CENTRAL ADMINISTRATIVE TRIBUNAL:PRINCIPAL BENCH.

O.A. NO. 2159/89

New Delhi this the 10 th day of August, 1994.

Shri N.V. Krishnan, Vice Chairman(A).

Shri C.J. Roy, Member(J).

D.P. Vohra,
S/o Shri Sita Ram,
160, Police Quarters,
Ahata Kadara,
Delhi. ...Petitioner.

By Advocate Shri B.B. Raval.

Versus

Union of India
through the Secretary,
Cabinet Secretariat,
8B, South Block,
New Delhi. ...Respondent.

By Advocate Shri V.S.R. Krishna.

O R D E R

Shri N.V. Krishnan.

The applicant is aggrieved by the order dated 3.8.1988 (Annexure P-10) denying him full pay and allowances for the period from 6.12.1980 to 24.9.1987 which was treated as non-duty and by the order dated 19.8.1988 rejecting the application for voluntary retirement on the ground that he has not rendered the required service.

2. The applicant was the appellant in Civil Appeal No. 576 of 1992 which, along with another civil appeal, was decided by the Supreme Court in Satyabir Singh Vs. Union of India, AIR 1986 SC 555. The applicant, an employee of the Research and Analysis Wing of the Cabinet Secretariat, Govt. of India, along with a number of other officials belonging to the same organisation, who had taken part in an agitation connected with their charter of demands, were dismissed from service for having taken active part in the disturbances connected with this agitation without holding any inquiry, by exercising the powers under clause (b) of the second proviso to Article 311(2) of the Constitution of India read with Rule 19(ii)

of the CCS(CCA) Rules, 1965. Following the celebrated judgement of the Supreme Court, delivered sometime earlier, in Union of India Vs. Tulsi Ram Patel (AIR 1985 SC 1416), the appeals were dismissed by the following orders:

> "23. We are, therefore, of the opinion that Cl.(b) of the second proviso to Art. 311(2) and Rule 19 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, were properly applied to the case of each of the appellant and the impugned orders of dismissal were validly passed against them.
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> Final orders.
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> 24. In the result, both these appeals fail and are dismissed and the interim orders passed in these appeals are hereby vacated. If any payment has been made to any of the appellants in pursuance of any interim order, such appellant will not be liable to refund such amount or any part thereof. The appellants have a right to file a departmental appeal under the Central Civil Services (Classification, Control and Appeal) Rules, 1965. In case they desire to file such an appeal, we give them time until October 31, 1985, to do so and we direct the appellate authority to condone in the exercise of its power under the proviso to Rule 25 of the said Rules the delay in filing the appeal and to hear and dispose of such appeals expeditiously subject to what has been laid down in Tulsiram Patel's case (AIR 1985 SC 1416) and summarised in the earlier part of this judgement".

3. In pursuance of this order, the applicant filed an appeal requesting for an enquiry to be held. Accordingly, a departmental enquiry was held. In this proceeding, the applicant was found guilty and by an order dated 18.9.1987, the penalty of reduction in pay from Rs.440/- to Rs.425/- in the pre-revised time scale of pay of Rs.425-800 for a period of three years, with immediate effect, was imposed

12

with a further direction that the applicant shall not earn increments of pay during the period of reduction but, on the expiry of the said period, the reduction will not have the effect of postponing his future increments of pay. As a result of this order, the applicant was reinstated in service on 24.9.1987.

4. As the applicant was not desirous of continuing in service any further, he submitted a letter dated 4.11.1987 requesting that the period from 6.12.1980 to 24.9.1987 be treated as spent on duty and the applicant be permitted to retire voluntarily from service and that the letter be treated as a notice for this purpose. A copy of this letter, but not dated, is at Annexure P-1. He also clarified in another letter (Annexure P-2) dated 12.11.1987 that he was interested in taking voluntary retirement,only if the aforesaid period was treated as duty for the purpose of emoluments, pension and leave encashment. He was informed that he should submit a fresh unconditional letter seeking voluntary retirement for consideration. Accordingly, he submitted the Annexure P-4 letter dated 25.1.1988 seeking voluntary retirement coupled with the request that the period from 6.12.1980 to 24.9.1987 be regularised, earned leave from 7.12.1987 to 25.4.1988 be granted and this letter be treated as the notice for voluntary retirement.

5. In the meanwhile, a notice dated 1.12.1987 (Annexure P-5), was issued to the applicant. This recapitulated the sequence of events leading to his dismissal and reinstatement and intimated him that it was proposed to treat the period of his absence i.e. 6.12.1980 to 24.9.1987 "as period under suspension and he will be paid a subsistence allowance as per the normalrules subject to the deductions of the amounts paid to him as per the orders of the Hon'ble Supreme Court dated 7.12.1984." He was asked to show cause against this proposed decision.

