CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH, KOLKATA

O.A. 1158 of 2017 (A & N)

Coram : **Hon'ble Ms. Bidisha Banerjee, Judicial Member**
Hon'ble Dr. Nandita Chatterjee, Administrative Member

Etwa Ekka,
Aged about 45 years,
Son of Shri Ragwa Ekka,
Residing at Rajeev Nagar,
Campbell Bay, Great Nicobar,
Pin – 744302,
Ex-Constable Ct/021304.

..... Applicant.

Versus

1. The Lieutenant Governor,
Andaman & Nicobar Islands,
Raj Niwas,
Port Blair – 744101.

2. The Andaman & Nicobar Administration,
Service through the Chief Secretary,
Andaman & Nicobar Administration,
Secretariat, Port Blair – 744101.

3. The Director General of Police,
Police Headquarters,
Atlanta Point, Port Blair,
Andaman – 744101.

4. The Commandant,
India Reserve Battalion,
Andaman & Nicobar Islands,
Port Blair – 744101.

5. The Assistant Commandant,
India Reserve Battalion,
Andaman & Nicobar Islands,
Port Blair – 744101.

..... Respondents.

For the applicant : Mr. P.C. Das , Counsel
Ms. T. Maity, Counsel

For the respondents : Mr. S.K. Ghosh , Counsel

Reserved on : 23.07.2018

Date of Order : 21.8.18

ORDER

Per : Bidisha Banerjee, Judicial Member

As a sequel to an earlier O. A., being O A N.65 of 2015 this application has been preferred.

2. The legality and propriety of a speaking order dated 19.05.17, issued by the Director General of Police as Appellate Authority whereby and whereunder the prayer of the applicant for reinstatement in service has been rejected, is under challenge in this O A.

3. The admitted facts that could be culled out from the pleadings of the parties are as under:

While the applicant was serving as constable in the India Reserve Battalion, A &N Police, a Crime Case No. 294/2010 was registered under Section 376/323/504 of IPC on 19.03.2010 against him at PS Aberdeen based on the complaint of one Ms. Mariayam Ekka. The registered complaint against the applicant was that he had been sexually exploiting paid Ms. Mariayam Ekka the complainant, under the guise of promise of marriage. As a result, she became pregnant on three occasions in 2007, 2008 and 2009 and was compelled, by the applicant, to abort her pregnancies. In pursuance of the complaint and the criminal case registered against the applicant, he was arrested on 25.03.2010 and remanded to judicial custody. On the same day, Ms. Mariayam Ekka lodged another FIR No.311/2010, dated

25.03.2010, stating that two India Reserve Battalion IRBn) constables approached her and shouted that she was the one who was responsible for the arrest of their friend Etwa (the applicant herein). They started beating her and using filthy and unparliamentary words. On the basis of the written report, a Criminal case under Section 341/354/323/504/506/34 IPC was registered against the two constables. Consequent on this, the two constables were placed under suspension and a departmental inquiry ordered against them. Subsequent to his arrest and remand to judicial custody, the applicant was dismissed from service, vide Annexure A-3 Order Book No.681,dated 03.04.2010, invoking proviso to Article 311(2)(b) of the Constitution of India read with Rule 11(viii) of the CCS (CCA) Rules 1964.

The Criminal Case filed before the Learned Additional Sessions Judge, Andaman & Nicobar Islands, Port Blair, ended with the applicant's acquittal from all charges as "the prosecution had failed to prove the charges levelled against him beyond reasonable doubt" and "the evidence against him was grossly insufficient and inadequate".

Immediately thereafter the applicant submitted a representation to the 3rd respondent on 02.01.2013 requesting for reinstatement into service. Since his case for reinstatement was not considered even after acquittal, he submitted an appeal to the first respondent on 06.11.2013. While the matter was under consideration by the 1st Respondent, the 3rd respondent being the Appellate Authority disposed of his representations dated 02.01.2013 and 24.6.2013 rejecting his prayer for reinstatement.

