that a non-obstante clause and comments with a proviso laying down giving an opportunity to the Government servant an opportunity of making representation against the proposed penalty on the ground of his being convicted on a criminal charge by itself goes to show that the principle of natural justice was sought to be followed and not to be excluded. Thus, this Court has no hesitation in rejecting the said statement of the learned Government Advocate. The learned Government Advocate submits that in the case of inflicting punishment against the Government servant on the ground of his being convicted on a criminal charge-, no notice is required to be given.

25. As a matter of fact, such notice to a Government servant sought to be inflicted penalty on the ground of being convicted on a criminal charge would serve a sanguine purpose inasmuch as first of all he will be in a position to say as to whether he is the person who has been convicted or not and consequently he would be still in a position to pursue that though he is convicted, the charge

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against him in the criminal case was not such which can have straightaway led to drawing adverse inference against his conduct of his being Government servant. This Court may elucidate this aspect that a person about whom the Government or the appointing authority comes to know from any source that he has been convicted and, therefore, had proceeds to inflict an order of punishment, even if he is not the person and some other person by the same name was convicted in the criminal case would at least give that government servant an opportunity to say actually such order of conviction was never passed against him and that he was never subjected to any criminal trial. Yet again, that government servant against whom such penalty is sought to be inflicted will be in a position to say that such charge was actually not in any way such a misconduct even as per the Rules which require inflicting of a punishment. For example, a Government servant driving a car parks it in a non-parking zone and is convicted by imposing a fine. Now, if that Government servant is not to be given an opportunity by way of notice and/or making representation against the proposed penalty, he would be actually punished even for such a charge which does not amount to misconduct as per the Conduct Rules. There may be any number of examples and specially when the principle of natural justice does not loose their application on the ground that hearing would make no difference. Judged from this angle, this Court is of the view that it would realty serve the ends of justice if a convicted Government servant is at least afforded an opportunity by way of notice to submit his explanation as with regard to the factum and the nature of his conviction on a criminal charge which in fact is also sought to be achieved by the expressed provisions made in second proviso to rule 20 of the Rules.

26. The reliance placed by the learned Government Advocate in the case of Tutsi Ram (supra) will have no application on the facts of this case because that case was basically arising out of a situation which is contemplating under Rule 20(ii) of the Rules inasmuch as in those cases the Government had come to a specific finding while inflicting punishment against those remaining members of the force, who had participated in a riot without holding of departmental proceeding by way of a regular enquiry against them was not possible, The case of Tulsi Ram is not an authority relating to inflicting of punishment on a Government servant convicted on a criminal charge.

27. The last submission of the Counsel for the petitioners also merits consideration for a simple reason that in the present case itself, there are two types of conviction and sentence. The petitioner in the first case has been convicted for an offence u/s 307 of the Indian Penal Code and sentence to undergo rigorous imprisonment for a period of five years whereas in the second case the petitioner Vikash Kumar Sharma has been convicted u/s 325 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for a period of one year with a further fine of Rs. 500/-. In the second case, it is the defence of the petitioner Vikash Kumar Sharma that on the day of holi festival in the spur of moment some scuffle among the family members which led to the occurrence. Obviously, in the second case, the conduct of the petitioner Vikash

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Kumar Sharma cannot be as grave as that of the petitioner in the first case where allegation against him is substantiated in course of trial leading to his-conviction was for a period for causing attempt to murder. True it is that the quantum of the punishment cannot be made the subject matter of a judicial review under Article 226 of the Constitution of India as held in the case of B.C. Chaturvedi Vs. Union of India and others, but if the punishment is disproportionate, the writ court can definitely ask the disciplinary authority to reconsider its decision. In the second case, on the facts read in the light of the judgment of the conviction it cannot be said that only penalty of removal was adequate. The petitioner Vikash Kumar Sharma in fact could Have been given even a lesser punishment if he had been given an opportunity to explain himself. This Court, however, would not express any opinion on the quantum of the punishment as it has found the order of punishment itself to be bad on the ground of violation of the principles of natural justice.

28. This Court cannot lose sight of the fact that both the petitioners are teachers and must have the highest regard for law and must possess the moral character of the highest character. This Court again would not like to lay down the law that conviction in cases arising out of serious charge under Sections 302, 307 and other allied sections of the Indian Penal Code may not involve the element of moral turpitude.