13

6. The applicant sent the following reply on 15.12.1987 (Annexure P-6):

> "I beg to submit that Hon'ble Supreme Court upheld the dismissal order dated 6.12.1980 due to the following charges which have been mentioned in the second last para of the Supreme Court judgement:
>
> (i) He made inflamatory speeches on 1,3,4 and 5th of December, 1980 and had to instigated(Sic) the other employees to continue the agitation and intimidated those who had not joined in the agitation into doing so.
>
> (ii) In a speech made by him on Dec. 4, 1980, he had tried to make public some of the top secret operations of the RAW claiming to have special knowledge of these operations by virtue of having posted earlier in a sensitive Branch.
>
> (iii) He was also actively engaged in collecting funds for continuing the agitation.
>
> Hon'ble Supreme Court has directed to the appellate authority to hold enquiry on the above mentioned charges.
>
> The above mentioned charges could not be proved and framed (Sic) in the departmental enquiry.
>
> Therefore, it is requested that full salary for the period 6.12.1980 to 24.9.1987 may kindly be given to me. The above period may also kindly be treated spent on duty for all purposes".

7. This reply was not accepted and the respondent passed an order on 3.8.1988 (Annexure P-10). Relevant extracts are given below:

> "The contention of Shri Vohra that the charges against him could not be proved in the departmental enquiry is untenable inasmuch as the charge number (1), viz; he attended the meetings of the agitators and delivered inflamatory speeches on 1.12.1980, 3.12.1980, 4.12.1980 and 5.12.1980 wherein, he, inter alia, tried to malign the senior officers of the department by uttering baseless and false indictment, was found fully established. However, in view of the fact that the incident was more than six years old and the atmosphere has changed, the appellate authority had decided to take a lenient view and to allow Shri Vohra a fresh chance to serve in the department.

"It was in pursuance of these orders that a notice dated 1.12.87 was issued to the applicant regarding the proposal to treat the period from 6.12.80 to 24.9.87 as period under suspension and payment of subsistence allowance for that period subject to the deduction of the amount paid to him as per the order dated 7.2.84 of the Hon'ble Supreme Court. It would not be correct to say that the aforesaid notice was only with regard to the proposal for payment of subsistence allowance. It was in regard to both (a) treatment of the period as "the period under suspension" and (b) the payment of only subsistence allowance for that period. The fact that the period from 6.12.80 to 24.9.87 was proposed to be treated as "the period under suspension" makes it abundantly clear that the respondents intended to treat the period as non-duty"

It was contended that, in the circumstances, it is incorrect to state that the applicant was not given a notice that the respondents intended to treat the period as non-duty.

12. It is necessary to add that the order of the Appellate Authority dated 18.9.87, imposing penalty in the D.E., was successfully challenged by the applicant before the Tribunal in OA-1808/87. A copy of the judgement dated 13.7.93 therein has been brought on record by the applicant. The impugned order was quashed. The applicant was permitted to file a representation against the action proposed in the DE and the appellate authority was directed to pass a fresh order in the DE after considering this representation. Such an order was passed on 6.4.94. A copy of that order is also on record. The result remains unchanged and the same penalty which was imposed earlier on 18.9.87 has been now imposed.

13. A question arose as to whether these developments have any effect on the impugned orders in this O.A. The learned counsel for the applicant contended that they have no connection with each other and the impugned order at Annexure P.10 remains unaffected. On the contrary, the learned counsel for the respondents contended that the Annexure P-10 order is required to be passed only in consequence of the order in the discipli-

13

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> "The contention of Shri Vohra that the charges against him could not be proved in the departmental enquiry is untenable inasmuch as the charge number (1), viz; he attended the meetings of the agitators and delivered inflamatory speeches on 1.12.1980, 3.12.1980, 4.12.1980 and 5.12.1980 wherein, he, inter alia, tried to malign the senior officers of the department by uttering baseless and false indictment, was found fully established. However, in view of the fact that the incident was more than six years old and the atmosphere has changed, the appellate authority had decided to take a lenient view and to allow Shri Vohra a fresh chance to serve in the department.

14

10. Taking the facts and circumstances of the case into consideration, the undersigned hereby makes the following order regarding the period between 6.12.80 to 24.9.87.

The period of Shri Vohra's absence from 6.12.1980 (the date of dismissal) to 24.9.1987 (the date immediately before he joined duties) will be treated as non-duty for all purposes and he will be paid what he would have received as subsistence allowance, as per the normal rules, had he remained under suspension during the period, subject to the deductions of the amounts already paid to him vide orders of the Hon'ble Supreme Court dated 7.2.1984 and may other amount earned by him during the aforesaid period".

