

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI
BENCH AT AURANGABAD**

ORIGINAL APPLICATION NO.329 OF 2021

DISTRICT:- JALGAON

Somnath s/o. Ambar Gaikwad,
Age : 33 years, Occ. Nil,
R/o. H.No.03, Pandav Nagari,
Pachora, Tq. Pachora,
District- Jalgaon 424 201.

...APPLICANT

V E R S U S

1. The Divisional Commissioner,
Nashik Road, Dist. Nashik 422 101.

2. The Collector,
Prabhat Colony, Jalgaon,
Dist. Jalgaon 412 005.

3. The Tahsildar, Jamner,
Tq. Jamner, Dist. Jalgaon.

...RESPONDENTS

APPEARANCE : Shri Ashish B. Rajkar, Advocate for
Applicant.

: Shri B.S.Deokar, Presenting
Officer for respondents.

**CORAM : JUSTICE SHRI P.R.BORA, VICE CHAIRMAN
AND
SHRI BIJAY KUMAR, MEMBER (A)**

Reserved on : 13-07-2022

Pronounced on : 21-07-2022

**O R D E R
(PER: JUSTICE SHRI P. R. BORA)**

1. In the present O.A., applicant has questioned the
legality of the order dated 12-03-2018 passed by

respondent no.2 whereby the said respondent has dismissed the applicant from the services by exercising powers under Article 311(2)(b) of the Constitution of India.

2. The applicant entered into Government service on 27-08-2014 as a Clerk. He was appointed on compassionate ground. Applicant belongs to Scheduled Tribe (ST) community. At the relevant time, applicant was appointed as Clerk-Typist in the office of Tahsildar, Jamner, Dist. Jalgaon. It is the allegation against the applicant that he remained absent from the duties continuously for quite a long period and he was in habit of remaining absent without obtaining any leave or prior permission of the higher authorities. In the circumstances, it appears that the respondent no.2 has ultimately dismissed the applicant from the services vide the impugned order by invoking provision under Article 311(2)(b) of the Constitution of India.

3. The impugned order has been challenged by applicant mainly on the ground that without affording him any opportunity of hearing in respect of misconduct alleged against him, he has been dismissed from the services. As has been mentioned in the O.A., applicant had remained

absent for genuine reasons and he has informed about his absence to his superior authority. It is his further contention that for his absence of previous period, the enquiries were conducted and he was saddled with punishments. It is his further contention that after receiving the show cause notice dated 15-12-2017, he has submitted his explanation on 28-12-2017 and has prayed for allowing him to join the duties, however, without considering the said explanation and without conducting enquiry against him in respect of misconduct alleged against him, respondent no.3 has illegally dismissed him from the services.

4. The learned Counsel appearing for the applicant argued that the applicant has been deprived from exercising his right conferred under Article 311(2) of the Constitution to defend the charges levelled against him. The learned Counsel submitted that the respondent has not provided just and cogent reasons for dispensing with the enquiry before ordering dismissal of the applicant. Learned Counsel further submitted that the respondent no.2 adopted an illegal method while ordering dismissal of the applicant. Learned Counsel further submitted that had an enquiry been conducted against the applicant, he could

have definitely brought on record the circumstances in which he was constrained to remain away from the duty. Learned Counsel submitted that it is settled principle of law that the Constitutional right conferred upon a delinquent cannot be dispensed with lightly or arbitrarily. Learned Counsel in the circumstances prayed for setting aside the impugned order.

5. Respondent nos.1 to 3 have resisted the O.A. by submitting their affidavit in reply. In the reply, respondents have denied the allegations made against the respondent no.2. It is contended that in view of the fact that the applicant was consistently remaining absent from duties since the year 2015 and though previously some lenient view was taken by the Disciplinary Authority by imposing upon the applicant the punishment other than termination or removal from services, no amend was noticed in the habit of the applicant of remaining absent without obtaining prior permission. It is further contended that, lastly, absence of the applicant from duty without prior permission was of a long period more than one year. It is further contended that after having considered the material on record and the conduct of the applicant, respondent no.2 was satisfied that it may not be reasonably

practicable to hold an enquiry against the applicant and he, therefore, found it necessary to invoke powers under Article 311(2)(b) of the Constitution of India in larger public interest.

6. It is also the contention of the respondents that in premise of the *per se* material available against the applicant, it was thought appropriate by respondent no.2 that conducting an enquiry was not necessary before ordering the dismissal of the applicant which according to the respondent was the only adequate punishment for the alleged misconduct of the applicant.

7. The learned P.O. in his arguments reiterated the contentions in the affidavit in reply and prayed for dismissal of the O.A. According to the learned P.O. when documentary evidence was in existence, it was not necessary as well as reasonably practicable to hold an enquiry against the applicant before ordering his dismissal.

