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CENTRAL ADMINISTRATIVE TRIBUNAL,
PRINCIPAL BENCH

OA No.1151/2003

New Delhi, this the 23rd day of September, 2003

Hon'ble Shri Justice V.S. Aggarwal, Chairman
Hon'ble Shri R.K. Upadhyaya, Member(A)

Madan Pal (PIS No.28820373)
Ex .Constable of Delhi Police
r/o Vill Dangrol, PO Kandhaia
Dist: Muzaffer Nagar, UP

.. Applicant

(Shri Anil Singal, Advocate)

versus

1. GNCT through
   Commissioner of Police
   PHQ IP Estate, New Delhi

2. Jt. Commissioner of Police
   New Delhi Range, PHQ
   IP Estate, New Delhi

3. Dy. Commissioner of Police
   North East Dist. Delhi

. Respondents

(Shri Ajesh Luthra, Advocate)

ORDER

Justice V.S. Aggarwal

The applicant was a Constable in Delhi Police. Invoking Article 311(2)(b) of the Constitution, the applicant was dismissed from service. His appeal had also been rejected. By virtue of the present application, the applicant assails both the abovesaid orders.

2. The assertions against the applicant were that on the night intervening 12/13.8.2001, the Assistant Commissioner of Police Shri R.S.Kataria was on night patrolling. He noticed that two police personnel along with Motor Cycle No.DL-IS 8514 were stopping a truck

illegally for extorting money from the driver of the truck at Wazirabad Road from Wazirabad towards Loni Road near ganda nala. They were called, but the applicant and the co-delinquent fled from the spot. The Assistant Commissioner of Police chased both of them with the Government vehicle but in vain. He was, however, able to note down the last number of the said Motor Cycle. In the process of chasing the Motor Cycle, the truck had also left and the number could not be noted. The Assistant Commissioner had directed the Control Room to call all the Motor Cycles displayed in the area. On checking of the record, he was told that the particular vehicle was on duty in connection with patrolling. A message was given to all Motor Cycles of the Police Station Gokul Puri, but no response was received from Omni-90. After some time, it was brought before the Assistant Commissioner of Police. The applicant and the co-defaulter begged a pardon and admitted the facts.

3. On basis of these facts, the disciplinary authority invoked Artice 311(2)(b) of the Constitution and recorded:-

> " The facts and circumstances of the case are such that it would not be reasonably practicable to conduct a departmental enquiry against the delinquent constables as it has emerged during preliminary enquiry that the registration No. of the stopped truck could not be noted due to chasing the motorcycle and in the meanwhile the truck had left the spot. It is also certain that even if identity of driver and conductor of stopped truck were to be traced and brought on record they would be

put under consequent fear/danger to their person by the delinquent constables. In such a situation conducting of a departmental proceedings would become virtually non-practicable. Instances are not uncommon, where people have not dared to depose even against ordinary criminals, whereas in the instant case, the deposition of the witness would be not only against these two desperate characters but also against police officers, who can indulge in terrorizing these witnesses. However, in order to maintain high standard of efficiency and integrity towards Govt. we must weed out such bad elements before the system is corrupted or tainted by the activities of such desperate characters. Keeping in view the above-mentioned reasons, I feel totally satisfied against the delinquent constables Ct. Madan Pal No.1565/NE and Ct. Lalit Kumar No.994/NE, whose act has clearly indicated serious criminal propensity on their part.

Under these circumstances, I am of the view that Ct. Madan Pal No.1565/NE and Ct. Lalit Kumar No.994/NE have brought a bad name to the entire police force and their retention in service would be prejudicial to public interest. In my opinion they are unfit to be retained in the police force any more. Therefore, I, Vivek Gogia, DCP/NE Dist. Delhi deem it proper that Ct. Madan Pal No.1565/NE and Ct. Lalit Kumar No.994/NE be dismissed from the service with immediate effect under Article 311(2)(b) of the Constitution of India. The suspension period of Ct. Madan Pal No.1565/NE and Ct. Lalit Kumar No.994/NE from 13.8.2001 to the date of issue of this order will be treated as period not spent on duty for all intents & purposes. They will deposit all their Govt. belongings i.e. Identity Card, CGHS Card and uniform articles with department forthwith."