8. Consequent upon this decision, the applicant was also informed by the Annexure P-8 memo dated 19.8.1988 that his notice for voluntary retirement could not be acceded to as he had not completed the required years of service needed for voluntary retirement.

9. Aggrieved by the orders, this O.A. has been filed to quash them and to direct the respondents to treat the period from 6.12.1980 to 24.9.1987 as a period spent on duty for all purposes and to pay the applicant his full salary for the above period with all other benefits.

10. The orders are assailed on the only ground that in the show cause notice issued to the applicant (Annexure P-5), he was never informed that it was proposed to treat the period in question as a period not spent on duty, as was finally ordered. The consequence of that decision is very serious as he has lost seven years of service for all purposes.

11. The respondents have filed a reply denying the allegations made by the applicant. It is stated that a notice (Annexure P-5) was issued to the applicant in accordance with the requirements of FR 54(1) and (2) and an order was passed (Annexure P-10) after considering his representation. In this connection, the respondents have stated as under:

15

"It was in pursuance of these orders that a notice dated 1.12.87 was issued to the applicant regarding the proposal to treat the period from 6.12.80 to 24.9.87 as period under suspension and payment of subsistence allowance for that period subject to the deduction of the amount paid to him as per the order dated 7.2.84 of the Hon'ble Supreme Court. It would not be correct to say that the aforesaid notice was only with regard to the proposal for payment of subsistence allowance. It was /in regard to both (a) treatment of the period as "the period under suspension" and (b) the payment of only subsistence allowance for that period. The fact that the period from 6.12.80 to 24.9.87 was proposed to be treated as "the period under suspension" makes it abundantly clear that the respondents intended to treat the period as non-duty"

It was contended that, in the circumstances, it is incorrect to state that the applicant was not given a notice that the respondents intended to treat the period as non-duty.

12. It is necessary to add that the order of the Appellate Authority dated 18.9.87, imposing penalty in the D.E., was successfully challenged by the applicant before the Tribunal in OA-1808/87. A copy of the judgement dated 13.7.93 therein has been brought on record by the applicant. The impugned order was quashed. The applicant was permitted to file a representation against the action proposed in the DE and the appellate authority was directed to pass a fresh order in the DE after considering this representation. Such an order was passed on 6.4.94. A copy of that order is also on record. The result remains unchanged and the same penalty which was imposed earlier on 18.9.87 has been now imposed.

13. A question arose as to whether these developments have any effect on the impugned orders in this O.A. The learned counsel for the applicant contended that they have no connection with each other and the impugned order at Annexure P.10 remains unaffected. On the contrary, the learned counsel for the respondents contended that the Annexure P-10 order is required to be passed only in consequence of the order in the discipli-

nary proceedings. As that order has been set aside by the Tribunal and as, in pursurance of the directions of the Tribunal, a fresh order dated 6.4.94 has been passed by the appellate authority in the disciplinary proceedings, a fresh order has to be passed by that authority as to how the period from the date of dismissal to the date of reinstatement should be treated.

14. We have considered this question. We are of the view that the Annexure P-10 order remains unaffected by the subsequent developments for several reasons. The most important of these is the fact that while rendering the judgement of the Tribunal dated 13.7.93 in OA 1808 of 1987, the Tribunal was aware that the applicant had been reinstated, though some penalty was imposed on him. This is clear from para 2 of the judgement where reference is made to the lenient view taken by the appellate authority and his desire to "give him a fresh chance to serve the Department". Yet, while the Tribunal quashed the order dated 18.9.87 imposing penalty it was silent on the reinstatement of the applicant. The reason is obvious. The applicant's prayer for relief having been granted, there was no question of depriving him of whatever benefit he already has got from the Department. Secondly, the respondents too could not have done any thing in this matter, even if it is assumed that such a course was open to them. For, the Tribunal merely remanded the matter to the appellate authority to pass appropriate order, after considering the applicant's representation against the enquiry report. This implied that the appellate authority was restrained from imposing any harsher penalty (e.g. dismissal or removal) than was imposed on 18.9.87, because that would be only due to a mere change of opinion. That apart, the penalty given earlier, without giving any opportunity to the applicant of being heard, cannot be harsher after a representation is filed and considered. Therefore, reinstatement of the applicant was inevitable and the earlier order reinstating him, as a

result of which he resumed duties on 25.9.87 cannot be altered. Therefore, the consequential proceedings leading to the issue of the Annexure P.5 notice, followed by the applicant's representation (Annexure P-6) and the impugned Annexure P.10 order remain unaffected.