4. Aggrieved, applicant preferred OA 65 of 2015 against the following orders:

"(i) Orders of the 4th respondent dated 03.04.2010 dismissing the applicant from service, and

(ii) Orders of the 3rd respondent dated 11.11.2013 rejecting the applicant's prayer for reinstatement into service after acquittal in the criminal case."

The applicant in the earlier round had urged that his dismissal from service was in contravention of Article 311 and that such action was arbitrary, illegal and in contravention of the provisions contained under Articles 14 and 21 of the Constitution of India as, he was neither given any show cause, notice nor provided with any opportunity of hearing before his dismissal. He alleged that the entire action and inaction on the part of the respondents were against all canons of service jurisprudence and therefore liable to be set aside. Further, that the Appellate Authority failed to consider the fact that he could not be denied reinstatement upon his acquittal by a competent Court of law in the criminal case and that he would be seriously prejudiced, if he was not reinstated even upon his acquittal from all criminal charges.

The applicant had heavily relied upon **Reena Rani v. State of Haryana(2012) 10 SCC 215** and the judgment in **Civil Appeal No.2839 of 2011(Risal Singh v. State of Haryana** in support of his contention, while the respondents relied on **Union of Inda v. Tulsi Ram Patel** in which Hon'ble Apex Court succinctly held as under :

"That, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the option of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, about some instances by way

of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the Government servant, particularly through or together with his associates, so terrorizes, threatens or intimidate witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the Government servant by himself or together with or through others threatens, intimates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the enquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned Government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this, that Clause (3) of Article 311 makes the decision of the disciplinary authority on this question final."

This Tribunal in O.A. 65 of 2015 framed the following questions:

"(i) Whether the action of the Disciplinary Authority in invoking Article 311 (2) (b) of the Constitution of India for dismissing the applicant from service is maintainable;

(ii) Whether the action of the Appellate Authority in rejecting his representation for reinstatement even after his acquittal in the criminal case was just and proper."

Having discussed the implications of **Tulsi Rani Patel** and **Reena Rani** and as also **Risal Singh**, (supra), thread bare, this Tribunal opined that "in the aforesaid judgments, the Hon'ble Supreme Court ruled that when reasons are not ascribed, the dismissal order is vitiated and consequently set aside. The instant OA is clearly distinguishable on facts inasmuch as the Disciplinary Authority has given in explicit terms the reasons as to why holding of an inquiry was not reasonably practicable. Hence, the judgments of the Hon'ble Supreme Court are not relevant to the facts and circumstances of the present case".

It ordered "that the first issue is answered against the applicant"

However, in regard to the second issue, this Tribunal held as under:

"24. The order of the appellate authority suffers from a serious defect as he has not made it clear as to what was the evidence for arriving at the conclusion that the applicant had indulged in a criminal act even when he was acquitted by the Trial Court and particularly when no appeal seems to have been filed against the order of the Additional Sessions Judge in Sessions Case No.44 of 2010. Thus, the order of the appellate authority does not stand the test of judicial scrutiny in this respect. His order has also failed to consider the pleas of the applicant that he was dismissed from service only on account of the criminal case and that he is entitled to claim reinstatement after his acquittal in the criminal case. It was incumbent on the third respondent to give a reasoned and justified finding as to why despite his acquittal in the Criminal Case, the applicant is not entitled to reinstatement. Thus, on account of the failure of the 3rd respondent to properly address the issues raised by the applicant, the appellate authority's order stands vitiated.

25. It has been well settled by the Hon'ble Apex Court in Mohinder Singh Gill v. The Chief Election Commissioner (1978 (1) SCC 405) and in Dipak Babaria v. State of Gujarat (2014 (3) SCC 502) that the Government must defend its action on the basis of the order that it has passed and that it cannot improve its stand by filing subsequent affidavits. It is also well settled that the validity of an order has to be judged by the reasons mentioned in the order and cannot be supplemented by fresh reasons in the shape of affidavits or otherwise.

