SUPREME COURT OF INDIA

Union of India & Anr.

Vs.

M.M.Sharma

C.A.No.2797 of 2011

(Mukundakam Sharma and Anil R.Dave,JJ.,)

30.03.2011

JUDGMENT

Dr.Mukundakam Sharma,J.,

SLP(Civil)No.9032 of 2011

1. Delay condoned.

2. Leave granted.

3. The present appeal is directed against the judgment and order dated 27.09.2010 whereby the Delhi High Court partly allowed the writ petition filed by the respondent herein by issuing a direction to the appellants to pass a speaking order by giving reasons for imposing the penalty of dismissal from service in exercise of powers under Article 311(2)(c) of the Constitution and not any other penalty.

4. In order to appreciate the contentions raised by the parties hereto some basic facts leading to filing of the aforesaid writ petition in the High Court must be stated.

5. The respondent was posted as First Secretary w.e.f. 02.07.2007 to 03.05.2008 in the Embassy of India, Beijing, China. While on special assignment, the respondent came under adverse notice and was found to be involved in an unauthorized and undesirable liaison with foreign nationals of the host country. The conduct of the respondent was enquired into by the Intelligence Bureau (IB). The Director, upon completion of the said inquiry forwarded a detailed report including findings of the Inquiry Officer. The aforesaid report was considered and it was felt that in view of the seriousness of the case and the adverse implications on the security of the State, it would not be expedient to hold the inquiry due to the following reasons: -

(i) The respondent was on special assignment and entrusted with responsible duties of external intelligence. Any formal inquiry would jeopardize security of India, as it would reveal details of intelligence operation in the host country.

(ii) For a proper disciplinary inquiry to be conducted, witnesses would be required to be examined. In this case witnesses can be either foreign nationals or officers working under cover in Indian Embassy in China and examination thereof would certainly jeopardize the security of the State."

6. Consequently, the competent authority took a decision that the services of the respondent should be dispensed with by exercising powers under Clause (c) of Second Proviso to Article 311(2) of the Constitution of India. Consequent thereto an order dated 22.12.2009 was issued intimating and stating that the President is satisfied to invoke Clause (c) of Second Proviso to Article 311(2) of the Constitution of India that in the interest of the security of the State it is not expedient to hold the inquiry in the case of the respondent. It was also mentioned in the said order that the President is also satisfied that on the basis of information available the activities of the respondent are such as to warrant his dismissal from the service.

7. The respondent challenged the aforesaid order by filing an Original Application before the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as `the Tribunal') which was registered as OA No. 176 of 2009. In the said Original Application contentions raised inter alia were that the order dated 22.12.2008 passed in exercise of power under Clause (c) of Second Proviso to Article 311(2) of the Constitution of India should be set aside. The aforesaid application was heard and the Tribunal passed an order on 10.12.2009 disposing of the said Original Application by holding that the order does not reveal that there has been application of mind with regard to the nature of punishment to be awarded to the respondent. The Tribunal directed the Government to re-consider whether the aforesaid penalty awarded to the respondent could be substituted by any other punishment.

8. Pursuant to the aforesaid order passed by the Tribunal the matter was placed before the competent authority once again and in compliance of the order of the Tribunal an order was passed by the Cabinet Secretariat, Government of India on 03.06.2010, which reads as follows:

"WHEREAS Shri M.M. Sharma was dismissed from service under the provisions of sub-clause (c) of the second proviso to clause 2 of Article 311 of the Constitution vide order No/2/2008-DO.II (A) 9Pt.I)-3643 dated 22.12.2008:

AND WHEREAS, Shri M.M. Sharma filed an Original Application No. 176/2009 in the Principal Bench of Central Administrative Tribunal, New Delhi praying for setting aside and quashing the said order of dismissal; dated 22.12.2008.

AND WHEREAS the Hon'ble Tribunal in their order dated 10.12.2009 in the said OA No. 176/2009 directed the Government to consider whether the penalty of dismissal

could be substituted by `reduction in rank' or the ex-officer could be granted any pensionary benefits. AND WHEREAS, the Government, in pursuance of observations of Hon'ble Tribunal re-considered the case of dismissal of Shri M.M. Sharma.