15. We have heard Sh. B.B. Raval, the learned counsel for the applicant. Besides reiterating the grounds raised in the O.A., he contended that an order was required to be passed only under FR 54-B and according to him, the provisions of sub-rule 3 & 4 would apply. He also contended that as only a minor penalty has been imposed, the period of suspension, if any, should be treated as duty, according to the decision of Government in this regard.

16. The learned counsel for the respondents, Shri V.S.R. Krishna, contended that the Annexure P-5 notice contains a provisional decision as to how the period is intended to be treated. Rebutting the fresh arguments of Shri B.B. Raval, he pointed out that when the penalty was imposed by the order dated 18.9.1987 it was a minor penalty and hence the Government instructions, referred to have no application.

17. We have given our anxious consideration to the rival contentions and we have carefully perused the record.

18. The first question is whether the applicant was given any notice as to the provisional decision taken by the respondents that the period from the date of dismissal to the date of reinstatement will not be treated as a period spent on duty. It may be mentioned here that the Annexure P-5 show cause notice informed the applicant as follows:

> "7. Now, therefore, it is proposed that the period of his absence from the date of dismissal, i.e. 6.12.1980 to 24.9.1987 (the date before he joined duties) will be treated as period under suspension and he will be paid a subsistence allowance as per the normal rules subject to the deductions of the amounts paid to him as per the orders of the Hon'ble Supreme Court dated 7.2.1984".

We notice that the Annexure P-6 representation to the show cause notice, has been concluded by the applicant as follows:

> "Therefore, it is requested that full salary for the period 6.12.1980 to 24.9.1987 may kindly be given to me. The above period may also kindly be treated spent on duty for all purposes".

It is thus clear that the applicant clearly understood the notice, Annexure P-5, to inform him that the respondents intended to treat the period as not spent on duty and, therefore, he had to make the request that it be treated as duty for all purposes. In other words, it appears, the applicant understood the proposal in the same manner as what the respondents claim they intended to convey to him-vide the extract of their reply reproduced in para 11 supra. Apparently, the applicant fully understood the language of the Annexure P-5 notice and its implications. We are, therefore, satisfied that in this circumstance, there is no violation of the principles of natural justice and the applicant had been given a reasonable opportunity of being heard in the specific matter as to how the period referred to in the Annexure P-5 notice was to be treated.

19. However, having said so, we are constrained to point out that the Annexure P-5 notice stating that it was intended to treat the period as one under suspension is, nevertheless, improper. For, FRs 54, 54-A and 54-B all require the competent authority to pass an order (i) as to what should be the pay and allowances which should be given for the period a person was kept under suspension; and (ii) whether the period of suspension should be treated as a period spent on duty or not? In other words, no period can be finally regularised as a period of suspension because, as the word 'suspension' itself implies, there is no finality about that status. Finality has to be given by separate orders which have to be passed when it is

19

decided to terminate the suspension and reinstate an employee, either when he is acquitted in a criminal trial or on the basis of the final order in a D.E. or otherwise. That order will have to indicate whether the period will at all be treated as duty and if so, whether it will be treated as duty for all purposes or only for some purposes.

20. The second question is whether the Annexure P-10 order is, otherwise, justified. We are of the view that inasmuch as the applicant has been found guilty in the departmental enquiry proceedings, the respondents are justified in the view taken by them.

21. We now turn to the argument based on the consideration that the penalty imposed, being a minor penalty, the period cannot be treated as a period spent on suspension as proposed in the Annexure P-5 show cause notice, which is understood to mean as period not spent on duty. This argument does not stand scrutiny. For, on the date when the penalty was imposed i.e. 18.9.87, as also on the date when the Annexure P-10 order was passed, i.e. 3.8.1988, this penalty was, as a matter of fact, classified as a minor penalty. The amendment to Rule 11 of the CCA Rules treating this as a minor penalty came into effect much later, vide notification No. 11012/4/86 Estt.(A) dated 13.7.1990 kept on record. That apart, the circular of the Department of Personnel that the period of suspension should be treated as wholly unjustified if a D.E. proceeding ends in a minor penalty (P-240 of Swamy's Compilation of CCS (CCA) Rules, 20th Edition) would not apply to this case because, in this case, the applicant was never suspended at all before the enquiry, nor was he treated to be under deemed suspension. As a matter of fact, until reinstatement on 25.9.1987, he was a dismissed Government employee.

22. That takes us to what we feel is the most important issue which is whether, in the circumstances of the case, the period during which the applicant remained dismissed can, at all, be treated as anything different from one of dismissal, i.e. not spent on duty for any purpose.

23. This is a case where the power of dismissal without holding an enquiry was exercised under Clause'b' of the second proviso to Article 311(2) of the Constitution - second proviso, for short - The relevant provisions read as follows:

> "311(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.
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> 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:
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> Provided further that this clause shall not apply.
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> (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
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> (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 any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under clause 2, the decision thereon of the authority empowered to dismiss or remove such person or reducing in rank, as the case may be, shall be final".