29. It, however, would require an application of mind by the disciplinary authority in each case as to what was the charge in the criminal case and whether on account of bringing of such charge in the criminal case leading to conviction where the Government servant has rendered himself unfit to continue in Government service br become entitle to be given certain punishment lesser than removal or dismissal from service, this much has to be looked into by the disciplinary authority and was held in the case of Union of India (UOI) Vs. Parma Nanda, wherein the Apex Court has held as follows:-

29. We may, however, carve out one exception to this proposition. There may be cases where the penalty is imposed under clause (a) of the second proviso to Article 311(2) of the Constitution. Where the person, without enquiry is dismissed, removed or reduced in rank solely on the basis of conviction by a criminal court, the Tribunal may examine the adequacy of the penalty imposed in the light of the conviction and sentence inflicted on the person. If the penalty impugned is apparently unreasonable or uncalled for, having regard to the nature of the criminal charge, the tribunal may step in to render substantial justice. The Tribunal may remit the matter to the competent authority for reconsideration or by itself substitute one of the penalties provided under clause (a). This power has been conceded to the court in Union of India and Another Vs. Tulsiram Patel and Others,

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

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so, what the penalty should be... 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. A Government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was to severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the Government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in the departmental remedies and still wants to pursue the matter, he can invoke the court''s power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular Government service the court will also strike down the impugned order. Thus, in Shankar Dass Vs. Union of India (UOI) and Another, this court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the court should always order reinstatement. The court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case.

13. As would be apparent, this Court in the case of Suryadeo Singh (supra) therefore, had taken note of not only the relevant service Rules but also the law laid down by the Apex Court with regard to the mandatory requirement of observance of the principles of natural justice in letter and spirit, in all cases except where the same has been excluded by specific provisions of law. As noted above, there is nothing in the 1983 Rules and/or other Rules which prohibits issuance of a show cause notice in case of a teacher, convicted and sentenced on criminal charge. This Court, therefore, would find that the fact of the present case is squarely covered by the ratio laid down in the case of Surya Deo Singh (supra).

14. It would be, however, necessary to take into notice the submissions made by the learned counsel for the State as with regard to the suppression of the fact by the petitioner of his being taken into judicial custody and his filing an application seeking leave on medical ground though he was in the relevant period under judicial custody after being convicted by the trial Court. Such submission of the learned counsel for the State, therefore, would go to show that the petitioner was sought to be nroceeded departmentally on a charge of thisconduct for giving false information and therefore, he was initially placed under suspension In contemplation of the departmental proceeding by an order dated 11.2.2003, as would be also apparent from the reading of the order of suspension of the

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petitioner dated 11.2.2003 reading as follows:-

and the wordings of the impunged order of dismissal of the petitioner dated 2nd December, 2004 reading as follows:-

15. Thus If the petitioner was subjected to an additional charge of giving false information regarding his aliment, though he was actually under judicial custody, he could not have been removed from service merely on the ground of his being convicted in a criminal charge. This aspect of the matter in fact would require serious consideration inasmuch as if the competent authority had found the petitioner guilty for certain misconduct that could not have been covered up by taking a plea of the petitioner being a convicted person. The petitioner''s suspension having been continued from 11.2.2003, only on the ground of a contemplated departmental proceeding for committing a misconduct of giving false information could not have been altogether given up because the Government or competent authority was always aware that the petitioner was a convicted person and had already been sentenced to rigorous, imprisonment for life.

16. It is this aspect of the matter which would have at least required issuance of a show cause notice to explain the nature of conviction in view of the criminal charge. This Court does not intend to lay down that the disciplinary authority will have also the power of going into the merits of judgment of conviction passed by the competent court but then as the conviction may extend from mere fine to rigorous imprisonment for life, the nature of allegation being the subject matter of criminal charge will have to be examined by the disciplinary authority so as to hold the convicted Government servant liable to be inflicted with suitable punishment. This Court would not like to repeat what was said in the case of Suryadeo Singh (supra) but then the question would definitely remain that if a person was convicted on a criminal charge and was imposed a fine of Rs. 100/-, can he be also dismissed from service only because he had also been convicted by the Criminal Court. It is this aspect of the matter which can be safely eliminated by exercise of caution if the person convicted is given a notice by way of an opportunity to explain the nature of allegation and conviction in criminal case.

17. The reliance placed by learned counsel for the State on the judgment of the Apex Court in the case of Viveka Nand Sethi vs. The Chairman, J&K Bank Ltd.& Ore., reported in 2005(3) PLJR (SC)55 can have no exception in law, inasmuch as, it is well settled that the principle of natural justice cannot be applied in a straightjacket formula. The facts, however, of each case would have to be gone into before deciding the element of exclusion of the principles of natural justice. In the aforesaid case of Vivekanand Sethi (supra) the issue was with regard to interpretation of bipartite settlement and the workman who was working on the post of cashier-cum-clerk having been subjected to disciplinary proceeding for disobedience of the order of transfer had been held to be bound by Clause-2 of bipartite settlement laying down voluntary cessation of the employment by the

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employee. It was in that background the Apex Court had held as follows:-

19. We cannot accept the sub-mission of Mr. Mathur that only because on a later date an application for grant of medical leave was filed, the same ipso facto would put an embargo on the exercise of the jurisdiction of the Bank from invoking clause (2) of the bipartite settlement.