As already mentioned above, the appeal was dismissed on 16.11.2002. Hence the present application. The same is being contested.

4. By way of preliminary objection on behalf of the respondents, it was pointed that the present application is not maintainable. According to the learned counsel,

the applicant had earlier filed an application in this Tribunal which was withdrawn. There was no right given to the applicant to file a fresh application and, therefore, the present application is barred. The learned counsel pressed into service, Order XXIII Rule 1 of the Code of Civil Procedure.

5. While considering the said argument, the admitted facts can conveniently be re-mentioned. It is not in dispute that the applicant along with another had filed OA No.40/2003 seeking quashing of the orders passed by the disciplinary as well the appellate authority. In that application, the Joint Commissioner of Police (appellate authority) and the Deputy Commissioner of Police (disciplinary authority) had only been arrayed as parties. The application was dismissed on 26.3.2003 with the following order:-

> "After making certain submissions, when it was pointed out to learned counsel for applicants that this OA is not maintainable for non-joinder of necessary parties as provided under the provisions of Administrative Tribunals Act, 1985 and Rules made thereunder, he has prayed for permission to withdraw the OA. In view of the above, OA is dismissed as withdrawn. No costs."

6. In the view of the learned counsel for the respondents, Order XXIII Rule 1 holds the key to his

preliminary objection. The same reads as under:-

"ORDER XXIII

R.1. Withdrawal of suit or abandonment of part of claim-- (1) At any time after the institution of a suit, the plaintiff may, as against all or any of the defendants, abandon his suit or abandon a part of his claim.

Provided that where the plaintiff is a minor or such other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied-

(a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim.

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff-
(a) abandons any suit or part of claim under sub-rule (1), or
(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim

under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

It is well-settled that Order XXIII Rule 1 had been enacted based on public policy. It is different from the principles of res judicata because therein there has to be a decision on merits adjudicated between the parties. Order XXIII Rule 1 deals with abandonment of the suit. If a person abandons his suit, in that event when he does not take permission of the court, a second suit on the same cause will be not maintainable. This principle had been taken note of and discussed by the Supreme Court in the case of **Sarguja Transport Service** v. **State Transport Appellate Tribunal, Gwalior and Others**, AIR 1987 SC 88 in the following words:-

"7. The code as it now stands thus makes a distinction between 'abandonment' of a suit and 'withdrawal' from a suit with permission to file a fresh suit. It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission referred to in sub-rule(3) of R.1 of O.XXIII of the Code, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The principle underlying R.1 of O.XXIII of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. Invito beneficium non datur. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good

reason the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule(3) of R.1 of O.XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in S.11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

On the contrary, the learned counsel for the applicant has drawn our attention to a decision of the Supreme Court in the case of **State of Maharashtra & Another** v. **M/s. National Construction Company, Bombay and Anr.**, JT 1996 (1) S.C.156. The Supreme Court held besides other controversies that if the former suit had been dismissed on technical ground of non-joinder of parties, then the principle of res judicata will not apply.

7. The cited decision in the case of National Construction Company (supra) will have little application because as already referred to above, we are not concerned with the principles of res judicata because here there has been no adjudication by the court.

8. However, as one peruses Order XXIII Rule 1 of the Code of Civil Procedure, it refers to abandonment of claims against all or any of the defendants. Sub-rule

(4) to Rule 1 to Order XXIII also refers to abandonment of any suit or part of claim referred to under sub- rule (1). Therefore, it is clear that when there is abandonment of claim, if any, the plaintiff would be debarred from instituting any fresh suit with respect to such subject-matter only against those defendants. This principle referred to above otherwise also would be clear from the fact that abandonment cannot be made against the world at large. A civil dispute is always adjudicated between the parties.

9. In the present case, as we have noticed above, the earlier application which was withdrawn was only against the Joint Commissioner of Police and the Deputy Commissioner of Police. The objection was that the Government of National Capital Territory of Delhi was not a party. It was this objection which was taken and the applicant had withdrawn the application. The application necessarily had to be filed against the National Capital Territory of Delhi rather than the functionaries of the State Government. Therefore, when the main respondent against whom the relief was claimed was not a party and in the present case as already referred to above, Order XXIII Rule 1 of the Code of Civil Procedure will have no application.

