

(13) When the facts of the present case are examined in the light of the principles laid down by Hon'ble the Supreme Court then no doubt is left that Shri R. R. Jowel was not competent to sit in the meeting of the Board of Directors-appellate authority because he himself has passed the order of punishment, which was subject matter of appeal before the Board of Directors. It would tantamount becoming a Judge in his own cause which is impermissible in law.

(14) For the reasons aforementioned, the writ petition succeeds to the extent that the appellate order has not been passed in accordance with law. Accordingly, the appellate order dated 29th December, 2006 (P-9) is set aside. The matter is remanded back to the Board of Directors for decision afresh in accordance with law. The Board of Directors shall decide the matter expeditiously preferably within a period of four months from the date of receipt of a certified copy of this order.

(15) The writ petition stands disposed of in the above terms.

R.N.R.

Before Mehtab S. Gill & Augustine George Masih, JJ.

NAGESH KUMAR,—Petitioner

versus

STATE OF HARYANA & OTHERS,—Respondents

C.W.P. No. 8102 of 2007

5th September, 2008

Constitution of India, 1950—Art. 226 & 311(2)(b)—Principles of audi altrem partem—Termination of services by invoking provisions of Art. 311(2)(b)—Charges against petitioner of filing false affidavit and complaint against Superintendent—Enquiry Officer recommending for taking strict action against petitioner—Government after considering explanation of petitioner deciding to terminate services—Appointing authority without giving an opportunity of hearing to petitioner terminating services of

petitioner—Respondents failing to produce record showing justification for invoking provisions contained in Art. 311(2) proviso (b)—Appointing authority misreading & misconstruing provisions of Art. 311(2)(b)—No reasons given for dispensing with holding of enquiry—Petition allowed, order terminating services of petitioner quashed.

Held, that keeping in view the principle of *audi alterm partem*, enquiry into the charges levelled against delinquent employee is a Rule wherein he is given full opportunity to put forth his defence to the allegations made against him. Exception to this general principle is dispensing with formal enquiry exercising the powers conferred under Article 311(2) proviso (b). A constitutional right of enquiry conferred under Article 311(2) cannot be taken away without fulfilling the requirement for dispensing with the enquiry as provided in the Constitution itself. A constitutional right conferred upon a delinquent employee cannot be dispensed with lightly or arbitrarily or out of ulterior motive or merely in order to avoid the holding of an enquiry. The provisions which provide for exception to the general rule are to be strictly construed and only and only when the strict principles and requirements of the Constitution are complied with and fulfilled, can an exception be justified, failing which, such exceptional powers need to give way to the general principle.

(Para 18)

Further held, that a perusal of the impugned order dated 24th April, 2007 would show that the General Manager, Haryana Roadways, Jind has totally misread and misconstrued the provisions of Article 311(2) proviso (b) of the Constitution. What has been said in the order is that “..... *there is no necessity of regular enquiry in this case....*” which is in total disregard of the provisions of the Constitution. What is required under Article 311(2)(b) is not the situation or the conclusion that there is no necessity of holding a regular enquiry but the requirement is that in the given facts and circumstances of the case, it is not reasonably practicable to hold an enquiry as required under Clause (2) of Article 311. Further, a perusal of the impugned order would show

that no reasons whatsoever are forthcoming which would show the satisfaction of the Authority for dispensing with the holding of the enquiry. This is quite obvious as the Authority has totally proceeded on a misconception with regard to the powers entrusted under the provisions of Article 311 of the Constitution. The impugned order, therefore, cannot be sustained being void and unconstitutional.

(Para 19)

R.K. Malik, Senior Advocate with Parveen Kumar Rohilla,
Advocate for the petitioner.

Harish Rathee, Senior DAG, Haryana.

AUGUSTINE GEORGE MASIH, J.

(1) By this judgment, we propose to dispose of Civil Writ Petition Nos. 8102 of 2007 and C.W.P. No. 8133 of 2007 as common question of law and facts is involved therein. For the sake of convenience, facts are being taken from Civil Writ Petition No. 8102 of 2007.

(2) This petition under Article 226 of the Constitution of India has been preferred by Nagesh Kumar who was working as a Conductor with Haryana Roadways, Jind for issuance of a writ in the nature of Certiorari to quash the order dated 24th April, 2007 (Annexure P-5),—*vide* which his services have been terminated without affording him an opportunity to defend himself or holding any regular enquiry by invoking the provisions of Article 311(2) proviso (b) of the Constitution of India.

