IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

(5)

O.A. No. 1707/94 199
T.A. No.

DATE OF DECISION 17..2.95

Ex-Constable Krishan Singh — Petitioner

Mrs S. Sharma — Advocate for the Petitioner(s)

Versus

Lt Governor Delhi through Commissioner of Police & Ors — Respondent

Shri S.K. Gupta — Advocate for the Respondent(s)

CORAM

The Hon'ble Mr. J.P. SHARMA, MEMBER (J)

The Hon'ble Mr. B.K. SINGH, MEMBER (A)

1. To be referred to the Reporter or not? ✓
2. Whether it needs to be circulated to other Benches of the Tribunal? X

(B.K. SINGH)
MEMBER (A)

(J.P. SHARMA)
MEMBER (J)

sss

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

(6)

O.A.No.1707/94

NEW DELHI THIS THE 17th DAY OF FEBRUARY, 1995.

HON'BLE SHRI J.P. SHARMA, MEMBER (J)
HON'BLE SHRI B.K. SINGH, MEMBER (A)

Ex. Constable Krishan Singh,
S/o Shri Mir Singh,
R/o Village and P.O. Kulasi,
P.S. Bahadurgarh,
Distt. Rohtak,
Haryana. ...Applicant

(By Advocate : Ms S. Sharma)

VERSUS

1. The Lt Governor
Govt of National Capital Territory of Delhi)
(Through Commissioner of Police,
Police Headquarters,
I.P. Estate,
NEW DELHI.

2. The Additional Dy Commissioner of Police,
North West Distt,
Ashok Vihar,
NEW DELHI.

3. The Additional Commissioner of Police,
Northern Range,
PHQ I.P. Estate,
New Delhi ...Respondents

(By Advocate : Shri S.K. Gupta)

JUDGEMENT

Shri B.K. Singh, Member (A)

This application No.1707/94 is directed against the dismissal order No.8780/9880 dated 19.7.1993, passed by the Additional Deputy Commissioner of Police, and the rejection of the appeal vide order No.97576 dt. 23.5.1994 passed by the Additional Commissioner of Police.

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2. The brief facts are that the applicant while posted at Police Post Prashant Vihar, New Delhi on the night of 16/17-7-1993, —— ———— was deputed on night petrolling duty in the beat area of Sector 15, Rohini and he departed for the duty at 12 p.m. vide D.D.No.45 along with Duty Head Constable Shiv Charan. The applicant went to the house of one Smt Shashi resident of C-8/79, Sector-15, Rohini, Delhi at about 12.15 A.M. on 16/17.7.93 and asked her to accompany him as she had been called by the incharge P.P. Prashant Vihar, and she came down from her Ist floor house and noticed a white Gypsy in which three persons were already sitting. She was asked to sit in the Gypsy in the presence of her husband. The applicant kept talking with her husband and three persons in plain clothes in Gypsy took her away in a flat in the vicinity where she was raped by the said three persons at about 3.30. A.M. during the night of 16/17-7-93. Smt Shashi was dropped near her residence who told her husband that she had been raped by three persons in some flat in Sector 16 or 17.

3. On the complaint of the husband, ACP Narela was directed to conduct further enquiry

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in which the alleged abduction and rape of Smt Shashi was revealed. The said enquiry conducted by the ACP also revealed that the lady was taken by Const. Daya Nand No.1647/NW and Constable Surender Kumar No.858/NW, both posted at P.P. Prashant Vihar and one private person Mr Kapoor resident of LIG Flat Sector-17, Rohini and she was raped by these three persons somewhere in Sector 16/17 Rohini. The enquiry further revealed that the applicant who went to call the lady at 12.15 A.M. in the night remained behind and kept her husband being in conversation given all sorts of assurance and excuses that his wife would be returning soon.

4. On the basis of the preliminary enquiry conducted by the ACP a case FIR No.289 dated 17.7.93 under Section 366/377/506/34 IPC P.S. Samaipur Badli was registered on the statement of Smt Shashi, and the applicant was arrested, and the other two constables and the public man Shri Kapur are absconding. The ACP Narela who conducted the enquiry had confirmed the misconduct on the part of the applicant and two constables as alleged by the victim.

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5. Consequently the applicant was dismissed from the Police Force under Proviso (b) of Article 311 (2) of the Constitution vide Order referred to above.