10. Our attention was drawn towards a decision of this Tribunal in the case of **Mrs.Susamma Thankachen v.Government of National Capital Territory of Delhi and**

Others in OA No.1913/2001 rendered on 9.8.2001. In the cited case, there was an earlier decision. The said application was dismissed as withdrawn without any liberty. This Tribunal held that that would operate as res judicata. We have already referred to above that the principles of res judicata in terms of the decision of the Supreme Court will have no application when there is mis-joinder of parties as in the present case. Therefore, the decision in the case of Mrs.Susamma Thankachen (supra) will not apply. In fact, Section 22 of the Administrative Tribunals Act, 1985 further makes the position clear. While for the purposes of summoning of attendance of any person; requiring the discovery and production of documents; receiving of evidence and for certain other purposes, this Tribunal will have the same power as a civil court, sub-section (1) to Section 22 in clear terms provides that this Tribunal is not bound by the procedure laid down in the Code of Civil Procedure. It is guided by the principles of natural justice.

11. The Tribunal may not be a civil court but still has trappings of the civil court. However, the strict provisions of the Code of Civil Procedure are not applicable and the principles of natural justice have to be followed. It must follow from the aforesaid that the same have to be applied not in strict sense. We hasten to add that necessarily one has still to see if there is any misuse of the process of the court or not.

12. In the present case before us, the earlier application had been withdrawn informing this Tribunal that there is mis-joinder of the parties. There is non-joinder of the necessary parties as provided under the provisions of the Administrative Tribunals Act, 1985 and the Rules made thereunder. Therefore, the National Capital Territory of Delhi is a necessary party. The principles of natural justice and fair play do require, therefore, that keeping in view these facts, it cannot be termed that the application is liable to fail. We reject the contention of the respondents' learned counsel.

13. Reverting back to the merits of the present case, the short question that comes up for consideration is whether in the facts of the present case, it was appropriate to invoke the provisions of Article 311(2)(b) of the Constitution.

14. Under Article 311 (2) (b) of the Constitution, the Appointing Authority can dismiss a person if he is of the opinion that it is not reasonably practicable to hold an enquiry.

15 The decision of the Supreme Court in the case of **Union of India and others** v. **Tulsiram Patel and others,** AIR 1985 SC 1416 had gone into the controversy as what would be the meaning of the expression "reasonably practicable to hold an enquiry" and after screening

through innumerable precedents, the Supreme Court held:-

> "130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished : feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner : to a fairly sufficient extent". Thus, 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 opinion 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, but 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, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid 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. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311 (3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty."

With respect to the second condition about the satisfaction of the disciplinary authority, the Supreme Court further provided the following guide-lines:-

"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 reason 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."

The said decision of the Supreme Court was again considered by another Bench of the same Court in the case of **Satyavir Singh and others vs. Union of India and others,** 1986 SCC (L&S) 1. The Supreme Court in different paragraphs analysed the decision in the case of Tulsi Ram Patel (supra) and thereupon held that judicial review would be permissible in matters where administrative

discretion is exercised and the court can put itself in the place of the disciplinary authority and consider what in the then prevailing situation, a reasonable man acting in a reasonable manner would have done. Paragraphs 106 and 108 in this regard read:-

> "106. In the case of a civil servant who has been dismissed or removed from service or reduced in rank by applying clause (b) of the second proviso to Article 311 (2) or an analogous service rule, the High Court under Article 226 or this Court under Article 32 will interfere on grounds well-established in law for the exercise of its power of judicial review in matters where administrative discretion is exercised."

> "108. In examining the relevancy of the reasons given for dispensing with the inquiry, the court will consider the circumstances which, according to the disciplinary authority, made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, the order dispensing with the inquiry and the order of penalty following upon it would be void and the court will strike them down. In considering the relevancy of the reasons given by the disciplinary authority, the court will not, however, sit in judgment over the reasons like a court of first appeal in order to decide whether or not the reasons are germane to clause (b) of the second proviso or an analogous service rule. The court must put itself in the place of the disciplinary authority and consider what in the then prevailing situation a reasonable man acting in a reasonable manner would have done. It will judge the matter in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a court room, removed in time from the situation in question. Where two views are possible, the court will decline to

interfere."