(3) Briefly stated the facts are that the petitioner was appointed as Conductor on contractual basis on 17th June, 1994, i.e. during the period when the regular staff of the Transport Department was on strike. Thereafter, the Transport Department framed a policy according to which the services of the petitioner were regularized on the post of Conductor,—*vide* letter dated 28th July, 2004 with effect from 20th August, 2000. In the petition, it is stated that the work and conduct of the petitioner always remained satisfactory. It is submitted that the petitioner and six other Conductors approached the Superintendent of the Office for regularization of their services, but he demanded an amount of Rs. 50,000 from them. Thereafter, on 3rd February, 2001,

a formal complaint in an Open Darbar of the Chief Minister, Haryana was made against the Superintendent, Jogi Ram along with an affidavit stating therein that the petitioner had given Rs. 50,000 on 20th April, 2000 along with other Conductors for their regularization. It has been further stated that the said Superintendent had also issued many threats to terminate their services if they did not complied with the said demand. Under these circumstances, these six Conductors had paid the amount for their regularization. On the basis thereof, the District Grievance Committee registered a case on 15th March, 2001 and after conducting an enquiry, a criminal case bearing F.I.R. No. 125 dated 28th March, 2001 under Sections 420/406 IPC was registered in Police Station Jind, against Jogi Ram, Superintendent. Jogi Ram was arrested on 20th April, 2001 and released on bail on 21st April, 2001.

(4) A departmental enquiry was conducted against Jogi Ram, Superintendent. In the said enquiry, the petitioner made statement, and also submitted an affidavit that the complaint dated 3rd February, 2001 was given due to some misunderstanding and stated that Jogi Ram, Superintendent had not taken any bribe from him. On the basis of the said statement and the affidavit given by the petitioner and other Conductors, the Enquiry Officer held the charges levelled against Jogi Ram, Superintendent not proved and rather held that the allegations made by Pani Singh and petitioner—Nagesh Kumar were completely false. The Enquiry Officer further concluded that either they had made a false complaint and submitted a false affidavit or the statements made by them before the Enquiry Officer were false and baseless. He therefore recommended that strict action be taken against these employees.

(5) Thereafter, clarification/explanation of the petitioner was sought,—*vide* letter dated 8th August, 2006 by the office of the Chief Administration, Haryana State Transport, Jind with regard to filing of false affidavit and complaint against Jogi Ram, Superintendent and then changing their-statements before the Enquiry Officer with an intention to get him exonerated from the charges. Reply to the charges. Reply to the said notice was sent by the petitioner,—*vide* letter dated 13th

November, 2006 wherein the petitioner had explained his position. This explanation was forwarded to the Transport Commissioner, Haryana, Chandigarh by the Chief Administration, Haryana State Transport, Jind,—*vide* memo. dated 1st December, 2006. On consideration of the said explanation, the Financial Commissioner and Principal Secretary to Government of Haryana, Transport Department,—*vide* order dated 5th March, 2007 wrote to the Transport Commissioner, Chandigarh regarding the admission made by Nagesh Kumar (petitioner) and Pani Singh, Conductors, to the effect that they had sworn false affidavits and made false complaints against Jogi Ram, the then Superintendent, Office of the General Manager, Haryana Roadways, Jind.

(6) The said memo is reproduced herein below.

“Sub. :—Disciplinary action against S/Shri Nagesh Kumar, Conductor No. 248, Haryana Roadways, Jind and Panni Singh, Conductor No. 26, H.R. Jhajjar Depot in the matter/cases of Shri Jogi Ram the then Supdt., o/o G.M. H.R. Jind.

...

Reference your Memo No. 12021/EA-3/E-I, dated 19th December, 2006 on the subject noted above.

2. It is informed that S/Shri Nagesh Kumar and Panni Singh, Conductors have admitted that they have given the false affidavits/complaints against Shri Jogi Ram the then Superintendent Office of General Manager, Haryana Roadways, Jind. After consideration of the whole matter, Government have decided to terminate the services forthwith. You are therefore requested to take action in the matter accordingly.

(Sd.) . . . ,

Superintendent Transport-II,
for Financial Commissioner &
Principal Secretary to Govt. Hr.
Transport Department.”