NOW, THEREFORE, the President orders that it is not possible either to substitute the penalty of Shri M.M. Sharma from `dismissal' to `reduction in rank' or to grant him any pensionary benefits.

(BY ORDER AND IN THE NAME OF THE PRESIDENT) (K.B.S. KATOCH) ADDITIONAL SECRETARY TO THE GOVT. OF INDIA"

9. The aforesaid order passed by the President came to be challenged before the Tribunal by the respondent by filing an Original Application which was registered as OA No. 2440 of 2010. The aforesaid application was taken up for hearing and the same was disposed of by the Tribunal vide its Judgment and Order dated 04.08.2010. By the aforesaid Judgment and Order, the Tribunal dismissed the Original Application holding that the matter called for no interference in the hands of the Tribunal. While coming to the aforesaid conclusion the Tribunal hold that invocation of power under Article 311(2) (c) of the Constitution of India cannot be faulted with because of the sensitive nature of the issues involved, which have become final and binding on the parties. It was also held that only question that was required to be decided by the competent authority was to re-consider the nature of penalty imposed on the respondent.

10. Since the Tribunal held the appellants have re-considered the question of punishment reiterating that it is not possible either to substitute the penalty of the respondent from `dismissal' to `reduction in rank' or to grant him any pensionary benefits, therefore, the same indicates and establishes the satisfaction for arriving at the decision of the competent authority to maintain the penalty of dismissal.

11. The aforesaid order was challenged by the respondent before the High Court of Delhi by filing a writ petition in which the High Court partly allowed the writ petition holding that the order which was passed by the competent authority on 03.06.2010 was not a reasoned order. The High Court therefore issued a direction that the appellants must pass a reasoned order showing its application of mind. The High Court set aside the order dated 04.08.2010 passed by the Tribunal and directed the appellants to give reasons for levying the penalty of dismissal from service and pass a fresh order. The aforesaid Judgment and Order passed by the High Court is under challenge in this appeal on which we heard the learned counsel appearing for the parties and also scrutinised the entire records.

12. Within the scheme of the Constitution of India, provisions relating to public service may be found in Articles 309, 310 and 311. It is important to note that these provisions (namely Articles 310 and 311) afford protection to public servants from penalty in the nature of dismissal, removal, or reduction which cannot be imposed without holding a proper inquiry or giving a hearing. An explicit articulation of "protection" in Article 311 of the Constitution itself gives an impression of complete `protection' to the civil servants.

13. Article 311 provides for protection to public servant from punitive action being taken against them by an authority subordinate to one who appointed him, or without holding an inquiry in accordance with law. Exceptions in Article 311 are contained in second proviso in the nature of clauses (a), (b) & (c) which provide that the said Article shall not apply to employees who have been punished for conviction in a criminal case or where inquiry is not practicable to be held for reasons to be recorded in writing or where the President or Governor as the case may be is satisfied that such an order is required to be passed without holding an enquiry in the interest of security of the State.

14. In order to appreciate the ambit or scope of power to be exercised under Article 311 of the Constitution of India it is to be noticed that in India we apply the doctrine of `pleasure", which is recognized under our constitution by way of Article 310 of the Constitution of India. Under the aforesaid provision, all civil posts under the Government are held at the pleasure of the Government under which they are held and are terminable at its will. The aforesaid power is what the doctrine of pleasure is, which was recognized in the United Kingdom and also received the constitutional sanction under our Constitution in the form of Article 310 of the Constitution of India. But in India the same is subject to other provisions of the Constitution which include the restrictions imposed by Article 310 (2) and Article 311(1) and Article 311(2) . Therefore, under the Indian constitution dismissal of civil servants must comply with the procedure laid down in Article 311, and Article 310(1) cannot be invoked independently with the object of justifying a contravention of Article 311(2). There is an exception provided by way of incorporation of Article 311 (2) with sub-clauses (a),(b) and (c). No such inquiry is required to be conducted for the purposes of dismissal, removal or reduction in rank of persons when the same relates to dismissal on the ground of conviction or where it is not practicable to hold an inquiry for the reasons to be recorded in writing by that authority empowered to dismiss or remove a person or reduce him in rank or where it is not possible to hold an enquiry in the interest of the security of the State. These three exceptions are recognized for dispensing with an inquiry, which is required to be conducted under Article 311 of the Constitution of India when the authority takes a decision for dismissal or removal or reduction in rank in writing. In other words, although there is a pleasure doctrine, however, the same cannot be said to be absolute and the same is subject to the conditions that when a government servant is to be dismissed or removed from service or he is reduced in rank a departmental inquiry is required to be conducted to enquire into his misconduct and only after holding such an inquiry and in the course of such inquiry if he is found guilty then only a person can be removed or dismissed from service or reduced in rank. However, such constitutional provision as set out under Article 311 of the Constitution of India could also be dispensed with under the exceptions provided in Article 311(2) of the constitution where clause (a) relates to a case where upon a conviction of a person by a criminal court on certain charges he could be dismissed or removed from service or reduced in rank without holding an inquiry. Similarly, under clause (c) an inquiry to be held against the government employee could be dispensed with if it is not possible to hold such an inquiry in the interest of the security of the State. Sub-clause (b) on the other hand provides that such an inquiry could be dispensed with by the concerned authority, after recording reasons, for which it is not practicable to hold an inquiry. The aforesaid power is an absolute power of the