26. In this view of the matter, we are of the considered view that the appellate authority's order is bad in law and is liable to be set aside. Thus, the second issue is answered in favour of the applicant."

5. This Tribunal in the earlier round in O.A. 65 of 2015, thus quashed the impugned order of the 3rd respondent (the Director General), dated 11.11.2013, and directed the 3rd respondent to reconsider the representation of the applicant and afford him an opportunity of hearing with submission of any other relevant material in support of his prayer for reinstatement, within a period of six weeks from the date of receipt of a copy of its order and further "to consider objectively the further developments and all the issues raised by the applicant and pass a

detailed and reasoned speaking order in accordance with law and communicate the same to the applicant within a period of four weeks thereafter".

Strangely enough having discussed the entire merit of the case including violation of Article 311, as well as reasonableness of invoking proviso to Article 311 (2) (b), this Tribunal observed as under "It is made clear that we have not expressed any opinion on the merits of the contentions raised by the applicant in his appeal petition to the 3rd respondents".

6. Therefore we embark upon the task of dealing with the legality and propriety of the order of Appellate authority on dismissal dated 3.4.2010 dated 03.04.2010 invoking proviso to Article 311 (2) (b) as well as the correctness of the Appellate order issued on 11.11.2013 by the Director General.

7. We noted that in Tulsi Ram Patel (supra),

"The Constitution Bench considered the scope of clauses (a), (b) and (c) of the second proviso to Article 311. While dealing with clause (b), Madon, J., who spoke for the majority of the Constitution of Bench observed as under:

"130.....

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133. The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reasons for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional.

134..... The reason for dispensing with the inquiry need not contain detailed particulars, but the reason must not be vague or just a repetition of the language of clause (b) of the second proviso. For instance, it would be no compliance with the requirement of clause (b) for the disciplinary authority simply to state that he was satisfied that it was not reasonably practicable to hold any inquiry."

8. We noted that the disciplinary authority while recording his reasons for invoking proviso to Article 311 (2) (b), wholely based upon the complaint filed by Mariam Ekka which she lodged with P.S. Aberdeen, U/S 376/323/504 of IPC about promise to marry, exploiting her sexually, compelling her to abort the pregnancies thrice, etc. all of which were criminal charges while the applicant got acquitted of all the charges in the criminal cases.

9. The order of the Addl. Sessions Judge, A & N Islands records the following:

"The victim" girl while deposing as PW-1 stated that she met with accused three years ago and then developed relationship with him. She also stated that she made a complaint against the accused person. From the complaint it is the evident that she made allegations against the accused that accused had promised to marry and then raped her on several occasions and on two occasions her pregnancies were terminated when the accused gave her pregnancies were terminated when the accused gave her medicines. She also alleged that in the year 2009 the accused forcibly raped her and she became pregnant and her pregnancy was terminated by medicines applied by the accused but she had some infections. She also made allegations that the accused abused her and then also assaulted her and then refused to marry her. The PW-1 also stated that she gave statement before the Magistrate stating the facts. The PW-1 was cross-examined by the defense counsel and in her cross-examination the PW-1 admitted that she made the statement as tutored by the police. She also admitted that she filed complaint on request by police. Thus, from the cross-examination of the victim (PW-1) it is quite evident that the victim's evidence cannot be at all relied upon as she admitted that her case was filed on request by police and whatever she stated before Magistrate was tutored by police.

PW-2 the mother of the victim stated nothing against the accused person except that she requested the accused to marry her daughter but the accused turned down her request and that the accused and the victim stayed together for 2/3 days. The PW-7 also stated that the victim Mariam Ekka and the accused resided at Vanvasi Kalyan Ashram together and one day they had quarrelled. PW-9 stated that the accused and the victim stayed together as husband and wife at her house as tenant. The PW-10 stated that Mariam and the accused resided together at Vanvasi Kalyan Ashram. Though from the evidence of PW-2, PW-7, PW-9 and PW-10 it is evident that they all have stated that the victim and the accused stayed together for a few days but this piece of evidence cannot be accepted as any proof of the charges against the accused person, in view of the evidence of the victim girl herself as PW-1. The PW-1 in her evidence on oath did not say anything that she and the accused stayed together as husband and wife. The evidence of PW-1 as per FIR and the statement before the

Magistrate cannot be accepted as substantiative piece of evidence against the accused person since the victim admitted that she made the statement before the Magistrate and also statement before police as directed by the police.