(7) On the basis of the said memo dated 5th March, 2007, the General Manager, Haryana Roadways, Jind passed an order dated 24th April, 2007, the operative part whereof reads as under :—

“XXXX XXXX XXXX

I examined affidavit, complaint, enquiry report and all record concerning to the case and after perusing the same, I reached to the conclusion that there is no necessity of regular enquiry in this case because by perusing the enquiry of Shri Jogi Ram, Superintendent, it is clear that behaviour and conduct of Shri Nagesh Kumar, Conductor, is not fit to retain in Government service. His conduct is unsatisfactory and his conduct does not demonstrate honesty and performance of his duties. Such employees are not fit to be retained in the Government service. Therefore, I exercising the power under Article 311(2)(b) ordered for termination of his services.

(Sd.) . . .,

General Manager,
Haryana Roadways, Jind.
Dated : 24-4-2007”

(8) On the basis of the above, the petitioner contends that he has been deprived of his right of *audi alterm partem*. It is a settled principle of law that no person should be condemned unheard and this what actually has precisely happened in the case of the petitioner. The Appointing Authority has, without applying its mind or without giving an opportunity of hearing to the petitioner, terminated his services by simply following the direction given by the Higher Authorities. The petitioner has further contended that the requirement for invoking the provisions of Article 311(2) proviso (b) of the Constitution of India has not been fulfilled and that no material whatsoever was before the Appointing Authority to hold that the holding of the departmental enquiry was not feasible and dispensing thereof was either in public interest based on public policy or for public good.

(9) Upon notice having been issued by this Court, reply on behalf of the respondents has been filed wherein the facts, as narrated above, have not been disputed. The only justification put-forth by the respondents is with regard to the merits of the case. It has been contended that the report of the Enquiry Officer has clearly held that Jogi Ram, Superintendent is not guilty of charges levelled against him because the statements given by Nagesh Kumar (petitioner) and Pani Singh, Conductors do not tally with the contents of the complaint and the affidavit so given by them earlier. The Enquiry Officer has gone further to hold the petitioner and Pani Singh, Conductors guilty and has suggested taking stern action against such employees who make false allegations so as to teach them a lesson so that they should stop giving such false evidence in future.

(10) In respect of the report of the Enquiry Officer, the explanation of the petitioner was sought and on consideration thereof, order dated 5th March, 2007 was passed wherein after considering the whole matter, the Government decided to terminate his services forthwith and respondent No. 3—General Manager, Haryana Roadways, Jind, after considering the contents of the affidavit, complaint, enquiry report and the case file, came to a conclusion that there was no need to hold a regular enquiry in the case because it stood proved in the report of the Enquiry Officer that the behaviours and conduct of the petitioner was not upto the mark and thus he was not fit to be retained in Government service. As a matter of fact, his conduct was found unsatisfactory, not demonstrating honesty in performance of duties.

(11) The reply when perused, does not give any reasons as to why the respondents in exercise of powers under Article 311(2) proviso (b) of the Constitution decided to dispense with the holding of a departmental enquiry against the petitioner nor has any record been produced which would justify the invoking of the provisions contained in the Article 311(2) proviso (b).

(12) We have heard counsel for the parties.

(13) The counsel for the petitioner contends that a perusal of the impugned order does not disclose any facts which culminated in

forming an opinion that it was not reasonably practicable to hold an enquiry against the petitioner nor does the order disclose as to what kind of activities the petitioner had indulged into which stopped the Authorities from holding a departmental enquiry against him. Further, the petitioner has been deprived of his right of being heard. He has been condemned unheard without giving him any opportunity to put forth and substantiate his defence as the departmental proceedings were dispensed with. Counsel for the respondents has not been able to point out anything from the record which would substantiate or justify the invoking of Article 311(2) proviso (b) of the Constitution of India.

(14) Article 311(2)(b) reads as under :—

311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.—(1) No person who is a member of a civil

service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(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.

xxxx xxxx xxxx

Provided further that this clause shall not apply—

xxxx xxxx xxxx

(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 reasonable practicable to hold such inquiry;

xxxx xxxx xxxx

(15) The exception to the said general rule is in provisos (a), (b) and (c). Provisos (a) and (c) would not be applicable to the present case and therefore the relevant provision is proviso (b).

(16) The requirements of Article 311(2) proviso (b) to come into play are :—

- (i) that the authority empowered to dismiss or remove or to reduce a person in rank, must first be satisfied with regard to the reasons that it is not reasonably practicable to hold an enquiry, as envisaged in clause 2; and
- (ii) that such reasons must be recorded in writing by the Authority which is empowered to dismiss or remove or reduce a person in rank.

