CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH:NEW DELHI

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OA.No.1756 of 1994

Dated New Delhi, this 6th day of January,1994

Hon'ble Shri J. P. Sharma,Member(J)
Hon'ble Shri B. K. Singh,Member(A)

Constable Harvir Singh No.9748/DAP
R/o H.No.29,C.P.O. Block, Madangir
Ambedkar Nagar
NEW DELHI 110062 ... Applicant

(By Advocate: Shri Shankar Raju)

versus

1. Lt. Governor of N.C.T. Delhi
   (Through Commissioner of Police)
   Police Headquarters
   I.P. Estate, M.S.O. Building
   NEW DELHI.

2. The Additional Commissioner of Police
   (Armed Police & Training)
   Police Headquarters
   I. P. Estate, M.S.O. Building
   NEW DELHI ... Respondents

(By Advocate: None)
Shri R. P. Sharma,Departmental Representative.

JUDGEMENT

Shri B. K. Singh,M(A)

This OA.No.1756/94 has been filed by constable Harvir Singh No.9748/DAP against order No.1521-71/HA-8th Bn DAP dated 16.4.93 received by the applicant on 19.4.93 issued by Respondent No.2 whereby his services have been dispensed with under proviso(b) to Article 311(2) of the Constitution vide Annexure A-1 and also directed against order No.F.XVI/129/94/11279/AP-I dated 11.7.94 issued by the Respondent No.2 whereby the appeal of the applicant preferred against the order of dismissal has been rejected vide Annexure A-2.

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2. The admitted facts of the case are that ex.Const. Harvir Singh No.9748/DAP while posted in 8th Bn. DAP was involved in case FIR No.139 dated 3.4.93 u/s 411 IPC P.S. Vinay Nagar, New Delhi. FIR lodged on 3.4.93 at 7.30 P.M. stated that the applicant was stopped by local police near Holiday Home when he was driving a Maruti Car No.UP-073-6094 which was found to be a stolen vehicle vide case FIR No.26/93 dated 18.1.93 u/s 379 IPC P.S. H. N. Din. On enquiry it was found that the original number of the said car was DL-2CC-4038. On the basis of interrogation by local police of P.S. Vinay Nagar, the co-accused of the applicant Imran alias Irfan son of Qurban a resident of House No.307, Karim Nagar, Meerut, Uttar Pradesh was also arrested. One more car No.HRU-4533 was recovered at the instance of the applicant which was found to be stolen as per FIR No.67/93 dated 22.2.93 u/s 379 IPC P.S. Tilak Marg. The original number of the car was traced as DL-2CD-1197. A third car No.HRU-3678-A was recovered at the instance of the co-accused Imran alias Irfan which was stolen vide case FIR No.58/93 dated 20.2.93 u/s 379 IPC P.S. Lajpat Nagar. The original number of this car was traced as DL-2CC-4372. The applicant was also involved in a theft of one more motor vehicle from A.I.I.M.S., New Delhi vide case FIR No.31 dated 14.1.93 u/s 379 IPC. The said vehicle was taken into possession u/s 102 Cr.P.C. by the staff of P.S. Defence Colony before it could be recovered

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by the staff of P.S. Vinay Nagar.

3. The Disciplinary Authority took a synoptic view of all the facts and circumstances and made a personal assessment of the gravity of the cases in which the applicant was involved. The protector of law, according to the Disciplinary Authority, had become a professional criminal and was indulging in criminal activity in collusion with other criminals and accomplices. Taking into consideration all the relevant facts, the Disciplinary Authority came to the conclusion that it would not be reasonably practicable to hold an enquiry expeditiously under the above circumstances because the policeman turned criminal was under judicial lock-up and was not readily available. It is true that he was placed under suspension as argued by the learned counsel for the applicant, but subsequently it was found that no purpose would be served in launching a formal departmental enquiry since he would not be available because of his having been in judicial custody and because he along with other criminals would be in a position to terrorise witnessess etc. and, therefore, the Disciplinary Authority resorted to Clause (b) of Proviso II of Article 311(2) of the Constitution and dismissed him from service with effect from 16.4.93 vide office order No.1521-71/HA-8th Bn DAP dated 16.4.93. He filed an appeal to the Appellate Authority which was considered and rejected

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vide PHQ's memo No.F.XVI/129/94/11279/AP-I dated 11.7.94.

-Hence, this OA was filed on 31st August,1994.

4. The reliefs sought in this OA are:

> "(a) To quash the impugned order of dismissal at Annexure A-1 and direct the respondents to reinstate the applicant in service w.e.f. 16.4.1993 with all the consequential benefits including back wages, promotion and seniority etc.
>
> (b) To set aside the Appellate Order at Annexure A-2..."

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

6. We heard the learned counsel Shri Shankar Raju for the applicant and departmental representative Shri R. P. Sharma on behalf of the respondents and perused the record of the case.

7. The learned counsel for the applicant, during the course of arguments, stated that the applicant was placed under suspension which shows the intention of the department to launch a departmental enquiry against him, but subsequently they adopted a short cut and resorted to proviso 2(b) of Article 311 (2) of the Constitution which was not fair. According to the learned counsel for the applicant, the only plea taken is that the applicant was under judicial lock-up and would not be available for

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the departmental enquiry and as such it would amount to ex-parte enquiry against him. According to him, the Disciplinary Authority has no valid reasons for dispensing with the enquiry. He further said that normally the departmental enquiry is kept in abeyance till the decision of the criminal case and this normal practice has not been adopted by the respondents. According to him, the situation was not such as to make the holding of an enquiry not practicable. The order of the Appellate Authority also is without application of mind and as such both the orders of the Disciplinary Authority/Appellate Authority are fit to be quashed and set aside.