6. Relief Sought

(i) Quash the dismissal order No.9780-9880 dated 19.7.1993 by which the service of the applicant has been dismissed.

(ii) Quash the order of rejecting the appeal of the applicant through Order No.975-76 dated 25.2.1994 by the appellate authority.

(iii) Pass an order to reinstate the applicant in service and also to maintain his seniority in the seniority list.

(iv) Grant all other consequential benefits.

(v) Award cost of the proceeding to the applicant.

7. A notice was issued to the respondents who filed the reply contesting the application and the grant of reliefs prayed for.

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8. We heard Ms Sumedha Sharma, Counsel for the applicant and Shri S.K. Gupta, Counsel for the respondents and perused the record of the case. We have also perused the order dispensing with the enquiry. The order is a detailed one at Page 1-3. After narrating the chronology of the events that took place the Dy Commissioner of Police relying on the enquiry made by ACP Narela came to the finding that the other two constables and the third gentleman - the public man involved are absconding and but for his arrest the same thing might have happened in the case of The applicant Sh. Kishan Singh The complicity of the three constables in this criminal activity of abduction and rape was proved by the ACP Narela. The three constables according to the disciplinary authority have not only indulged in the growth of criminal mis-conduct but also have brought shame to a noble profession where service is the only motto. He has stated:

> "It is shocking to know that the three constable named above have not only indulged in growth criminal misconduct but also have brought shame to a noble profession where service is the only motto. If the protector of the society turned into predator then there will be no trust left on protector. To

restore the confident of the weak and helpless and other innocent people, it is mandatory that such elements must be weeded out ruthlessly to set an example for other and keep the force clean. By virtue of their position as police man and horror they had inflicted on the mind of the victim by their torture on her it is difficult to ensure carrying out of judicial departmental action against them as they shall try their level best to threaten the witness and jeopardise the departmental action. In view of this conducting of departmental action against these persons will be a futile exercise and would not meet the ends of the justice. Therefore I deem it proper that constable Daya Nand No.1647/NW, Surinder Kumar No.858/N and Krishan Singh No.690/NW be dismissed from the force with immediate effect under article 311 (2) - (b) of the constitution of India. There suspension period from 17.7.1993 to the date of issue of this order will be treated as period not spent on duty for all intents and purposes."

9. The applicant filed an appeal which is at Annexure 'C' at Pages 20-25 of the paper-book. The additional Commissioner of Police has passed a very detailed order which is at Page 26-28. While rejecting the appeal of the applicant he has referred to the various transactions which took place

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involving abduction and rape and also referred to the orders passed by the disciplinary authority who awarded all the three constables punishment of dismissal under Article 311 (2) (b) of the Constitution of India vide the impugned order. Even the two constables who had been absconding have also been meted out the same treatment as the applicant. The appellate authority has stated in clear terms that the ACP Narela was not concerned with the investigation of the case. His purpose was to identify the rapists. The appellate orders are extracted below:-

> "It was found that the appellant was involved in the morbid conspiracy to rape this house wife. The complaint, the victim of the gang rape by the appellant's two colleagues and accomplices, Smt. Shashi clearly stated the act of the appellant before ACP/ Narela when he conducted the enquiry. The disciplinary authority in its order has clearly given the reasons for not holding Departmental Enquiry as the victim is not likely to stand by its stand under the pressure by these three Police Officers and support her allegations later on. As a matter of fact that was clearly proved by the action of the complainant Smt. Shashi who subsequently made a statement retracting her earlier allegations of rape against these three policemen. But her statement which was the basis of registration of a case of rape and the enquiry by Asstt. Commissioner of Police/Narela clearly proved that

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the offence did not take place and there are no motives for her to name these policmen falsely in her complaint. The fact that she had retracted her statement only proves disciplinary authority's apprehension that the victim is not likely to stand up to the pressure that these policemen will exercise on her subsequently during the pendency of the criminal trial or the departmental enquiry. The question is whether the appellant can be allowed to take benefit of their pressure tactics and allowed to get away with such barbaric act of gang rape or drastic action as contemplated under 311 (ii) (b) precisely for such circumstances should be taken by the disciplinary authority. If this is not a fit case for invoking Article 311 (ii) (b) then I am afraid there can be no other case that would merit action under these provisions. Here is a hapless women who is pulled out from her residence by three policemen at middle of the night and subjected to gang rape. Policemen are expected to protect the citizen and it is horrendous that these three protectors of law behaved in this outrigeous and beastly manner that they pulled out a woman from the sanctity of her home and subjected her to most gruesome act of their lust. I have considered is appeal. Although the same have been made after more than 30 days and find no merit in his appeal to