16. Similarly, in the case of **Chief Security Officer & ors.** vs. **Singasan Rabi Das,** AIR 1991 S.C. 1043, respondent Singasan Rabi Das was removed from service. The allegations against him were that while on duty outside Railway yard, certain material had been left and he concealed the same under a tree. The order recited that an enquiry into the misconduct as provided in Rules 44, 45 and 46 of the Railway Protection Force Rules, 1959 was considered not practicable. He was dismissed from service without holding the enquiry. The order as such had not been upheld by the High Court and when the matter came up before the Supreme Court, the appeal had been dismissed holding:-

> "In the present case the only reason given for dispensing with that enquiry was that it was considered not feasible or desirable to procure witnesses of the security/ other Railway employees since this will expose these witnesses and make them ineffective in the future. It was stated further that if these witnesses were asked to appear at a confronted enquiry they were likely to suffer personal humiliation and insults and even their family members might become targets of acts of violence. In our view these reasons are totally insufficient in law. We fail to understand how if these witnesses appeared at a confronted enquiry, they are likely to suffer personal humiliation and insults. These are normal witnesses and they could not be said to be placed in any delicate or special position in which asking them to appear at a confronted enquiry would render them subject to any danger to which witnesses are not normally subjected and hence these grounds constitute no justification for dispensing with the enquiry. There is total absence of sufficient material or good grounds for dispensing with the

enquiry."

Our attention has also been drawn to a subsequent decision of the Supreme Court in the case of **Kuldip Singh vs. State of Punjab and others**, (1996) 10 SCC 659. The appellant before the Supreme Court along with others had caused the death of Superintendent and few other Police officers. The case had arisen in the situation ~~obtaining~~ running in Punjab during the years 1990-91. The disciplinary enquiry had been dispensed with and in the peculiar facts, the Supreme Court held that there was little scope for interference and the findings of the Supreme Court read:-

> "It must be remembered that we are dealing with a situation obtaining in Punjab during the years 1990-91. Moreover, the appellate authority has also agreed with the disciplinary authority that there were good grounds for coming to the conclusion that it was not reasonably practicable to hold a disciplinary enquiry against the appellant and that the appellant was guilty of the crime confessed by him. There is no allegation of mala fides levelled against the appellate authority. The disciplinary and the appellate authorities are the men on the spot and we have no reason to believe that their decision has not been arrived at fairly. The High Court is also satisfied with the reasons for which the disciplinary enquiry was dispensed with. In the face of all these circumstances, it is not possible for us to take a different view at this stage. It is not permissible for us to go into the question whether the confession made by the appellant is voluntary or not, once it has been accepted as voluntary by the disciplinary authority and the appellate authority."

Though the Supreme Court has already drawn the

conclusions in the case of Satyavir Singh (supra), for the purpose of the present controversy, we can conveniently draw the following conclusions:

(a) judicial review would be permissible against the orders that are passed by the concerned authorities under Article 311(2)(b) of the Constitution dispensing with the departmental enquiry;

(b) the language used in the order is not the conclusive factor. The Tribunal would be competent to go into the details; and

(c) it varies with the facts and circumstances of each case as to whether the order would be justified or not.

With this back-drop, one can revert back to the facts of the present case because the legal position as is apparent from the facts we have reproduced above has already been enunciated. The language used in the order is not material. The facts and circumstances of a case has to be seen. Judicial review is permissible to see reasons.

17. In the facts of the present case, it is difficult

to believe the version of the respondents that it was not reasonably practicable to hold the enquiry. There is nothing on the record to indicate that the witnesses were being threatened or they were not willing to come forward in this regard. As one reads the assertions (without any opinion on merits), it appears that the witnesses were basically official. Otherwise also, the necessary ingredients contemplated are that it should not be reasonably practicable to hold the enquiry. When there is no threat or any complaint in this regard, the short-cut method of punishment could not be approved. There is no other material before us to support the impugned order.

18. Resultantly the same must be quashed.

19. For these reasons, we allow the present application and quash the impugned orders. It is directed that:

(a) the applicant would continue to be under suspension;

(b) the disciplinary authority would be within its right to pass an appropriate order if it deems appropriate for disciplinary proceedings to be initiated; and

(c) the applicant would be entitled to all consequential benefits.

No costs.

(R.K.UPADHYAYA)
MEMBER (A)

(V.S. AGGARWAL)
CHAIRMAN

/sns/