disciplinary authority who after following the procedure laid down therein could resort to such extra ordinary power provided it follows the pre-conditions laid down therein meaningfully and effectively.

15. It should also be pointed out at this stage that clause (b) of the second proviso to Article 311 (2) of the Constitution of India mandates that in case the disciplinary authority feels and decides that it is not reasonably practical to hold an inquiry against the delinquent officer the reasons for such satisfaction must be recorded in writing before an action is taken. Clause (c) of the second proviso to Article 311 (2) on the other hand does not specifically prescribe for recording of such reasons for the satisfaction but at the same time there must be records to indicate that there are sufficient and cogent reasons for dispensing with the enquiry in the interest of the security of the State. Unless and until such satisfaction, based on reasonable and cogent grounds is recorded it would not be possible for the court or the Tribunal, where such legality of an order is challenged, to ascertain as to whether such an order passed in the interest of security of State is based on reasons and is not arbitrary. If and when such an order is challenged in the court of law the competent authority would have to satisfy the court that the competent authority has sufficient materials on record to dispense with the enquiry in the interest of the security of the State.

16. We have analyzed the facts of the present case and on such analysis, we find that even in the first order passed by the Tribunal on 10th December, 2009 itself it was clearly recorded that it could be held from the records, as available, that there essentially was no arbitrariness in the approach of the Government of India while dealing with an officer who had by his conduct showed that he was not reliable for holding sensitive or superior positions and therefore invocation of power under Article 311(2)(c) of the Constitution of India also cannot be faulted because of the sensitive nature of the issues.

17. The aforesaid order passed by the Tribunal in the due course has become final and binding as no challenge was made as against the aforesaid observation by any of the parties before any higher forum. The Tribunal, however, by the aforesaid order issued a direction to the Government to consider as to whether the penalty could be substituted by issuing a lesser punishment.

18. In terms of the aforesaid order the competent authority reconsidered the matter and maintained the order of punishment awarded to the respondent holding that it is not possible either to substitute the penalty of the respondent from dismissal to reduction in rank or to grant him any pensionary benefit. The said order therefore indicates that the direction of the Tribunal was duly complied with and an effective and conscious decision was taken by the competent authority to maintain the penalty of dismissal.

19. There are credible and substantial materials on record in terms of clause (c) to second proviso to Article 311(2) of the Constitution. The aforesaid action of invoking the extra ordinary provisions like clause (c) to second proviso to Article 311(2) was also found to be justified by the Tribunal in the earlier stage of litigation itself.