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interfere with the punishment order. As a matter of fact interfering with the orders of dismissal would send entirely wrong signals to both Police and publice. Some policemen may like it as an act of encouragement for similar behaviour and the public would be right in thinking that probably such criminal behaviour by the policemen has the endorsement of the department in matters like this, the poor and hapless victim of policemen lust belonging to poorer and weaker section of society hardly have the courage to stand the pressure brought upon by the police officers and the fact that the victim has retracted her statement only confirms disciplinary authority's apprehension that a regular DE under these circumstances will not be possible and the appellant cannot escape justice by virtue of their position and tactics of intimidation. Any Police organisaion that will retain people with such criminal records will be jeopardising the security of the society at large because if they get away from the consequences of their gruesome actions, they are likely to be emboldened and any woman may be their next victim. The appellant by his conduct in detaining the husband of the victim was an equal parter in this crime and I find no merit in the appeal to interfere with the punishment. Any compassion

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in such cases would amount to endorsement of rape. Appeal is rejected.

Let the appellant be informed accordingly."

10. The order of the disciplinary authority merges with the appellate order. "The Appellate Authority has given a very reasoned order on the question of dispensing with the enquiry as impracticable."

11. The governing words of the second proviso to clause (ii) of Article 311, namely "this clause shall not apply" are mandatory and not directory. These are in the nature of a constitutional prohibitory injunction restraining the disciplinary authority from holding an enquiry under Article 311 (2) or from giving any kind of opportunity to the concerned civil servant in a case where one of the three clauses of the second proviso becomes applicable. There is thus no scope for introducing into the second proviso some kind of enquiry or opportunity to show-cause (by a process of inference or implication). The maxim Expressum facit cessare taciturn holds good (when there express mention of certain things, then anything not mentioned is excluded applies to the case). This wellknown maxim is a principle of logic and common sense and not merely a technical rule of construction as pointed out in B. Shankar Rao Badami Vs State of Mysore (1961) 1 SCC 1.

12. The moment the prooviso comes into operation the safeguards provided under Article 311 (2) and principles of natural justice

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and the safeguards contained in the CCS (CCA) Rules, 1965 are all excluded. Before a recourse is taken to proviso (b) of Article 311 (2) there are two conditions which must be satisfied i) There must exist a situation which makes the holding of an enquiry contemplated by Article 311 (2) not practicable.

(ii) The disciplinary authority should record in writing the reason for his' satisfaction that it is not reasonably practicable to hold such an enquiry.

13. According to the Webester's dictionary "Practicable" means possible to practice or perform or capable of being put into practice, done or accomplished. The impracticability must have relationship to holding of the enquiry and the difficulty in establishing charges or in achieving certain object by the enquiry would be wholly irrelevant. The impracticablity implies some physical and legal impediments to the holding of an enquiry. The administrative expediency is subject to constitutional and statutory constraints and executive action must therefore be contained within such limitation. If a course of action is not permissible in law it could not be legitimised due to any compulsion arising out of administrative necessity. This has been clearly held in the case of R.K. Mishra Vs General Manager Northern Railway, New Delhi (1977) 1 Lab IC 643.

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14. Whether it was practicable to hold the enquiry or not has to be judged in the context whether it was reasonably practicable to do so. The mandate of the constitution being there it is not total or absolute impracticability which is required by clause (b) of the second proviso. What is requisite is that the holding of the enquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.

