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No.11012/11/85-Estt(A) IMMEDIATE

Government of India/Bharat Sarkar
Ministry of Personnel and Training, Administrative Reforms and Public Grievances and Pension
(DEPARTMENT OF PERSONNEL & TRAINING)

New Delhi-110001 dt. 11 November, 1985

OFFICE MEMORANDUM

Subject:- Judgement of Supreme Court in Civil Appeal No.6814 of 1983, Civil Appeal No.3484 of 1982 etc. delivered on 11-7-1985 regarding the scope of second proviso to Art. 311(2) of the Constitution.

The judgement delivered by the Supreme Court on 11-7-1985 in the case of Tulsi Ram Patel and others has been the cause of much controversy. The apprehension caused by the Judgement is merely due to an inadequate appreciation of the points clarified in this judgement and in the subsequent judgement of the Supreme Court delivered on September 12, 1985 in the case of Satyavir Singh and others (Civil Appeal No.242 of 1982 and Civil Appeal No.576 of 1982). It is, therefore, imperative to clarify the issue for the benefit and guidance of all concerned.

2. In the first place it may be understood that the Supreme Court in its judgement has not established any new principle of law. It has only clarified the constitutional provisions, as embodied in Art. 311(2) of the Constitution. In other words, the judgement does not take away the constitutional protection granted to government employees by the said Article, under which no government employee can be dismissed, removed or reduced in rank without an inquiry in which he has been informed of the charges against him and given a reasonable opportunity to defend himself. It is only in three exceptional situations listed in clauses(a),(b) and (c) of the second proviso to Art. 311(2) that the requirement of holding such an inquiry may be dispensed with.

3. Even under these three exceptional circumstances, the judgement does not give unbridled power to the competent authority when it takes action under any of the three clauses in the second proviso to Art. 311(2) of the Constitution or any service rule corresponding to it. The competent authority is expected to exercise its power under this proviso after due caution and considerable application of mind. The principles to be kept in view by the competent authority while taking action under the second proviso to Art. 311(2) or corresponding service rules have been defined by the Supreme Court itself. These are reproduced in the succeeding paragraphs for the information, guidance and compliance of all concerned.

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4. When action is taken under clause (a) of the second proviso to Art. 311(2) of the Constitution or rule 19(1) of the CCS (CC &A) Rules, 1965 or any other service rule similar to it, the first pre-requisite is that the disciplinary authority should be aware that a government servant has been convicted on a criminal charge. But this awareness alone will not suffice. Having come to know of the conviction of a government servant on a criminal charge, the disciplinary authority must consider whether his conduct, which had led to his conviction, was such as warrants the imposition of a penalty and if so, what that penalty should be. For that purpose, it will have to peruse the judgement of the criminal court and consider all the facts and circumstances of the case. In considering the matter, the disciplinary authority will have to take into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features. This, however, has to be done by the disciplinary authority by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was blameworthy and punishable, it must decide upon the penalty that should be imposed on the government servant. This too has to be done by the disciplinary authority by itself. The principle, however, to be kept in mind is that the penalty imposed upon the civil servant should not be grossly excessive or out of all proportion to the offence committed or one not warranted by the facts and circumstances of the case.

5. After the competent authority passes the requisite orders as indicated in the preceding paragraph, a government servant who is aggrieved by it can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the person who was in fact, convicted, he can also agitate this question in appeal, revision or review. If he fails in all the departmental remedies available to him and still wants to pursue the matter, he can seek judicial review. The court (which term will include a Tribunal having the powers of a Court) will go into the question whether the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed, or not warranted by the facts and circumstances of the case or the requirements of the particular service to which the government servant belongs.

6. Coming to clause (b) of the second proviso to Art. 311(2), there are two conditions precedent which must be satisfied before action under this clause is taken against a government servant. These conditions are :-

(i) There must exist a situation which makes the holding of an inquiry contemplated by Art. 311(2) not reasonably practicable. What is

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required is that holding of 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 all the cases in which it would not be reasonably practicable to hold the inquiry. Illustrative cases would be :-

(a) Where a civil servant, through or together with his associates, terrorises, threatens or intimidates witnesses who are likely to give evidence against him with fear of reprisal in order to prevent them from doing so; or

(b) where the civil servant by himself or with or through others threatens, intimidates and terrorises the officer who is the disciplinary authority or members of his family so that the officer is afraid to hold the inquiry or direct it to be held; or

(c) where an atmosphere of violence or of general indiscipline and insubordination prevails at the time the attempt to hold the inquiry is made.

The 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 civil servant is weak and is, therefore, bound to fail.

(ii) Another important condition precedent to the application of clause (b) of the second proviso to Art. 311(2), or rule 19(ii) of the CCS(CC &A) Rules, 1965 or any other similar rule is that the disciplinary authority should record in writing the reason or reasons for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Art.311(2) or corresponding provisions in the service rules. This is a constitutional obligation and, if the reasons are not recorded in writing, the order dispensing with the inquiry and the order of penalty following it would both be void and unconstitutional. It should also be kept in mind that the recording in writing of the reasons for dispensing with the inquiry must precede an order imposing the penalty. Legally speaking, the reasons for dispensing with the inquiry need not find a place in the final order itself, though they should be recorded separately in the relevant file. In spite of this legal position, it would be of advantage to incorporate briefly the reasons which led

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the disciplinary authority to the conclusion that it was not reasonably practicable to hold an inquiry, in the order or penalty. While the reasons so given may be brief, they should not be vague or they should not be just a repetition of the language of the relevant rules.