20. It may be true that in a case of this nature, the principles of natural justice were required to be complled with but the same would not mean that a full-fledged departmental proceeding was required to be initiated. A limited enquiry as to whether the employee concerned had sufficient explanation for not reporting to duties after the period of leave had expired or failure on his part on being asked so to do, in our considered view, amounts to sufficient compliance of the requirements of the principles of natural justice.

18. The aforesaid passage of the judgment cited by the learned counsel for the State in support of his contention would far from helping him in fact would go against him, inasmuch as though a regular departmental proceeding would not be required against a convicted employee but then a show cause notice on the issue as to whether he was convicted by Court of Law and whether such conviction could lead to his dismissal from service, would definitely be required to be issued. In fact this view was also taken in the judgment of this Court in the case of Surya Deo Singh (supra), in which it has been laid down that there would be no requirement of holding a regular departmental proceeding but still issuance of a show cause notice to a convicted employee was mandatory before his being inflicted the punishment of dismissal from service.

19. The second judgment cited by the learned counsel for the State in the case of Surendra Prasad Singh Vs. The State of Bihar and Others, is also of no avail. Noticing from the facts of this case, it would be clear that the writ petitioner Surendra Prasad Singh was reverted from the post of Assistant Sub-Inspector to the post of constable on the ground that he had not passed the Physical Training Course (P.T.C.) examination and yet was claiming his seniority on the basis of Offtciation on the post of ASI for his regular promotion on the post of ASI. It was in this background that this Court had held as follows:-

16. No doubt, the order of reversion has been passed without giving an opportunity of hearing to the appellant but the fact remains that he was promoted temporarily on the post of ASI for a limited period up to 28.2.1981. Thereafter he continued on the said post contrary to the rules. No post was in existence. Any administrative order affecting the rights of the citizens is to be passed consistent with the requirement of principles of natural justice and opportunity to show cause before passing an adverse order affecting the citizen is a check and balance concept so that a right of person is not taken away without giving an opportunity to state his version. However, when the facts are admitted or no plausible explanation or defence is available, then the principle of natural justice is not to be insisted upon by treating as a ritual which has to be

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performed irrespective of the fact that insistence for observance of the principles of natural justice would be only an empty formality or wastage of time.

17. In the present appeal, the admitted facts are that the appellant was promoted as ASI purely on ad hoc ba- '' sis for a limited period. He was not eligible for promotion to the said post, as such his ad hoc promotion was de hors the rules. He has not been able to show even before this Court that his order for offtciation on the said post was made by following the procedure for promotion. In view of these admitted facts quashing the order of reversion only on the ground that the same was passed without giving an opportunity of hearing, in our view will amount to only an empty formality. Thus, the learned Single Judge was not justified in quashing the order of reversion on the ground of violation of principles of natural justice and directing the authorities to consider the case in the same manner as was done in the case of Sabir Ahmad Khan. It will be open for the State Government to reconsider the matter regarding promotions given to Sabir Ahmad Khan on the post of ASI and Sub-Inspector of Police in accordance with law. As the matter is not before us, we are not expressing any opinion with regard to his case.

20. The aforesaid view taken by the Division Bench of this court as with regard to the consequences of reversion being imminent on account of nonfulfillment of the prescribed qualification of passing the P.T.C. examination and the officiating promotion being not justified can have no exception in law but then the question would be where is the provision that a person convicted on a criminal charge has to be only subjected to the order of removal from service A convicted employee on a criminal charge can be given even also a lesser punishment by the Government depending on the gravity of criminal charge and therefore, the consequences of conviction and sentence in the case of a Government servant by way of removal or dismissal from service is not automatic but would be dependent on the nature of criminal charge and the quantum of punishment inflicted on such a person by the Court.

21. True it is that the petitioner has been inflicted with most severe punishment (but for death sentence) by the Court on a criminal charge but then he has to be still given a show cause notice to explain himself. May be that the Authorities may reach to the same conclusion that a person like the petitioner being retained in the Government service after being convicted and sentence for life imprisonment on a criminal charge was impermissible or that the nature of charge against him was sufficient to remove him from Government service but such conclusion cannot be arrived at even without giving him a notice and/or affording opportunity of hearing to him.

22. The submission of learned counsel for the State that if there can be no two views in the tight of the admitted fact, the Rules of natural justice is not be followed at all, was also examined and decided by the Constitution Bench of the Apex Court the case of Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, wherein, it was held as follows;-

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47. The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well-recognized understanding of the real Import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses on for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities. [Kadish, "Methodology and Criteria in Due Process Adjudication-A Survey and Criticism", (1957)66 Yale LJ 319, 340] The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individual or groups, against whom decisions taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons [Goldberg vs. Kelly, (1970) 397 US 254, 264-65 (right of the poor to participate in public processes)].