The exercise of that power was found justified by the Supreme Court and the dismissal of the applicant was upheld. The Court only held that even so, an appeal could still be filed where the issue would be whether it is now practicable to hold an enquiry and if so, the enquiry shall be held as provided in the Rules. That has been done and a minor penalty has been imposed. The applicant has also been reinstated. The authority has to next consider how the period of absence i.e. from the date of dismissal to the date of reinstatement has to be regularised. The question is whether the fact that the applicant was dismissed by an order issued under the second proviso, which has, on appeal, been upheld by the Supreme Court, will alone be relevant to determine the issue or what will be the effect of this circumstance on the decision to be taken.

23. For a proper consideration of this question, it is useful to recall the following observations and conclusions of the Supreme Court in Tulsi Ram Patel (Supra) which highlight the nature and implications of an order issued under the second proviso; more particularly under clause (b) thereof.

(i) Before examining any power under the second proviso, some conditions should be satisfied. The second proviso will apply only where the conduct of a Government servant is such that he deserves the punishment of either dismissal or removal or reduction in rank and nothing less. If the conduct is such as to deserve any other punishment, the second proviso cannot come into play at all, because Article 311(2) is itself confined to only these three penalties.

(Para 62 of the judgement). It is only thereafter that a decision has to be taken whether it is reasonably practicable to hold the enquiry or not. For a valid exercise of the power under clause (b), it is also necessary to record the reasons in writing as to why the disciplinary authority is satisfied that it is not reasonably practicable to hold the enquiry (para 133 ibid). Therefore, when an order has been passed under the second proviso, it implies that the competent authority has considered and held that the misconduct is grave enough to warrant a penalty not less than reduction in rank, or removal from service or dismissal, as the case may be, and that there were grounds to conclude that it was not practicable to hold an enquiry.

(ii) There is no scope for introducing any kind of opportunity to be given to a Government servant before action is taken under this proviso. There is a constitutional prohibitory injunction restraining the disciplinary authority from holding any enquiry under Article 311(2) or from giving any kind of opportunity to the employee (Para 70 ibid). Therefore, an order under the second proviso cannot be issued lightly, because it deprives an employee of his valuable rights.

(iii) This is reiterated while specifically dealing with clause (b) of the second proviso, clause (b), for short, that a disciplinary authority is not expected to dispense with the disciplinary enquiry lightly or arbitrarily or out of ulterior motives or merely in order

to avoid the holding of an enquiry or because the department's case against the Government servant is weak and must fail (para 130 ibid). If, therefore, an order under clause (b) is sustained in judicial review, it follows that the disciplinary authority had considered all aspects before taking the grave decision to invoke the power under clause (b) and that there was no need for judicial interference.

(iv) The following observations made in para 70 ibid indicate how an order under the second proviso is to be viewed:

> "...Equally, where a public servant by himself or in concert with others, has brought about a situation in which it is not reasonably practicable to hold an enquiry and his conduct is such as to justify his dismissal, removal or reduction in rank, both public interest and public good demand that such penalty should forthwith and summarily be imposed upon him.....Much as this may seem harsh and oppressive to a government servant, this Court must not forget that the object underlying the second proviso is public policy, public interest and public good and the Court must, therefore, repel the temptation to be carried away by feelings of commiseration and sympathy for those government servants who have been dismissed, removed or reduced in rank by applying the second proviso. ...After all, it is not as if a government servant is without any remedy when the second proviso has been applied to him. There are two remedies open to him, namely, departmental appeal and judicial review".

(v) When an employee, dismissed under clause (b) appeals to the High Court under Article 226 or to the Supreme Court under Article 32 of the Constitution, the Court will interfere on grounds well established in law for the exercise of power of judicial review in matters where administrative decision is exercised. It will consider whether clause (b) or an analogous provision in the service rules was properly applied or not (para 137 ibid). This not only means that the reasons recorded for concluding that a departmental enquiry is not practicable will be scrutinised but that the Court will also consider whether the misconduct alleged, prima facie, calls for one of the three punishments referred to in Article 311 (2). This is clear paras 147 onwards of the judgement in Tulsiram Patel whether the appeals are considered on merits, on the facts and circumstances disclosed therein.

(vi) In so far as the right of an employee to seek departmental remedies and the scope of such remedies are concerned, these have been set out in Satyabir Singh's (supra), i.e., in the judgement of the Supreme Court by which the applicant's appeal was dismissed at one place. The conclusions reached in Tulsiram Patel's case are given in summary form in para-6 of that judgement. Conclusions given in paras 99, 101 and 102 are relevant and are reproduced below:-

contd...17..