(17) What is required, therefore under proviso (b) is the recording of satisfaction that a departmental enquiry against the person concerned cannot be held being not reasonably practicable and there must be a situation which makes the holding of the enquiry not reasonably practicable at the stage when order under Article 311(2) proviso (b) is proposed to be passed. The second condition necessary for valid application of proviso (b) is that the disciplinary authority should record its reasons in writing for its satisfaction that it was not reasonably practicable to hold the enquiry as contemplated by Article 311(2). If such situation regarding the holding of enquiry being not reasonably practicable, does not exist or and if such reason(s) is not recorded in writing, the order dispensing with the enquiry and the order of penalty following thereupon would both be void and unconstitutional. It, thus, goes without saying that the aforesaid two conditions must precede the order imposing the penalty.

(18) Keeping in view the principle of *audi altrem partem*, enquiry into the charges levelled against the delinquent employee is a Rule wherein he is given full opportunity to put-forth his defence to the allegations made against him. Exception to this general principle

is dispensing with formal enquiry exercising the powers conferred under Article 311(2) proviso (b). A constitutional right of enquiry conferred under Article 311(2) cannot be taken away without fulfilling the requirement for dispensing with the enquiry as provided in the Constitution itself. A constitutional right conferred upon a delinquent employee cannot be dispensed with lightly or arbitrarily or out of ulterior motive or merely in order to avoid the holding of an enquiry. The provisions which provide for exception to the general rule are to be strictly construed and only when the strict principles and requirements of the Constitution are complied with and fulfilled, can an exception be justified, failing which, such exceptional powers need to give way to the general principle.

(19) A perusal of the impugned order, dated 24th April, 2007 (Annexure P-5) would show that the General Manager, Haryana Roadways, Jind has totally misread and misconstrued the provisions of Article 311(2) proviso (b) of the Constitution. What has been said in the order is that “.....there is no necessity of regular enquiry in this case....” which is in total disregard of the provisions of the Constitution. What is required under Article 311(2)(b) is not the situation or the conclusion that there is no necessity of holding a regular enquiry but the requirement is that in the given facts and circumstances of the case, it is not reasonably practicable to hold an enquiry as required under clause (2) of Article 311. Further, a perusal of the impugned order would show that no reasons whatsoever are forthcoming which would show the satisfaction of the Authority for dispensing with the holding of the enquiry. This is quite obvious as the Authority has totally proceeded on a misconception with regard to the powers entrusted under the provisions of Article 311 of the Constitution. The impugned order therefore cannot be sustained being void and unconstitutional.

(20) Before parting, we would like to state here that the Authority conferred with the powers should, before exercising the same, go through the provisions of the Statute under which they are exercising such powers. The Authority exercising the powers must understand the ambit, the gravity, the effect and the result of such exercise of powers. We have although made an observation with regard to the application

of mind by the Authority in the preceding paragraph but refrain to further proceed against the officer who had passed the said order. A word of caution is, however, passed to the respondents to be careful and watchful while passing orders without actually complying with the provisions and requirements of the Statute under which the said powers are being exercised by them.

(21) In the result, the writ petition is allowed. The impugned order, dated 24th April, 2007 (Annexure P-5) passed by the General Manager, Haryana Roadways, Jind is hereby quashed and the petitioner is reinstated in service forthwith. However, liberty is granted to the respondents for taking a decision for holding a regular departmental enquiry against the petitioner for the alleged misconduct on his part.

R.N.R.

BEFORE M.M. KUMAR & SABINA, JJ.

HARJINDER SINGH,—Petitioner

versus

STATE OF PUNJAB & OTHERS,—Respondents

C.W.P. No. 5169 of 2007

18th September, 2008

Constitution of India, 1950—Art. 226—High Court setting aside conviction & sentence of accused—Supreme Court allowing State's appeal and convicting accused under S. 304 Part I and S.34 IPC—Government granting remission releasing accused without serving full term of sentence awarded by Supreme Court—Challenge thereto—Whether judgment of Supreme Court in Joginder Singh's case is applicable—Held, yes—Respondents failing to consider judgment in Joginder Singh's case in its proper prospective—Order passed by authorities suffers from lack of application of mind—Petition allowed, respondents directed to recalculate remaining part of sentence of accused.