57

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

....

OA No.2253/1999
MA No.1393/2000

New Delhi, this the 2nd day of ~~December~~ January, 2004.

**HON'BLE SHRI JUSTICE V.S.AGGARWAL, CHAIRMAN**
**HON'BLE SHRI S.A. SINGH, MEMBER (A)**

1. Shri Govind Singh
S/o Sh. Bachi Singh,
R/o H.No. 200, Pocket 2,
200/II, Janata Flats,
Paschimpuri, New Delhi.

2. B.Murali Krishnan,
S/o late Sh. S.B. Raju,
R/o RZ/D-3, Nanda Block,
Mahavir Enclave,
New Delhi - 110 045.
(Both are employed as Security Assistants
in Intelligence Bureau, Min. of Home Affairs
Government of India, North Block, New Delhi)

...Applicants

**(By Advocate: Shri B.B.Raval)**

Versus

1. Union of India through
The Secretary,
Ministry of Home Affairs,
Government of India, North Block,
New Delhi- 110 001.

2. The Director,
Intelligence Bureau,
Ministry of Home Affairs,
Government of India,
North Block, New Delhi - 110 001.

3. The Secretary,
Ministry of External Affairs,
Government of India,
South Block, New Delhi-110 001. ...Respondents

**(By Advocates: Shri R.V.Sinha and Shri R.N.Singh)**

O R D E R

**JUSTICE V.S. AGGARWAL:-**

Applicants (Gobind Singh and B.Murali Krishnan)

VS Ag

58

had been appointed as Security Guards in the Ministry of External Affairs on deputation basis. They were directed to report to the Ministry of External Affairs on 1.9.1998. Both the applicants vide the order of 6.11.1998 were transferred as Security Guards to the High Commission of India at Islamabad. They joined their duties. By virtue of the present application, they seek quashing of the orders whereby they had been dismissed from service in pursuance of the order passed under Article 311(2)(c) of the Constitution with consequential benefits and re-instatement, arrears and promotion etc.

2. Applicants contend that on 17.7.1999, they were on night duty at the residence of the High Commissioner of India as well as at the office of the High Commission of India. They had gone to Apara market to purchase goods and various articles for the Mess of which applicant no. 1 was incharge for the month. As a matter of practice, he is to be accompanied by another person. Applicant no. 2 had accompanied him. At the market, the applicants met Pakistani Police officials who were doing their duties outside the High Commission. Therefore, they knew each other. The applicants were taken to Lake View Hotel and were framed into an incident of raping a Pakistani girl. The Pakistani police took pictures of both of them under duress and were man-handled. They were made to write certain false statements and were threatened that their pictures would

59

be sent to High Commission of India and their families unless they agree to do their bidding. After that the applicants were let off. They took leave. The leave of Applicant no.2 was sanctioned, but in the case of Applicant No. 1, it was refused on account of shortage of staff. The applicants contend that thereafter they were sent back to India. They were even interrogated. Vide the impugned order, it is asserted that by invoking Article 311(2)(c) of the Constitution, they had been dismissed. According to the applicants, the said order is illegal on various counts, which we shall deal with hereinafter.

3. Misc. Application No.1393/2000 has even been filed by the applicants seeking that respondents should produce all the relevant records which they submitted before the Committee of Secretaries to process the dismissal of the applicants because they had not claimed any privilege against the production of this record so far. The said application had been contested accompanied by an affidavit of the Secretary to the Government of India, Ministry of Home Affairs. In the said affidavit, it has been pointed that he is in control and incharge of the records. The record cannot be disclosed without serious damage to the public interest and violation of the mandatory provisions of the Constitution. The disclosure of the material would seriously invade the secrecy enjoined on the proceedings of the Cabinet. Therefore, privilege was claimed for

60

production of the same pertaining to the following articles:-

"(i) The records and files containing the information on the basis of which the President of India was satisfied for the purpose of exercising his powers under proviso (c) to clause (2) of Article 311 of the Constitution of India.

(ii) The records and files containing the narration or description of activities of S/Shri Govind Singh and B. Muralikrishnan which led to their dismissal from service in exercise of powers under Article 311 (2)(c) of the Constitution of India.

(iii) The records and files containing the details of misconduct of S/Shri Govind Singh and B. Muralikrishnan leading to their dismissal as covered in CCS (Conduct) Rules, 1965, in so far as the same relates to dismissal under Article 311(2)(c) of the Constitution of India.