"99. A civil servant who has been dismissed or removed from service or reduced in rank by applying to his case one of the clauses of the second proviso of Art.311(2) or of an analogous service rule has, therefore, the right in a departmental appeal or revision to a full and complete inquiry into the allegations made against him subject to a situation envisaged in the second proviso to Art.311(2) not existing at the time of the hearing of the appeal or revision application. Even in case where such a situation exists, he has the right to have the hearing of the appeal or revision application postponed for a reasonable length of time for the situation to become normal.

101. A civil servant who has been dismissed or removed from service or reduced in rank by applying to his case Cl(b) of the second proviso to Art.311(2) or an analogous service rule can claim in appeal or revision that an inquiry should be held with respect to the charges on which such penalty has been imposed upon him unless a situation envisaged by the second proviso is prevailing at the hearing of the appeal or revision application. Even in such a case the hearing of the appeal or revision application should be postponed for a reasonable length of time for the situation to return to normal.

102. In a case where a civil servant has been dismissed or removed from service or reduced in rank by applying clause (b) of the second proviso or an analogous service rule to him, by reason of Cl.(3) of Art.311 it is not open to him to contend in appeal, revision or review that the inquiry was wrongly dispensed with."

24. It is clear from the foregoing that when an order under clause (b) is upheld in judicial review, it becomes final and is not subject to any other order. That apart, conceptually, there can be no appeal or revision on merits against that order. For, in so far as the departmental authorities are concerned, the bar of Article 311(3) will operate and, therefore, no enquiry can be held. No appellate or revisional authority can reasonably conclude, without conducting an enquiry, which has been finally held to be impracticable by the competent disciplinary authority- that the misconduct alleged against an employee is baseless. It is for this reason that the Supreme Court deliberately avoided stating that the penalty can be challenged in appeal/revision. It has only been held that an appeal/revision can be filed to (i) request that as conditions have changed, an enquiry is practicable and it be held and (ii) an opportunity be given to establish that the government servant is not guilty of the charges.

25. This can be seen from another angle. The second proviso to Article 311(2) does not subject any order passed under clauses (a), (b) and (c) to any order that might be passed subsequently by the departmental appellate authority or revisional authority in an appeal/ revision filed by the aggrieved government servant. There cannot be any departmental service rule to this effect. For, the implication of such a service rule would be that an order passed in terms of the second proviso to the Constitution, which prohibits the holding of an enquiry, is made subject to an order passed after holding such an enquiry. Any such provision will be void as being unconstitutional, as held in para 106 of Tulsiram Patel as follows:

> "...For an Act or a rule to provide that in a case where the second proviso applies any of the safeguards excluded by that proviso will be available to a government servant would amount to such act or rule impinging upon the pleasure of the President or Governor, as the case may be, and would be void as being unconstitutional."

26. Therefore, any order passed by a disciplinary authority or appellate authority, which dilutes the penalty imposed under the second proviso will have only prospective effect. It cannot have any effect on the order issued under the second proviso which will remain in force until the revised order is passed.

27. In this connection, it is necessary to refer to the judgement rendered in O.A. 1808/87 where the applicant challenged the minor penalty imposed by the appellate authority. It was observed that when the appellate authority to whom the applicant was permitted by the Supreme Court to file an appeal, was satisfied that it was now practicable to hold an enquiry, he should have only remitted the enquiry to the disciplinary authority. Inter alia, it was held as follows:

> "Rule 27(2) (ii) empowers the appellate authority to remit the case to the authority which imposed or enhanced the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case. It is this power which the appellate authority ought to have exercised on his coming to conclusion that having regard to the changed circumstances, it is now reasonably practicable to hold a disciplinary enquiry against the petitioner, after setting aside the order imposing the penalty made earlier against the petitioner".
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> (Emphasis ours)

With great respect, we are unable to agree that the appellate authority had the power to set aside the order imposing the penalty of dismissal under clause(b) for the reasons given above.

28. In the instant case, the validity of the order of dismissal under clause (b) has been upheld by the Supreme Court in Satyabir Singh(Supra), as would be clear from extracts of the judgement reproduced in para 2 supra. In other words, the dismissal has the seal of approval of the Supreme Court and is, therefore, final.

29. After the employee is reinstated, the question arises as to how the period from dismissal to reinstatement is to be treated. In the above circumstances, there is no right left with the government servant to contend that this period should be treated as duty, either fully or partially. Likewise, the competent authority too is not left with any choice in the matter. For, that issue has been sealed by the decision rendered in judicial review upholding the penalty. Therefore, there is no scope, whatsoever, to hold that this period can be treated as anything other than dismissal i.e. not spent on duty for any purpose.