15. The reasonable practicability of holding an enquiry is a matter of assessment to be made by the disciplinary authority and must be judged in the light of the circumstances then prevailing. The disciplinary authority is generally on the spot and he knows what is happening. It is because the disciplinary authority is the best judge of the prevailing situation that proviso (b) of Article 311 (2) makes the decision of the disciplinary authority in this connection final. In the case of Ikramudin vs. S.P. 1988 (Supp.) SCC 633, AIR 1988 SC 2254, a few illustrations have been given as to which situation will warrant dispensing with the enquiry. These are: (i) where civil servant particularly through or together with all his associates is in a position to terrorise, threaten, intimidate witnesses who are likely to tend evidence with fear of reprisal as to prevent them from doing so. The same was reiterated in case of Bimal Govind Biswan vs. Union of India (1990) 12 ATC 41. It is not necessary that the witnesses should give any such statement that they are terrorised. It is to be

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inferred from 'the circumstances prevailing at a particular time by the disciplinary authority. It is also possible that the delinquent may threaten, intimidate and terrorise the Inquiry Officer or the D.A. so that neither the I.O. nor the D.A. are willing to conduct the enquiry; (ii) where an atmosphere of violance or a sense of indiscipline involving growth of criminality, insubordination is prevailing it is immaterial that the concerned civil servant is a party or is not a party to bring about such a situation. In such a situation it has been held by the Hon'ble Supreme Court that the members coerced and terrorized whereas an individual does not. In the instant case it is admitted that the two constables who are rapists along with the private citizens Sh. Kapoor are all absconding whereas the present applicant was arrested and it is possible but for his arrest he would have also absconded along with them.

16. It is not necessary that the situation which makes the holding of an enquiry not reasonably practicable should exist before the enquiry is instituted against the civil servant. Even when a civil servant is suspended and the enquiry is on and the disciplinary authority comes to a finding that a situation has come into being making the enquiry impracticable he may revoke the suspension order and dispense with the enquiry. This is possible even after the service of charge-sheet on the civil servant or after he has

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filed his written statement thereto or even if evidence has been led in part.

17. We know that the recording of the reasions for dispensing with the enquiry is a condition precedent to the application of clause (b) of the second proviso. This is a constitutional obligation and if such a reason is not recorded in writing the order of the disciplinary authority and the penalty resulting thereon would be void and unconstitutional. The constitution does not, however, envisage that the courts should substitute their own assessment in place of the assessment of the D.A. It only envisages that the reason should find a place in the final order with a view to avoid the allegation that the reason was not recorded in writing before passing the final order but was subsequently fabricated. The reasons were recorded on the basis of which the applicant could submit a detailed representation. He has submitted a detailed representation and the appellate authority was fully conscious that his powers are far wider than that of the disciplinary authority and that is the reason why he has recorded further cogent reasons supporting the arguments of the D.A. for dispensing with the enquiry under proviso (b) to Article 311 (2) of the constitution. Thus, the reasons recorded by the disciplinary authority have merged with the reasons given by the appellate authority whose powers are far wider than that of the disciplinary authority and his reasons are also much more to the point. Even if a preliminary enquiry was held by

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A.C.P. it was not investigation of the case but was a fact finding enquiry and to idenitfy the rapists and the role played by the applicant.

18. We cannot find fault with the logic of the disciplinary authority or the appellate authority that the Police are the guardians and protectors of law and order and if the protectors of law become criminals in uniforms nothing can be worse. If the uniformed men indulge in lawlessness and criminal activity who else would be entrusted with the charge of maintaining law and order and controlling crime in their place. We cannot go on calling Army for maintaining the law and order which we often do when there are serious communal riots but the Army is not expected to take charge of the criminal activities indulged in by the protectors of law since this would imply the end of democracy itself and the total collapse of rule of law. In such a situation the disciplinary authority and the appellate authority are well within their rights to dispense with the enquiry because it would have been a futility since the three actual rapists, including two constables and a private person are all absconding and this gentleman presumably would have absconded but for his immediate arrest. The satisfaction that it is not reasoably practicable to hold an enquiry is

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that of the disciplinary authority and the appellate authority and their obligation is only to record reasons to do so.

They have discharged their obligation extremely well and we hold that the reasons given by the D.A./ and appellate authority are based on the facts and circumstances from which their satisfaction has been arrived that it is not reasonably practicable to hold an enquiry. The facts are neither irrelvant nor are they extraneous. The facts are such that they reasonably lead to the satisfaction of even a commonman and thus we hold that the powers have been validly and legitimately exercised and the order of punishment passed against the applicant is just and fair. The application thus fails and is dismissed leaving the parties to bear their own costs.

(B.K. SINGH)
Member(J)

(J.P. SHARMA)
Member(J)

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