(iv) Records and files containing the deliberations, recommendations and findings of the Committee of Advisers (as envisaged in O.M. dated 26th July, 1980) advising the President to exercise powers under Article 311(2)(c) of the Constitution of India."

4. We have heard the parties' learned counsel and seen the relevant records.

5. Sections 123 and 124 are in the nature of exceptions to the general rule of admissibility under the Evidence Act. The same read as under:-

"S. 123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

"S. 124. No public officer shall be compelled to disclose communications made to him

US Ag

61

in official confidence, when he considers that the public interests would suffer by the disclosure."

6. The privilege with respect to these documents is based on the broad principles of State policy and public convenience. It makes a departure from ordinary rules of evidence as referred to above. However, the justification for exercise of the claim of the privilege can be in public interest when public interest served by the disclosure clearly outweighs that served by the non-disclosure of the documents in question. When such conflict arises between the public interest and private interest, the latter must yield to the former.

7. The learned counsel for the applicants had drawn our attention in this regard, besides other facts, to Article 74 of the Constitution to contend that question whether any, and if so what, advice was tendered by the Ministers to the President cannot be enquired into by any court. Article 74(2) of the Constitution, which was referred to, reads:

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

On the strength of the same, it was urged that the only privilege can be claimed is what advice was tendered by the Ministers to the President.

8. On careful consideration of the submissions which had been eloquently put forward before us by the

62

learned counsel, we find that the argument in the facts of the present case, cannot be accepted. In the well-known decision rendered in the case of **Samsher Singh v. State of Punjab**, AIR 1974 S.C. 2192, the Supreme Court considered the Parliamentary system of Government which we have inherited from the British Model. In paragraphs 27 and 28 of the said judgement, the Supreme Court held:

> "27. Our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model for the Union and the States. Under this system the President is the Constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Article 103 is an exception to the aid and advice of the Council of Ministers because it specifically provides that the President acts only according to the opinion of the Election Commission. This is when any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102.
>
> 28. Under the Cabinet system of Government as embodied in our Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion."

9. In other words, it was categorically held that under the Cabinet system of Government as embodied in the Constitution, the President is a formal head and he exercises functions on the aid and advice of the council of Ministers except where the Constitution requires to exercise the functions in his own discretion.

63

10. At this stage, we deem it unnecessary to mention that the scope of Article 74 of the Constitution is totally different from the scope of Sections 123 and 124 of the Evidence Act. So far as Articles 74 of the Constitution is concerned, it puts an embargo on the court not to inquire into as to what advice was tendered by the Ministers to the President. This pertained to confidentiality of such a decision pertaining to the advice. However, sections 123/124 deal with altogether a different controversy where privilege is provided pertaining to certain files or unpublished official record relating to affairs of the State. The permission can only be granted for production of the same by the Head of the Department concerned. Therefore, to connect the scope of Article 74 of the Constitution with Sections 123/124 of the Evidence Act will not be proper.

11. In the case of **State of Uttar Pradesh v. Raj Narain and others**, AIR 1975 S.C. 865, the Supreme Court held that the privilege contemplated under Sections 123/124 of the Evidence Act can be waived, but where the fact is excluded by evidence and public policy, there is no power to waive in the parties. The Supreme Court had provided the ratio decidendi in paragraph 41, which we reproduce for the sake of convenience:-

> "41. The several decisions to which reference has already been made establish that the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if

> disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection. (See 1973 AC 388 (supra) at p. 40). To illustrate, the class of documents would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security of the State and high level inter-departmental minutes. In the ultimate analysis the contents of the document are so described that it could be seen at once that in the public interest the documents are to be withheld. (See Merricks v. Nott Bower, (1964) 1 All ER 717)."

The same question again had drawn the attention of the Apex Court in the Constitution Bench decision rendered in the matter of **S.P.Gupta & Ors. vs.President of India & Ors.**, AIR 1982 SC 149. Since the basic question was pertaining to the appointment of Judges to the different High Courts but the question as to when privilege could be claimed pertaining to unpublished official record had also come up before the Supreme Court, the said Court in paragraph 60 of the judgement while dealing with Article 74 of the Constitution concluded that the material on which the advice tendered by the Concil of Ministers is based cannot be said to be a part of the advice and the correspondence exchanged between the Law Minister, Chief Justice of India, and the Chief Justice of Delhi High

(65)

Court which constituted the material forming the basis of the decision of the Cental Government must be said to be outside the scope of clause (2) of Article 74 of the Constitution. Thereafter the Supreme Court did express themselves about the concept of an open Government and the right to know and held:-

> "This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest. It is in the context of this background that we must proceed to interpret S. 123 of the Indian Evidence Act."