30. Therefore, the issue of a show cause notice in this respect would appear to be a futile exercise. However, considering the observations of the Supreme Court in M. Gopal Krishna Naidu's case (AIR 1968 SC 240)- referred to in para 107 of the judgement in Tulsi Ram Patel - the formality of giving the government servant a reasonable opportunity to show cause under FR 54 has to be observed. In Gopal Krishna Naidu's case, it was observed that there would have been no earlier enquiry in the class of cases where the penalty

is imposed under the second proviso. Therefore, the authority would not have before him any explanation by the government servant as to how the period should be treated and hence there was a need for the issue of a notice. In that case, the question was not considered whether any purpose would be served of such show cause notice, if the legal position is that the period has by necessarily to be treated only in terms of the penalty earlier imposed.

31. The same conclusion can be reached by another route considering the nature of the order to be passed under FR 54-B. Sub-rule 3 thereof directs that where the authority competent to order reinstatement is of the view that the suspension was wholly unjustified, the Government servant shall be paid the full pay and allowances and under sub-rule (4), this period shall be treated as a period spent on duty for all purposes. In other words, what is to be considered is whether the suspension was wholly unjustified or not. By analogy, what has to be considered in this case is whether the dismissal preceding the reinstatement was wholly unjustified. There is no scope for any such consideration at all because the Supreme Court has approved the dismissal and found it justified in an appeal filed by the applicant. Therefore, there is no question of that period being treated as anything other than dismissal i.e. not on duty.

32. We may now refer to Union of India & Ors. Vs. R. Reddappa and anr, JT 1993(4) SC 470, where the Supreme Court has given relief to railway employees against whom action was taken under clause (b) of the second proviso. As seen therefrom, about 800 railway employees were dismissed

under Rule 14(2) of the Railway Service (Discipline and Appeal) Rules for their participation in Loco Running Staff Association strike in Jan, 1981. In each of the cases the disciplinary authority held that it was not reasonably practicable to hold any enquiry. The judgement then proceeds to state as follows:

> "...Appeal Numbers 4681-82 of 1992 and 4751-4680 of 1992 arise out of the orders passed by the CAT, Hyderbad. Earlier, the employees challenged their dismissal by way of writ petitions in the High Court of Andhra Pradesh. Some of these petitions were allowed as the appellate authority had passed non-speaking orders. Others were dismissed. Against the orders dismissing the writ petitions the employees filed a review petition, which was allowed in view of decision of this Court in Union of India V. Tulsiram Patel, 1985(3) SCC 398 and a direction was given to the appellate authority to decide the appeals afresh in light of observations made by this Court in Satyavir Singh V. Union of India & Others, 1985(4) SCC 252 and Ram Chander V. Union of India & Others, 1986(3) SCC 103. The appellate authority once again maintained the order of dismissal. It has been set aside by the CAT both for failure to apply mind and absence of any material justifying dismissal. Following directions were issued:
>
> > "In the result, we set aside the orders of the appellate authorities/reviewing authorities rejecting the appeals/review petition of the applicants and the orders of the disciplinary authorities dismissing the applicants from service. In O.A. Nos..... we direct the appellate authority to conduct an enquiry either himself or through an enquiring authority appointed by it in accordance with the Railway Services (Discipline and Appeal) Rules, 1968. If an enquiry is not possible at all, the applicants will be entitled to

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be reinstated with all consequential benefits. In O.As....., it is represented that the applicants have since retired. The question of holding an enquiry in their cases does not, therefore, arise. The orders of the disciplinary authority/appellate authority in these cases are set aside, as has been done by the Gauhati Bench in O.A.No. 408/86 (Golul Ch. Barua & Ors. Vs. Union of India & Ors.). The applicants therein will be entitled to receive the salary for the period from the date of dismissal to the date of their attaining the age of superannuation and thereafter to pension as if they had retired from service on attaining the age of superannuation".

33. Union of India filed appeals against this order of the Hyderabad Bench as well as an order of the Jodhpur Bench. The workmen too filed appeals against the order of the Chandigarh Bench rejecting their claim. After careful consideration, orders in favour of the employees were issued as below by the Supreme Court:

> "...It has not been found by any tribunal that the orders passed against the respondents was in any manner justified. In other words, the exercise of power was arbitrary. If this be so, as is apparent, then there can be no justification for denying the benefit to employees. Technical arguments apart, once this Court is satisfied that the participants in the strike were unjustly treated, the Court is not only competent but has an obligation to act in a manner which may be just and fair. Keeping this in light, we issue following directions:
>
> (i) Employees who were dismissed under Rule 14(2) for having participated in the Loco Staff strike of 1981 shall be restored to their respective post within a period of three months from today.
>
> (ii) (a) Since more than three years have elapsed from the date the orders were found to be bad on merits by one

tribunal it is just and fair to direct the applicant to pay the employees compensation equivalent to three years salary inclusive of dearness allowance calculated on the scale of pay prevalent in the year the judgement was delivered, that is, in 1990.