7. It is true that the Art. 311(3) of the Constitution provides that the decision of the competent authority under clause (b) of the second proviso to Art. 311(2) shall be final. Consequently, the decision of the competent authority cannot be questioned in appeal, revision or review. This finality given to the decision of the competent authority is, however, not binding on a Court (or Tribunal having the powers of a Court)so far as its power of judicial review is concerned, and the court is competent to strike down the order dispensing with the inquiry as also the order imposing penalty, should such a course of action be considered necessary by the court in the circumstances of the case. All disciplinary authorities should keep this factor in mind while forming the opinion that it is not reasonably practicable to hold an inquiry.

8. Another important guideline with regard to this clause which needs to be kept in mind is that a civil servant who has been dismissed or removed from service or reduced in rank by applying to his case clause(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 applicable should be postponed for a reasonable length of time for the situation to return to normal.

9. As regards action under clause (c) of the second proviso to Art. 311(2) of the Constitution, what is required under this clause is the satisfaction of the President or the Governor, as the case may be, that in the interest of the security of the State, it is not expedient to hold an inquiry as contemplated by Art. 311(2). This satisfaction is of the President or the Governor as a constitutional authority arrived at with the aid and advice of his Council of Ministers. The satisfaction so reached by the President or the Governor is necessarily a subjective satisfaction. The reasons for this satisfaction need not be recorded in the order of dismissal, removal or reduction in rank; nor can it be made public. There is no provision for departmental appeal or other departmental remedy against the satisfaction reached by the President or the Governor. If, however, the inquiry has been dispensed with by the President or the Governor and the order of penalty has been passed by disciplinary authority subordinate thereto, a departmental appeal or revision will lie. In such an appeal or

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revision, the civil servant can ask for an inquiry to be held into his alleged conduct, unless at the time of the hearing of the appeal or revision a situation envisaged by the second proviso to Article 311(2) is prevailing. Even in such a situation the hearing of the appeal or revision application should be postponed for a reasonable length of time for the situation to become normal. Ordinarily the satisfaction reached by the President or the Governor, would not be a matter for judicial review. However, if it is alleged that the satisfaction of the President or Governor, as the case may be, had been reached mala fide or was based on wholly extraneous or irrelevant grounds, the matter will become subject to judicial review because, in such a case, there would be no satisfaction, in law, of the President or the Governor at all. The question whether the court may compel the Government to disclose the materials to examine whether the satisfaction was arrived at mala fide or based on extraneous or irrelevant grounds, would depend upon the nature of the documents in question i.e. whether they fall within the class of privileged documents or whether in respect of them privilege has been properly claimed or not.

10. The preceding paragraphs clarify the scope of clauses(a), (b) and (c) of the second proviso to Art. 311(2) of the Constitution, rule 19 of CCS (CC & A) Rules, 1965 and other service rules similar to it, in the light of the judgements of the Supreme Court delivered on 11-7-1985 and 12-9-1985. It is, therefore, imperative that these clarifications are not lost sight of while invoking the provisions of the second proviso to Art. 311(2) or service rules based on them. Particularly, nothing should be done that would create the impression that the action taken is arbitrary or mala fide. So far as clauses(a) and (c) and service rules similar to them are concerned, there are already detailed instructions laying down the procedure for dealing with the cases falling within the purview of the aforesaid clauses and rules similar to them. As regards invoking clause (b) of the second proviso to Art. 311(2) or any similarly worded service rule, absolute care should be exercised and it should always be kept in view that action under it should not appear to be arbitrary or designed to avoid an inquiry which is quite practicable.

11. Ministry of Finance etc. are requested to bring the above clarifications to the notice of all the authorities serving under their control for their information, guidance and compliance.

12. Hindi version will follow

(A.JAYARAMAN)
Director

To

All Ministries/Departments of the Govt.of India
(with usual number of spare copies)

No.11012/11/85-Estt(A) New Delhi-110001 dt. 11 November, 1985

Copy, with usual number of spare copies forwarded for information to:-

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(iv) Lok Sabha Secretariat, New Delhi.
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(vi) Staff Selection Commission, New Delhi.
(vii) All Union Territory Administrations.
(viii) All Chief Vigilance Officers.
(ix) All Attached/Subordinate Offices of Ministry of Personnel and Training, AR and PG and Pension.
(x) Administrative Vigilance Division, Department of Personnel and Training.
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(xiv) Secretary, Staff Side, National Council(JCM) 13-A, Feroze Shah Road, New Delhi.
(xv) AIS(III) Section, Department of Personnel and Trg.
(xvi) All Attached/Subordinate Offices of Ministry of Home Affairs.
(xvii) Ministry of Law(Deptt. of Legal Affairs) with reference to their U.O. No.5749/85 dated 5-11-1985.

A Jayaraman

(A. JAYARAMAN)
Director