The Supreme Court held thereafter that where non-appointment of an additional Judge for a further term or transfer of a High Court Judge is challenged, the disclosure of the correspondence exchanged between the Law Minister, Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notings made by them could not at all be said to be injurious to the public interest.

12. From the aforesaid, it is clear that unpublished official records which the applicants wanted to be produced regarding which privilege is being

US Ag

66

claimed pertaining to the same controversy as we have referred to above, the Head of the department, namely, the then Home Secretary had claimed privilege in this regard. As would be noticed hereinafter, the same pertained to certain documents which are kept away from the public gaze in public interest. When such is the situation, the respondents indeed could claim privilege though the files were made available to the Bench for perusal.

13. As already pointed above in the case of S.P. Gupta (Supra), the following classes of documents were taken to be protected from disclosure:-

> "(i) Cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and dispatches from ambassadors abroad.
>
> (ii) Papers brought into existence for the purpose of preparing a submission to cabinet.
>
> (iii) Documents which relate to the framing of the Government policy at a high level.
>
> (iv) Notes and minutes made by the respective officers on the relevant files, information expressed or reports made and gist of official decisions reached.
>
> (v) Documents concerned with policy-making within departments including minutes and the like by junior officials and correspondence with outside bodies."

It included documents which relate to framing of the Government policy and the documents relating to the notes recorded by the respective officers on the

67

relevant files and papers brought into existence for preparing the Cabinet Notes etc. In the present case before us, documents do pertain to the information relating to the narration and description of activities of the applicants, their misconduct and also the record containing the deliberations, recommendations and findings of the Committee. Keeping in view the nature of the acts purported to have been committed by the applicants, their disclosures certainly would not be in public interest and the privilege has rightly been claimed. Consequently the Misc.Application No.1393/2000 must fail.

14. Reverting back to the merits of the matter, we know from Article 311 (2)(c) of the Constitution that there are three exceptions to the general rule. Under general rule as enshrined in clause (1) of Article 311, no person who is a member of a Civil Service can be dismissed or removed by an authority subordinate to that by which he was appointed and clause (2) further provides that such dismissal, removal and reduction in rank was only to be effected after an enquiry in which the concerned person is informed of the charges against him and given a reasonable opportunity of being heard. However, under Article 311 (2)(c) where the President or Governor as the case may be is satisfied that in the interest of the security of the State, it is not expedient to hold an enquiry then such enquiry could not be held. The enquiry in this process is dispensed with.

(68)

To contend that in this process, the rules of natural justice are being violated would not be appropriate. This question has already been decided by the Supreme Court in the case of **Union of India & Anr.** vs. **Tulsi Ram Patel**, (1985) 3 SCC 398 wherein the Supreme Court concluded in paragraph 70 as under:

> "70. The position which emerges from the above discussion is that the keywords of the second proviso govern each and every clause of that proviso and leave no scope for any kind of opportunity to be given to a government servant. The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of constitutional prohibitory injunction restraining the disciplinary authority from holding an inquiry under Article 311 (2) or from giving any kind of opportunity to the concerned government servant. There is thus no scope for introducing into the second proviso some kind of inquiry or opportunity by a process of inference or implication. the maxim "expressum faceit cessare tacitum" ("when there is express mention of certain things, then anything not mentioned is excluded") applies to the case."

15. Reverting back to the impugned order whereby Article 311(2)(c) had been invoked, we know from the decision in the case of **Satyavir Singh and Ors. vs. Union of India & Ors.**, 1985(4) SCC 252, that the language used in Article 311(2) is plain and unambiguous. The key words in the second proviso are "this clause shall not apply." There is no unambiguity in these words and, therefore, three conditions that were prescribed to that proviso to clause (2)) of Article 311 has no role to play. This has been retained as a matter of public policy and for public good. The Supreme Court noted this in the case of Satyavir Singh

69

(Supra) in the following words:

> "The second proviso to Article 311(2) has been in the Constitution of India since the time the Constitution was originally enacted. It was not blindly or slavishly copied from Section 240(3) of the Govt. of India Act, 1935. There was a considerable debate on this proviso in the Constituent Assembly as shown by the Official Report of the Constituent Assembly Debates, Vol. IX, pages 1099 to 1116. The majority of the members of the Constituent Assembly had fought for freedom and had suffered imprisonment in the cause of liberty and were, therefore, not likely to introduce into our Constitution any provision from the earlier Government of India Acts which had been enacted purely for the benefit of a foreign imperialistic power. They retained the second proviso as a matter of public policy and as being in the public interest and for public good. They further inserted clause (c) in the second proviso dispensing with the inquiry under Article 311(2) in a case 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 as also added a new clause, namely, clause (3), in Article 311 giving finality to the decision of the disciplinary authority that it is not reasonably practicable to hold the inquiry under Article 311(2). Section 240 of the Government of India Act, 1935, did not contain any provision similar to clause (c) of the second provisio to Article 311(2) or clause (3) of Article 311."

16. The principle of doctrine of pleasure from where the said principle referred to above draws its strength and colour is thus a constitutional sanction. Article 311(2) is an exception to the said principle i.e. the doctrine of pleasure. It restricts the operation of the pleasure of doctrine so far as civil servants are concerned, but reverting back to the controversy as referred to above clauses (a), (b) & (c) to proviso (2) to Article 311 is subject to the

ls Ag

condition being so satisfied and in certain circumstances, the provision to provide reasonable opportunity to contest will have no role to play.

17. When an order is passed invoking the said provision, it is always subject to judicial scrutiny. The decision of the Constitution Bench of the Supreme Court in the case of Tulsi Ram Patel (Supra) provides the necessary guide-lines. In the case of **S.R.Bommai & Ors. vs. Union of India & Ors.,** 1994 (3) SCC 1, in a separate judgement that was relied upon, it was held that judicial review is the basic feature of the Constitution. The authority having power of judicial review has the duty and responsibility to exercise it. The judicial review is not concerned with the merits of the decision, but with the manner in which the decision is taken.

18. In the case of **A.K.Kaul and Anr. vs. Union of India & anr.,** 1995(4) SCC 73, the same principle had again been reiterated. Even in the case of Tulsi Ram Patel (Supra), the scope for judicial review was succinctly put forward in the following words:-

> "In the case of a civil servant who has been dismissed or removed from service or reduced in rank by applying clause (b) of the second proviso to Article 311 (2) or an analogous service rule, the High Court under Article 226 or this Court under Article 32 will interfere on grounds well-established in law for the exercise of its power of judicial review in matters where administrative discretion is exercised."

> "In examining the relevancy of the reasons given for dispensing with the inquiry, the court will consider the circumstances which, according to the disciplinary authority, made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, the order dispensing with the inquiry and the order of penalty following upon it would be void and the court will strike them down. In considering the relevancy of the reasons given by the disciplinary authority, the court will not, however, sit in judgment over the reasons like a court of first appeal in order to decide whether or not the reasons are germane to clause (b) of the second proviso or an analogous service rule. The court must put itself in the place of the disciplinary authority and consider what in the then prevailing situation a reasonable man acting in a reasonable manner would have done. It will judge the matter in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a court room, removed in time from the situation in question. Where two views are possible, the court will decline to interfere."

19. With this limited scope, one necessarily has to travel back to the provisions of Article 311(2)(c) of the Constitution as to whether in the peculiar facts it can be pressed into service holding that keeping in view the security of the State and the public interest, the impugned order could be passed.

20. The expression "public interest" is not without meaning or insignificant. It is this expression under which the power can be exercised and if the said ingredient is not satisfied, the order necessarily will be quashed and not otherwise. In the case of Tulsi Ram

72

Patel (Supra) The Supreme Court explained that the expression "law and order","public order" and "security of the State" had been used in different Acts. Their meaning was explained as under:-

> "141. The expression "law and order, "public order" and "security of the State" have been used in diffrerent Acts. Situations which affect "public order" are graver than those which affect "law and order" and situations which affect "security of the State" are graver than those which affect "public order". Thus, of these situations those which affect "security of the State" are the gravest. Danger to the security of the State may arise from without or within the State. The expression "security of the State" does not mean security of the entire country or a whole State. It includes security of a part of the State. It also cannot be confined to an armed rebellion or revolt. There are various ways in which security of the State can be affected. It can be affected by State secrets or information relating to defence production or similar matters being passed on to other countries, whether inimical or not to our country, or by secret links with terrorists. It is difficult to enumerate the various ways in which security of the State can be affected. The way in which security of the State is affected may be either open or clandestine. Amongst the more obvious acts which affect the security of the State would be disaffection in the Armed Forces or para-military Forces. Disaffection in any of these Forces is likely to spread, for disaffected or dissatisfied members of these Forces spread such dissatisfaction and disaffection among other members of the Force and thus induce them not to discharge their duties properly and to commit acts of indiscipline, insubordination and disobedience to the orders of their superiors. Such a situation cannot be a matter affecting only law and order or public order but is a matter affecting vitally the security of the State."