(b) This benefit shall be available even to those employees who have retired from service. In those cases where the employees are dead the compensation shall be paid to their dependents. The compensation shall be calculated on the scale prevalent three years immediately before the date of retirement or death.

(iii) Although the employees shall not be entitled to any promotional benefit but they shall be given notional continuity from the date of termination till the date of restoration for purposes of calculation of pensionary benefits. This benefit shall be available to retired employees as well as to those who are dead by calculating the period till date of retirement or death".

(Emphasis ours)

34. This relief was given only because of the fact that the dismissal was not upheld in judicial review. It is to be noted that clause (i) of the direction makes reinstatement prospective. Clause (iii) of the direction allows the period from the date of termination till restoration only for the purposes of pensionary benefits. The applicant whose dismissasl has been upheld by the Supreme Court, cannot, therefore, claim that the period for which he stood dismissed should be treated as duty for all purposes.

35. For these reasons, we are of the view that in the present case, there was no alternative for the disciplinary authority except to treat the period as not spent on duty. The disciplinary authority is, however, left free to take a decision on only one matter. He could either hold that the period of dismissal would also amount to a break in service resulting in forfeiture of all past service or he could direct that, despite the dismissal, the service rendered, after the applicant is reinstated, shall be treated to be in continuation of the past service rendered prior to dismissal. We notice that the disciplinary authority has not passed any order forfeiting the service rendered prior to dismissal, even though he has treated the period of dismissal as not spent on duty. Therefore, in our view, the period spent prior to dismissal would have to be taken into account for all purposes along with the period of duty commencing from the date of reinstatement.

36. To summarise, our views are as follows:-

i) The applicant has been given a reasonable opportunity of being heard in regard to the manner in which the period of absence referred to in the Annexure P-5 notice is to be treated.

ii) The Annexure P-10 order under F.R. 54 cannot be faulted and the view taken therein is entirely justified. Consequently, the Annexure-9 order is also valid.

iii) No relief is due to the applicant on the consideration that the penalty imposed is only a minor penalty and that, therefore, the period of suspension should be treated as duty.

iv) In the circumstances of the case, where the applicant was dismissed under clause (b) of the second proviso to Article 311 (2) of the Constitution and his dismissal has been upheld

by the Supreme Court, the appellate authority cannot set aside this order of dismissal, but can only order an enquiry to be held, if such enquiry is practicable. The order passed after such enquiry will have only prospective effect.

v) Thereafter, the competent authority acting under FR 54 cannot treat the period of absence from the date of dismissal till the date of reinstatement as any thing other than a period of dismissal, i.e., a period not spent on duty for any purpose.

37. The view that we have taken in regard to the treatment of the period from the date of dismissal till the date of reinstatement in the context of the fact that the applicant's dismissal was under clause (b) of the second proviso to Article 311 (2) of the Constitution, which has been upheld in judicial review by the Supreme Court, raises an important issue of law and we are of the view that this matter should be finally decided by a larger Bench. More so, when we have regretted our inability to agree with one aspect of the judgement rendered in OA-1808/87, to which we have made a reference in para 27 supra. The issues for consideration by the larger Bench would be as follows:

i) Where an order of dismissal has been passed under clause (b) of the second proviso to Article 311 (2) of the Constitution - clause (b) for short - and that order has been upheld in judicial review, but an appeal, permitted to be filed in terms of the judgement of the Supreme Court in Union of India vs. Tulsi Ram Patel (AIR 1985 SC 1416), has been filed and the appellate authority holds that it is now practicable to hold an enquiry into the charges against the Govt. servant, can the appellate authority

set aside the aforesaid order under clause (b) imposing the penalty, before remitting the case to the disciplinary authority to hold an enquiry or, can the authority which passes the final order, reinstating the Government servant, set aside that order of penalty?

ii) If, in the disciplinary proceedings so initiated, a lesser penalty is imposed, will it have the effect of annulling the penalty earlier imposed under clause (b)?

iii) In the circumstances mentioned in (i) above, where the Govt. servant is reinstated on the completion of the aforesaid disciplinary proceedings, can the period between the date of dismissal under clause (b) and the date of reinstatement, be treated as anything other than a period of dismissal, i.e., a period not spent on duty for any purpose.

38. The Registry is directed to place this OA before the Hon'ble Chairman for appropriate orders. Before that is done, a copy of this order be served on the parties.

10/8/94

(C.J. Roy)
Member(J)

10/8/94

(N.V. Krishnan)
Vice-Chairman

'S.R.D'