In view of the evidence of the victim girl it is found that the medical evidence cannot be relied upon. From the medical evidence also it is not proved that the accused committed rape or committed assault to the victim. Since the prosecution charges could not be proved by the independent witnesses, it is found that the evidence of PW-13 and other police evidence cannot be relied upon to hold that the charges against the accused person could be proved by the prosecution.

Therefore, considering the entire evidence on record it is found that the prosecution side failed to prove the charges against the accused person u/s 376/323/419/504 IPC with evidence beyond reasonable doubts. The evidence against the accused person is grossly insufficient and inadequate. Therefore, it is found that prosecution side failed to prove the charges against the accused person and the accused person cannot be held guilty. Accordingly, the accused person is liable to be acquitted of the said charges.

Hence, it is, ordered that

that the accused namely, Etwa Ekka is acquitted of the said charges u/s 376/323/419/504 IPC. He is discharged from the bail bounds.

10. This order was passed on 12.12.2012. Long before that the Disciplinary Authority, issued its order on 3.4.2010, dismissing the applicant and held as under:

> "On 04.03.2010 Miss Mariayam Ekka appeared before the undersigned during public hearing and discussed the above incident briefly. On this, to ascertain the facts, Miss Mariayam Ekka (complaint) & Ct/021304 Etwa were called in my office on 11.01.2010, wherein the above constable accepted his fault and assured to get married with Miss Mariayam Ekka shortly. On the same day both the above Miss Mariayam Ekka (complainant) & Ct/021304 Etwa were sent to the office of the Assttt Commandant – I, IRBn, who had forwarded her complaint to Station House Officer, P.S. Aberdeen for further necessary action.
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> Whereas, the accused Ct/021304 Etwa being a member of a disciplined force was responsible for protecting the life and honours of the citizens of the Islands but instead of discharging his duty honestly and sincerely, he himself has indulged in criminal activities, which is most abhorrable, most reprehensible and most unexpected from a member of a uniformed force. If the member of the Battalion, who is charged with the sacred responsibility of upholding the rule of law indulges in such acts of crime and

lawlessness, it shatters the faith of the common man in the Government's law & order machinery. It also attracts immediate public attention and compels the authorities to take stern action against erring officials. Such acts of misdemeanour produce undesirable and negative impact on the organization. Such gross misconduct directly erodes the very basis of the functioning of the Battalion i.e. "Public Trust", the foundation on which IRBn has been raised. The reputation and image assiduously built on sustained and good teamwork, suffer irreparable damage when an individual member of the service trips and indulges in such an abhorrent act. And after such acts of gross misconduct, if the accused Ct/021304 Etwa is allowed to continue in the Battalion, it would be detrimental to the public interest & trust.

It is under these compelling circumstances, that the provision of Article 311(2) (b) of the Constitution of India is being invoked in this case for the sake of justice and restoring public trust in law enforcing machinery. The above Constable has become a inability to the department and the society and deserves the highest level of punishment of dismissal from service. It would be both in the public interest as well as for the establishment of rule of law, which is expected by public at large.

Not only that, the friends of Constable/021304 Etwa, either on his instigation or on their own wanted to teach a lesson to Miss Mariyam Ekka for lodging a complaint against Constable/021304 Etwa. These IRBn Constables felt emboldened and took law into their hand even when they knew that Constable/021304 Etwa would be arrested sooner or later for committing such heinous crime. But they showed no respect for the system and attacked the complainant in a most daring manner in full public view. Probably they were so sure of the inaction of the law enforcement agency that they thought of teaching the complainant a lesion for complaining against their friend &probably thought of browbeating her. They had probably also thought of getting the complaint withdrawn forcibly. However these Constables have been placed under suspension and are facing departmental proceedings as well as criminal case for their act of violence & misdemeanour. Under these compelling situation the continuation of Constable/031304 Etwa on the rolls of IRBn would be detrimental to public order and trust in the criminal justice system.