21. Furthermore, the Supreme Court held that the interest of the security of the State may be affected by

US Ag

(73)

actual acts or even the likelihood of such acts taking place. The findings in this regard read:-

> "142. The question under clause (c), however, is not whether the security of the State has been affected or not, for the expression used in clause (c) is "in the interest of security of the State". The interest of the security of the State may be affected by actual acts or even the likelihood of such acts taking place. Further, what is required under clause (c) is not the satisfaction of the President or the Governor, as the case may be, that the interest of the security of the State is or will be affected but his satisfaction that in the interest of the security of the State, it is not expedient to hold an inquiry as contemplated by Article 311(2). The satisfaction of the President or Governor must, therefore, be with respect to the expediency or inexpediency of holding an inquiry in the interest of the security of the State. The Shorter Oxford English Dictionary, Third Edition, defines the word "inexpedient" as meaning "not expedient; disadvantageous in the circumstances, unadvisable, impolitic." The same dictionary defines 'expedient' as meaning inter alia "advantageous; fit, proper, or suitable to the circumstances of the case". Webster's Third New International Dictionary also defines the term 'expedient' as meaning inter alia "characterized by suitability, practicality, and efficiency in achieving a particular end: fit, proper or advantageous under the circumstances". It must be borne in mind that the satisfaction required by clause (c) is of the Constitutional Head of the whole country or of the State. Under Article 74(1) of the Constitution, the satisfaction of the President would be arrived at with the aid and advice of the Council of Ministers with the Prime Minister as the Head and in the case of a State by reason of the provisions of Article 163(1) by the Governor acting with the aid and advice of his Council of Ministers with the Chief Minister as the Head. Whenever, therefore, the President or the Governor in the constitutional sense is satisfied that it will not be advantageous or fit or proper or suitable or politic in the interest of the security of the State to hold an inquiry, he would be entitled to dispense with it under clause (c). The satisfaction so reached by

GSAg

74

the President or the Governor must necessarily be a subjective satisfaction. Expediency involves matters of policy. Satisfaction may be arrived at as a result of secret information received by the Government about the brewing of danger to the security of the State and like matters. There may be other factors which may be required to be considered., weighed and balanced in order to reach the requisite satisfaction whether holding an inquiry would be expedient or not. If the requisite satisfaction has been reached as a result of secret information received by the Government, making known such information may very often result in disclosure of the source of such information. Once known, the particular source for which the information was received would no more be available to the Government. The reasons for the satisfaction reached by the President or Governor under clause (c) cannot, therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public."

22. During the course of discussion the Supreme Court explained in the case of Tulsi Ram Patel (Supra) that the security of the State can be affected by stealing of secrets or information relating to defence production or similar matters which can be passed on to the other countries. Similarly, in the case of A.K.Kaul (supra) after scanning through the various authorities, the Supreme Court held that the power under Article 311(2)(c) has to be exercised bearing in mind distinction between situations which may affect the security of the State and the situations which may affect public order or law and order. The findings are:-

"25. 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 interest of the security of

the State to hold an enquiry as prescribed under Article 311(2). Are the considerations involving the interests of the security of the State 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? We do not think so. Article 19(2) of the Constitution permits the State to impose, by law, reasonable restrictions in the interests of the security of the State on the exercise of the right to freedom of speech and expression conferred by sub-clause (a) of 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. The Court is required to adjudicate on the question whether a particular restriction on the right to freedom of speech and expression is reasonable in the interests of the security of the State and for that purpose the Court takes into consideration the interests of the security of the State and the need of the restrictions for protecting those interests. If the courts are competent to adjudicate on matters relating to the security of the State in respect of restrictions on the right to freedom of speech and expression under Article 19(2) there appears to be no reason why the courts should not be competent 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. While examining the validity of a law imposing restrictions on the right to freedom of speech and expression this Court has emphasised the distinction between security of the State and maintenance of 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 clause (2) of Article 19. (See:Romesh Thappar vs. State of Madras, AIR 1950 SC 124)). So also in Tulsiram Patel the court has pointed out the distinction between the expressions "security of the State", "public order" and "law and order" and has stated that situations which affect public order are graver than those which affect law and order and situations which affect security of the State are graver than those which affect public order. The President or the Governor while exercising the power under Article 311(2) (c) has to bear in mind this distinction between situations which affect the security of the State and the situatioins