8. The departmental representative on the other hand, rebutted the arguments of the learned counsel for the applicant and stated that the ex. Const. Harvir Singh had turned out to be a criminal and was indulging in criminal activities along with his accoplices and other associates and since he was also in judicial lock-up in connection with theft of several motor vehicles in which several FIRs had been lodged and his involvement in criminal activity has been prima-facie proved and it was felt that it was dangerous to keep him in a disciplined force like Police, therefore, it was decided to dispense with the enquiry and to dismiss the said constable with a criminal bent of mind with proven track record of criminal activities and involvement in several theft cases

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of motor vehicles. He was dismissed under proviso 2(b) to Article 311 of the Constitution.

9. The language of the 2nd Proviso to Article 311(2) is plain and unambiguous. The key words in the 2nd Proviso are "this clause shall not apply". There is no ambiguity in these words. Where, therefore, a situation envisaged in any of the three clauses of the Second Proviso arises the safeguard provided to a civil servant in Article 311(2) is taken away. The governing words of Second Proviso to Clause 2 of Article 311 viz. "this clause shall not apply" are mandatory and not directory and 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. Thus, there is no basis for the contention that the ex-constable was denied opportunity because there is 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 tacitum" (when there is express mention of certain things, then anything not mentioned is excluded) applies to this case. This well known maxim is a principle of logic and commonsense and not merely a technical rule of construction as pointed out in B. Shankar Rao Badami Vs State of Mysore (1969 1S.C.C.1 .

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10. It is well established that the principle of natural justice yield to and change with the exigencies of different situations and do not apply in the same manner to situations which are not alike. They are neither cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible and can be adapted, modified or excluded by statute and statutory rules as also by the Constitution.

11. There are two conditions precedent which must be satisfied before clause (b) of the second proviso to Article 311(2) can be invoked. These are: (i) there must exist a situation which makes holding of an enquiry contemplated by Article 311(2) not reasonably practicable and, (ii) the disciplinary authority concerned records in writing its reasons for its satisfaction. This satisfaction normally is based on the personal assessment of the disciplinary authority. Whether it was practicable to hold the enquiry or not must be judged in the context whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b) of the Second Proviso. What is required 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. As stated above, the reasonable practicability of holding of an enquiry is a matter of assessment to be made by the disciplinary authority and has to be judged in the light

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of the circumstances prevailing. The disciplinary authority is a man on the spot and knows what is happening. He is the best judge of the prevailing situation. Judged from this angle, we find that a police constable whose paramount duty is to protect the life and property of others himself indulges in criminal activities of stealing motor vehicles and gets involved in different FIRs where the real numbers of the motor vehicles have been changed and these vehicles are plying on the roads of Delhi and neighbouring towns of Uttar Pradesh and Haryana and all these criminal activities are perpetrated by the applicant along with his other accomplices of the district of Meerut. He himself has admitted his complicity in these theft cases and in certain cases recoveries of the vehicles were also made at his behest and since he is still in judicial lock-up the Disciplinary Authority felt that it would be of no use keeping him under suspension or to have a formal disciplinary enquiry. The gravity of the situation is such that he had to resort to proviso 2(b) to Article 311 to dismiss this man because holding of an enquiry was considered as impracticable and the reasons given are the criminal bent of mind of the applicant and his close association with other criminals coupled with his lock-up in judicial custody. These are the reasons recorded by the competent authority to dispense with the enquiry.

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12. The word 'enquiry' in Clause (b) of the Second Proviso includes a part of an enquiry. Therefore, suspension also must be treated as a part of the enquiry. 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 delinquent employee. Such a situation can also come into existence subsequently during the course of enquiry, for instance, after the service of chargesheet upon the civil servant and after he has filed his written statement thereto or even after evidence has been tendered in part. Thus, the scope and ambit of Clause (b) of the Second Proviso is quite wide and can be invoked even after initiating the formal enquiry.

13. The recording of the reason for dispensing with the enquiry is based on the assessment of the disciplinary authority. The disciplinary authority realised the constitutional obligations and has recorded reasons why it is not reasonably practicable to hold the enquiry and this is more than adequate. As already stated it is not absolute impracticability which is required. The requisite condition is that it is not reasonably practicable to do so. It is on the basis of these reasons that the applicant should be in a position to file an appeal before the Appellate Authority and this meets the requirement of Clause (b) of proviso to Article 311(2) of the Constitution.

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14. The present applicant was a police constable prior to his dismissal from service under clause (b) of the proviso II to Article 311(2). The Police are the guardians of law and order. They stand guard at the border between the green valleys of law and order and the rough and hilly terrain of lawlessness and public disorder and if these guards like the present applicant turn law breakers and indulge in criminal activities which they are required to prevent and curb then who will guard these fellows? In such a situation where protectors of law become law breakers and indulge in criminal activities, such a situation itself demands prompt and urgent action and therefore the holding of an enquiry into the conduct of such a person of a disciplined force like the Delhi Police is not necessary. Therefore, the Disciplinary Authority was well within his right to take recourse to clause(b) of provisoII to Article 311(2) of the Constitution and dispense with the enquiry and dismiss the applicant from the service. The reasons recorded by him are adequate and do not require any judicial interference and accordingly this OA fails and is dismissed, but without any order as to costs.

(B. K. Singh)
Member(A)

(J. P. Sharma)
Member(J)

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