In this background, it won't be possible to deal with Constable/021304 Etwa through regular departmental proceedings. It is teared that once these constables are out of jail, they won't allow the departmental proceedings to get completed. Neither they would allow the complainant and the witnesses to come to the witness box to depose against them. They may not even hesitate to eliminate the complainant from the scene."

As already said, the aforesaid dismissal order was issued long before the applicant's discharge from criminal case, therefore, issued without having any occasion to come across or peruse the order of acquittal. Nevertheless, the

authority failed to record reasons why it found holding of inquiry as "not reasonably practicable".

11. But the Appellate Authority, the DG, A & N Islands had the occasion to peruse the order of acquittal to appreciate correction of invoking the proviso, and entitlement to reinstatement in view of acquittal, yet he solely banked upon the wisdom of the disciplinary authority and issued the following order:

> "The possibility of winning over the Complainant/ victim girl by the Appellant herein on the promise of marriage cannot be ruled out. Moreover, in the instant case, the order under challenge before the undersigned being the Appellate Authority is mainly required to be looked into the aspect as to whether Article 311 (2) (b) of the Constitution of India and the provision of Rule 11 (viii) of CCS (CCA) Rules, 1964 have been rightly exercised by the Disciplinary Authority in dismissing the Appellant herein or otherwise at the relevant point of time.
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> On perusal of the order of Disciplinary Authority, it is revealed that it has recorded the reasons for invoking Article 311(2)(b) of the Constitution of India read with CCS(CCA) Rules 11(viii) of 1964 as the facts leading to the registration of a case Crime No.294/ 2010 dated 19/03/2010 on the complaint of Ms. Mariayam Ekka was also pointed out that immediately after arrest of the Appellant on 25/03/2010, two IRBn constables have attacked and intimated the complainant which led to registration of another criminal case u/s 341/354/323/504/506/34 IPC against the two constables. The said constables were placed under suspension and a Departmental Enquiry was initiated against them. I am of the considered view that the Appellant herein was rightly dismissed from service by the Disciplinary Authority by invoking above provisions. The dismissed employee cannot claim for reinstatement merely on the ground of his acquittal from criminal case, where the principle of strict proof beyond reasonable doubt applies. Moreover, the order passed by the Disciplinary Authority has also been upheld by the Hon'ble Tribunal in its judgment/ order dated 10/04/2017.
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> The third contention of the Appellant that due to his dismissal from service he is leading a very miserable life without any source of income and he be reinstated into service so that he can earn bread & butter for him and his poor parents. Such contention of the Appellant is devoid of any merit as he should have thought before indulging in such an act of grave misconduct being member of disciplined organization.
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> xxx xxx xxx
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> The representations of the Appellant herein have been reconsidered and the prayer for his reinstatement into service in view of his acquittal from the criminal case has been rejected being devoid of any merit."

12. A bare perusal of the order supra would show, reveal & demonstrate that while the disciplinary authority issued its order without noticing the acquittal order, the Appellate Authority had the occasion to go through the acquittal order yet failed to consider the following issues:

(1) reasonableness of invoking the proviso i.e. why it was not found by the disciplinary as reasonably practicable to hold an enquiry against the employee, who was charged with criminal offence.

(2) why he did not deserve a reinstatement when complaints were in regard to sexual offences and the Administration had neither the expertise nor the mechanism of a Criminal Court to prove the same even the basis of preponderance of probabilities.

13. In the aforesaid backdrop the Appellate order is quashed with opportunity to the said authority to act in accordance with law.

(Dr. Nandita Chatterjee)
Administrative Member

(Bidisha Banerjee)
Judicial Member

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