76

which affect public order or law and order and for the purpose of arriving at his satisfaction for the purpose of passing an order under Article 311 (2)(c) the President or the Governor can take into consideration only those circumstances which have a bearing on the interests of the security of the State and not on situations having a bearing on law and order or public order. The satisfaction of the President or the Governor would be vitiated if it is based on circumstances having no bearing on the security of the State. If an order passed under Article 311(2)(c) is assailed before a court of law on the ground that the satisfaction of the President or the Governor is not based on circumstances which have a bearing on the security of the State the Court can examine the circumstances on which the satisfaction of the President or the Governor is based and if it finds that the said circumstances have no bearing on the security of the State the Court can hold that the satisfaction of the President or the Governor which is required for passing such an order has been vitiated by wholly extraneous or irrelevant considerations."

Identical was the view expressed in the case of **Union of India and Anr. vs. Balbir Singh & Anr.,** 1998(5) SCC 216. An argument was raised that the satisfaction of the President is not based on circumstances which have bearing on the security of the State. The findings of the Supreme Court are:

"8. If an order passed under Article 311 (2) proviso (c) is assailed before a court of law on the ground that the satisfaction of the President or the Governor is not based on circumstances which have a bearing on the security of the State, the court can examine the circumstances on which the satisfaction of the President or the Governor is based; and if it finds that the said circumstances have no bearing whatsoever on the security of the State, the court can hold that the satisfaction of the President or the Governor which is required for passing such an order has been vitiated by wholly extraneous or irrelevant considerations."

Ls Ag

77

> 9. In the present case, there is no material to infer any mala fides. What is required to be seen is whether the order is based on material which is wholly extraneous or irrelevant, having no bearing whatsoever on the security of the State. The Tribunal had called upon the appellants to produce the entire confidential material on which the order is based. The Tribunal has held that at least two of the files placed before it are highly confidential. They all relate to the activities of the respondent which have a bearing on the security of the State. This is not a case where there is absolutely no material relating to the activities of the respondent prejudicial to the security of the State. The entire material gathered by the Intelligence Bureau was placed before a very high-level Committee of Advisors under the procedure prescribed by the government memorandum. This was precisely for the purpose of ensuring that when a government servant is dismissed without enquiry, there should cogent material to indicate that it is necessary to do so in the interest of the security of the State. The material was examined by the Advisory Committee. Thereafter, it advised the dismissal of the respondent under proviso (c) to Article 311(2). Therefore, the President has issued an order under proviso (c) to Article 311(2)."

Therefore, the expression "Security of State" necessarily has to go with the facts in this regard.

23. The applicants, as already referred to above, were posted in the Indian High Commission at Islamabad. We have already given above the version of the applicants. The reply and the record indicate that a Constable posted by the Islamabad Police allured the applicants for arranging wine and women for them. The applicants had weakness for the same. It appears that

even the applicants disclosed to the Pak officials, a few names of the security guards posted in the High Commission and the organisations in India to which they belonged. Though the incident took place on 17.07.1999, the applicants reported it only on 19.07.1999 and that too after the applicant no. 1 was scared by a telephone call from a lady. It is denied that they had reported the matter to the senior officers immediately or a clean chit had been given to them. Giving any other country, such information, can affect the security of the State or be prejudicial to the security of the State. The facts show, therefore, that in the peculiar facts it cannot be termed that the exercise of power was without any basis, material facts or for any extraneous reasons. We find, on judicial review, no ground to interfere.

24. The learned counsel for the applicants stated that, in any case, in such like matters, the departmental proceedings should be taken in camera. Even on this count, the plea must fail. When the security of the State is involved, in that event, the proceedings in camera will not be a solution.

25. Another limb of the argument was that applicants' right to appeal is affected.

26. Right to appeal is not a fundamental right and, therefore, when such an order had been passed in exercise of the power under Article 311(2)(c), there

79

cannot be any grievance that can be raised in this regard.

27. Taking stock of the totality of the facts referred to above, the application is found to be without merit. Necessarily, therefore, it must fail and is hereby dismissed. No costs.

(S.A.Singh)
Member (A)

(V.S.Aggarwal)
Chairman

/sns/