20. Despite the said fact the High Court held that the order dated 04.08.2010 passed by the Tribunal not being a speaking order showing application of mind cannot be upheld and consequently the High Court passed the impugned order dated 27.09.2010 thereby setting aside the order passed by the Tribunal with a direction to the appellants herein to pass a fresh speaking order giving reasons for its decision. The said findings of the High Court are being challenged in this appeal contending inter alia that a conscious and informed decision has been taken on the basis of materials on record to dismiss the respondent from the service and the reasons for inability to hold an inquiry in the interest of the security of the State have also been recorded although there is no such mandate to record such reasons. The records indicate that there are sufficient reasons and materials on record as to why the service of the respondent was dispensed with in the interest of the security of the State. We are also satisfied that the reasons contained in the records establish that in the facts of this case holding of an enquiry was rightly dispensed with in the interest of security of the country. We must hasten to add that the Tribunal had in the earlier round of litigation upheld the action of the appellants in dispensing with the enquiry in the interest of the security of the State. The said order of the Tribunal has also become final and binding. Therefore, challenge in the present round of litigation is whether the appellants are justified in awarding the punishment of dismissal from service on the respondent which also deprives him from getting any pensionary benefit.

21. The original records were placed before us, which we have perused. The allegations against the respondent are very serious which could jeopardize the sovereignty and integrity of India. The records also disclose the highly objectionable activities and conduct of the respondent which is unbecoming of a responsible Government servant. The Inquiry Committee took the decision of not disclosing the grounds for taking action against the delinquent officer under clause (c) of the proviso to Article 311(2) of the Constitution because disclosure of the same or holding of an inquiry has the potential to jeopardize national security and relations with a neighbouring country and such disclosure could lead to gross embarrassment to the Government of India. Intelligence Bureau has already conducted an inquiry and findings of the inquiry officer were based on the written statement of the suspected officer and other officers; analysis of phone records; and recovery of photographs from the laptop of the respondent. In that context and in view of the reasons recorded it was concluded that the allegation had far reaching effects and therefore it was decided to dispense with holding of any inquiry in the matter and also to dismiss him from service.

22. A very high level committee considered the entire record and the allegations against the respondent and on the basis of the materials available on record, the committee prima facie came to the conclusion that action could be taken for his dismissal under clause (c) to second proviso to Article 311(2) of the Constitution. The aforesaid recommendation is available on record and the High Court could have called for such record and therefrom satisfy itself that there are sufficient and cogent reasons recorded for taking action under Article 311(2) (c) of the Constitution and also for imposing the penalty for dispensation of the service of the respondent by way of dismissal from the service.

23. In our considered opinion, in the present case, charges against the delinquent officer being very serious and also in view of the fact that the respondent was working in a very sensitive post, it cannot be said to be a case of disproportionate punishment to the offence alleged. The reasons recorded in the official file against the person for dismissing him from service need not be incorporated in the impugned order passed.

24. The High Court while passing the impugned order was fully and effectively aware of the reasons as to why the requirement of holding an enquiry in accordance with law was dispensed with. Being so situated, the High Court could have examined and scrutinised the original records to ascertain for itself as to whether the order imposing the penalty of dismissal of service is justified or not in the light of the allegations and the reports of the fact finding enquiry. The power to be exercised under clauses (a), (b) and (c) being special and extraordinary powers conferred by the Constitution, there was no obligation on the part of the disciplinary authority to communicate the reasons for imposing the penalty of dismissal and not any other penalty. For taking action in due discharge of its responsibility for exercising powers under clause (a) or (b) or (c) it is nowhere provided that the disciplinary authority must provide the reasons indicating application of mind for awarding punishment of dismissal. While no reason for arriving at the satisfaction of the President or the Governor, as the case may be, to dispense with the enquiry in the interest of the security of the State is required to be disclosed in the order, we cannot hold that, in such a situation, the impugned order passed against the respondent should mandatorily disclose the reasons for taking action of dismissal of his service and not any other penalty.

25. If in terms of the mandate of the Constitution, the communication of the charge and holding of an enquiry could be dispensed with, in view of the interest involving security of the State, there is equally for the same reasons no necessity of communicating the reasons for arriving at the satisfaction as to why the extreme penalty of dismissal is imposed on the delinquent officer. The High Court was, therefore, not justified in passing the impugned order.

26. For the aforesaid reasons, we hold that the order and direction passed by the High Court cannot be sustained. Consequently, we set aside the same and restore the order dated 04.08.2010 passed by the Central Administrative Tribunal, Principle Bench at New Delhi in OA No. 2440 of 2010.

27. The present appeal is accordingly allowed to the aforesaid extent leaving the parties to bear their own costs.