8. We have carefully considered the submissions advanced on behalf of the applicant and the respondents. We have perused the impugned order and the other documents filed by the parties. A detail order has been passed by respondent no.2 while ordering dismissal of the

applicant from services. Perusal of the impugned order reveals that the main allegation against the applicant is that he has been remaining absent from duties frequently that too without obtaining prior permission or sanction from the appropriate authority. The impugned order reveals that after one year of entering into Government service, applicant started remaining absent without obtaining any prior permission or getting the leave sanctioned. It appears that all the leaves at the credit of the applicant were exhausted by the applicant and many of his leaves were made without pay by the Disciplinary Authority. It is further revealed that though on previous two occasions, the enquiries were conducted against the applicant and in the said enquiries the applicant was held guilty and was subjected to punishments, applicant did not show any amend in his conduct and again unauthorisedly remained absent. Lastly, his period of absence was inordinately long i.e. more than one year.

9. From the documents filed on record, it apparently appears that the applicant was in habit of remaining absent without obtaining prior permission form the appropriate authority. Issue, however, for our consideration in the present O.A. is, whether the dismissal of the applicant by

respondent no.2 by exercising powers under Article 311 (2)(b) of the Constitution of India can be upheld ?

10. The Hon'ble Apex Court has consistently ruled that in order to invoke provision under Article 311(2)(b) of the Constitution, following conditions must be satisfied to sustain any action taken thereunder. These are: -

- (i) There must exist a situation which renders holding of any enquiry, "not reasonably practicable; and
- (ii) The disciplinary authority must record in writing its reasons in support of its satisfaction.

The question of practicability for conducting enquiry would depend on the existing facts, situation and other surrounding circumstances in the matter concerned. The aspect of reasonable practicability, therefore, has to be judged in light of the circumstances prevailing in that particular case at the time of passing of the order.

11. In the instant matter, as we have noted above, absenteeism or prolonged absence from duty without obtaining prior permission is the main charge against the applicant. As against the contentions of the respondents, it is the case of the applicant that he had remained absent for

certain compelling reasons and he had time to time informed about the same to his superior officer.

12. Considering the facts as aforesaid, it appears to us that there was no reason for respondent no.2 to deviate from the mandate under Article 311(2) of the Constitution which says that no person holding civil post shall be dismissed or removed from service or reduced in rank except after an enquiry in which he has been informed about the charges against him and a reasonable opportunity of being heard in respect of those charges is given.

13. In the present matter, it is a fact that in relation to his absence of the previous period, enquiries were conducted in the past and punishments were also imposed upon the applicant. When the conduct of the applicant in the subsequent period i.e. immediately preceding to the order of dismissal, was under consideration, according to us, there was no reason for respondent no.2 to dispense with the enquiry presuming that there is no necessity of giving any opportunity of hearing to the applicant to explain the circumstances for his absence. It was totally within the discretion of respondent no.2, whether or not to accept the

reasons and / or justification given by the applicant for his absence. However, having regard to the mandate of the Article 311(2) of the Constitution, it was certainly not within the discretion of the respondent no.2 to dispense with the enquiry and order the dismissal of the applicant by exercising powers under Article 311(2)(b) of the Constitution of India.

14. The law is well settled that a constitutional right conferred upon a delinquent cannot be dispensed with lightly or arbitrarily or merely in order to avoid holding of an enquiry. According to us, the reasons as have been canvassed by the learned Presenting Officer are neither objective nor reasonable in the facts of the present case. It appears to us that the respondent no.2 has adopted a wrong method in ordering dismissal of the applicant from the services. The order so passed by the respondent is in utter disregard of the principles of natural justice. As has been held by the Hon'ble Apex Court in the case of **Jaswant Singh Vs. State of Punjab [1991 AIR (SC) 385**, the decision to dispense with the departmental enquiry cannot be rested solely on the *ipse dixit* of the concerned authority. The Hon'ble Apex Court has further held that when the satisfaction of the concerned authority is questioned in a

Court of law, it is incumbent on those, who support the order to show that satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer. The respondents have utterly failed in convincing us that any such circumstance was prevailing so as to dispense with the enquiry envisaged by Article 311(2) of the Constitution. Respondent no.2 has, thus, arbitrarily exercised the power vested in him. Though the learned Presenting Officer has placed reliance on the judgment of the Hon'ble Apex Court in the case of **Ved Mitter Gill Vs. Union Territory Administration, Chandigarh and others [(2015(3) SLR 739 (SC))]**, the facts in the said matter were altogether different than the facts involved in the present matter.

15. In view of the fact that no material has been placed by the respondents to establish that it was necessary to dispense with a normal enquiry against the applicant in terms of proviso (b) appended to clause (2) of Article 311 of the Constitution, we are of the opinion that the impugned order cannot be sustained and deserves to be set aside. It is accordingly set aside. The respondents are directed to reinstate the applicant in service within one month from the date of this order. However, in view of the discussion

made by us in the body of judgment it would be open to the respondents to initiate the departmental enquiry against the applicant if they so desire. Payment of back-wages shall abide by the result of the said enquiry. Such enquiry, if any, must be initiated as expeditiously as possible but not later than two months from the date of passing of this order and shall be completed within six months from its commencement. The applicant shall ensure that the enquiry proceedings are not delayed or protracted at his instance.

The Original Application is allowed in the aforesaid terms. There shall be no order as to costs.

(BIJAY KUMAR)
MEMBER (A)

(JUSTICE P.R. BORA)
VICE CHAIRMAN

Place : Aurangabad
Date : 21st July, 2022