Whatever its outcome, such a hearing represents a valued human Interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction or receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to Interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one. Justice Frankfurter captured part of this sense of procedural justice when he wrote that the "validity and moral authority or a conclusion largely depend on the mode by which it was reached...No better Instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular Government, that justice has beer done" [Joint Anti-fascist Refugee Committee vs. McGrath, (1950) 341 US 123, 171-172]. At stake here is not just the much-acclaimed appearance of justice but, from a perspective that treats process as intrinsically significant, the very essence of justice" [See "American Constitutional Law" by Laurence H. Tribe, Professor of Law, Harvard University (Ed. 1978 page 503)].

The instrumental facet of the right of hearing consists in the means which it affords of assuring that the public rules of conduct, which result in benefits and prejudices alike, are in fact accurately and consistently followed.

"It ensures that a challenged action accurately reflects that substantive rules applicable to such action; its point is less to assure participation than to use to assure accuracy". [See Laurence H. Tribe, page 503].

48. Any discussion of this topic would be incomplete without reference to an

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important decision of this Court in S.L. Kapoor Vs. Jagmohan and Others, S.L. Kapoor Vs. Jagmohan and Others, In that case, the supersession of the New Delhi Municipal Committee was challenged on the ground that it was in violation of the principles of natural justice since, no show cause notice was issued before the order of supersession was passed. Linked with that question was the question whether the failure to observe the principles of natural justice matters at all, if such observance would have made no difference, the admitted or indisputable facts speaking for themselves. After referring to the decisions in Ridge vs. Baldwin, 1964 AC 40 at p. 68; John vs. Rees, (1970)1 Ch 345 at p. 402; Annamunthodo vs. Oilfield Workers'' Trade Union, (1961)3 All ER 621 at P. 625(HL); Margarita Fuentes ot al vs. Robert L Shevln, (1972)32 Law ED 2d 556 at p. 574; Chintapalli Agency Taluk Arrack Sales Cooperative Society Ltd. and Others Vs. Secretary (Food and Agriculture) Government of Andhra Pradesh and Others, Chintapalli Agency Taluk Arrack Sales Cooperative Society Ltd. and Others Vs. Secretary (Food and Agriculture) Government of Andhra Pradesh and Others, and to an interesting discussion of the subject in Jackson''s Natural Justice (1980 Edn.), the Court, speaking through one of us, Chinnappa Reddy, J. said:-

"In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It III comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

These observations sum up the true legal position regarding the purport and Implications of the right of hearing.

49. The jurisprudence requiring hearing to be given to those who have encroached on pavements and other public properties evoked a sharp response from the respondents'' counsel. "Hearing to be given to trespassers who have encroached on public properties. To persons who commit crimes", they seemed to ask in wonderment. There is no doubt that the petitioners are using pavements and other public properties for an unauthorized purpose. But, their intention or object in doing so is not to "commit an offence or intimidate, insult or annoy any person", which is the gist of the offence of ''Criminal trespass'' u/s 441 of the Penal Code. They manage to find a habitat In places which are mostly filthy or marshy, out of sheer helplessness. It is not as If they have a free choice to exercise as to whether to commit an encroachment and If so, where. The encroachments committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice. Trespass Is a tort. But, even the Law of Torts requires that though a trespasser may be evicted forcibly, the force used must be no greater than what is reasonable and appropriate to the occasion and, what is even more important. The trespasser should be asked and given a reasonable opportunity to depart

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before fore is used to expel him." [See Ramaswamy Iyer''s law of torts'' 7th Edn. by Justice and Mrs. S.K. Desai, (Page 98, para 41)]. Besides, under the Law of Torts, necessity is a plausible defence, which enables a person to escape liability on the ground that the acts complained of are necessary to prevent greater damage, inter alia, to himself. "Here, as elsewhere in the Law of Torts, a balance has to be struck between competing sets of values..."[See Salmond and Houston, "Law of Torts'', 18th Edn. (Chapter 21, page 463, Article 185-''Necessity'')].

23. In that view of the matter, this Court would find no force in the submission of learned counsel for the State that merely because the petitioner was a convicted person, he had not to be given any notice before being dismissed from service.

24. Thus the outcome of the aforementioned discussion would be that that impugned order dismissing the petitioner from service without following the principles of natural justice has to be held to be bad and consequently the impugned order as contained in Annexure-3 is hereby quashed. The matter is remitted back to the Director of Secondary Education, who shall now issue show cause notice to the petitioner and pass necessary order. Any financial entitlement to the petitioner would depend strictly on the outcome of the fresh exercise to be undergone and completed by the Director of Secondary Education within a period of six months. With the aforementioned observations and direction, this application is disposed of.

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