DISPENSATION OF ENQUIRY
CHAPTER VI

DISPENSATION OF ENQUIRY

In order to properly appreciate the scope and extent of procedural safeguards available to a civil servant, one has to consider the exceptions laid down by way of the provisos to Article 311(2) of the Constitution. The Constitution has provided that the services of civil servants may be dispensed with, without holding any enquiry under certain circumstances.

It provides that the fetter imposed by way of procedural safeguards under clause (2) of Article 311 of the Constitution, may be dispensed with under certain circumstances. The proviso to clause (2) of Article 311 of the Constitution lifts the fetters when the penalty is sought to be imposed in the following cases:

(a) On the basis of conduct which has led to the conviction of the civil servant on a criminal charge.

(b) For misconduct without holding enquiry by the competent authority if it is satisfied for reasons to be recorded in writing that the holding of the enquiry is impracticable.
(c) If the President or the Governor as the case may be is satisfied that it is inexpedient in the interest of the security of the State to hold an enquiry.

In such cases, the holding of an enquiry becomes infructuous. Apart from the above mentioned provisos, clause (3) of article 311 of the Constitution also provides for the finality of any administrative action taken under proviso to clause (2) of Article 311. This clause, therefore, seeks to oust the jurisdiction of the courts in case of such action.

The procedural fetters placed under clause (2) of Article 311 may be validly dispensed with in the aforesaid three exceptional circumstances. The Constitution therefore, arms the Government to deny procedural safeguards to delinquent civil servants in certain emergent situations. In the event of invocation of the above provisos, considerations of natural justice does not arise. It therefore, dispenses with the requirement of hearing to be given to a civil servant, when any major penalty is proposed to be invoked under provisos to Article 311 (2) Constitution. Where however, a clause of the second proviso is imposed on an extraneous ground, such action would be the malafide, and therefore, void. According to the observations of the
Supreme Court\(^3\), 'sympathy and commiseration cannot be allowed to out weigh considerations of public policy, concern for public interest, regard for public good and the pre-emptory dictate of a constitutional prohibition'.

An attempt is being made to examine the application of the provisos, with a view to finding out whether they are being properly applied or abused. An endavour is also being made to finding out whether the provisos have reduced the security of tenure of the civil servants, or in fact have led to a balance between the interests of the State and that of the individual.

**Conviction On Criminal Charge**

Clause (a) of the proviso to Article 311 (2) of the Constitution states that where a civil servant is already found guilty of a criminal charge by a court of law, the holding of a departmental enquiry is unnecessary and superfluous\(^4\). The underlying principle of the proviso is to prevent duplication of an enquiry, since the civil servant already avails of proper defence in a court\(^5\).

When an accused after being defended by a lawyer is unable to get acquittal, it is very unlikely that he would
ever come through in a departmental enquiry. A fresh departmental enquiry would only result in unnecessary wastage of time and expense.

Clause (a) of the second proviso does not prescribe the nature of conviction, or the quantum of punishment by the criminal court for the applicability of the clause. What is required is that, such conviction should relate to one's conduct during the course of his employment. It follows therefore, that conviction of a civil servant prior to his appointment cannot furnish any basis for dispensing with an enquiry.

A conviction on a criminal charge is not necessarily confined to the Indian Penal Code, 1860. Therefore, a civil servant convicted under any other offense than the Indian Penal Code, 1860 may also be visited with termination of service after dispensing with the enquiry. Any type of judicial conviction, including one for contempt of court may be a sufficient ground for action by the punishing authority. However, in order to justify such an action, the punishing authority has to duly apply its mind to the circumstances of the case.

A civil servant cannot simply be visited with any major
penalty on the basis of a criminal conviction without any
application of mind. In Hardayal Singh Vs State of Himachal
Pradesh, the High court considered removal of the petitioner
from service on account of conviction under sections 447, 147
and 149 Indian Penal Code to be unjustified, since the
punishment was disproportionate to the criminal action. It
follows, therefore, that disciplinary authority has to
examine the case of the civil servant, in order to decide the
nature and extent of penalty. In cases of trivial offenses
like the violation of the Motor Vehicles Act, 1988 invoking
of major penalties would not be justified, as has been hold
in Divisional Personnel Officer, Southern Railway vs. T. R.
Challappan.

Conduct of a civil servant is the criteria for any
disciplinary action under proviso (a) to Article 311(2) of
the Constitution. Therefore, acquittal in a criminal case
may not be a bar to departmental proceedings. For instance,
where an acquittal is granted on technical grounds, there
might remain sufficient materials against a civil servant to
indicate that he is not a fit person to be retained in
service.

A civil servant may be convicted for either major or
minor offenses, involving moral turpitude. While dispensing with an enquiry under clause (a) of the second proviso, a major penalty can be justified only when the offense entailing conviction amounts to a moral turpitude. As such, in case of dispensation of enquiry involving moral turpitude, the civil servant cannot complain that he has been deprived of his livelihood.

An order imposing a major penalty on a civil servant, simply on the basis of his conviction, without a reference to his conduct cannot be sustained. There has to be a corresponding finding by the disciplinary authority to the fact that the conduct which led to the conviction of the civil servant warrants the imposition of a penalty. This has been eloquently observed by the Supreme Court in D.P.Q. Southern Rly Vs. Chellappan in the following words: "Any imposition of penalty on a civil servant on the basis of the mere conviction without a finding by the disciplinary authority that the conduct which led to his conviction renders the imposition of penalty invalid".

In the instant case, since the disciplinary authority did not consider the circumstances of the case in terms of the rules, the apex court considered the imposition of the
penalty to be in violation of the rules. The Court further took the view that objective consideration of the case before the imposition of penalty is required. But the said interpretation came to be rejected by the larger Bench in Union of India vs Tulsi Ram Patel and ors.\textsuperscript{17} for not interpreting the relevant statutory provision\textsuperscript{18} in conjunction with the second proviso to Article 311(2) of the Constitution. The bench further has held that consideration of what penalty is to be imposed must be decided by the authority itself.

The decision in D.P.O. Southern Railway vs. Chellappan\textsuperscript{19} holding consideration of the pleasure doctrine under Article 311(2)(a) of the Constitution to be not necessary came in for criticism before the Constitution bench in Union of India or Tulsiram Patel and ors\textsuperscript{20}. The Court refused to find a niche even for a limited review for consideration of the quantum of penalty.\textsuperscript{21} Justice Madan\textsuperscript{22} who delivered the majority judgment observed:

\[W\]here a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which led to his conviction was such as might warrant the imposition of a penalty and if so, what that penalty should be. For that purpose it would have to peruse the whole judgment of the criminal court and consider all the facts and
circumstances of the case. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. However, a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant and therefore, it is not mandatory to impose any of the three major punishments.

In Union of India Vs. Tulsiram Patel and ors, Tulsiram Patel was compulsorily retired from service under rule 19(I) of the Central Civil Services Conduct Rules 1968, consequent upon his conviction under section 332 of the Indian Penal Code, 1860. But instead of censuring him, the trial court considered his release under the Probation of Offenders Act, 1958 on executing a bond of good behavior. His case attracted clause (a) of the second proviso to Article 311(2) of the Constitution. He contended that the order of compulsory retirement without giving him a hearing, amounted to a penal action by way of removal from service.

The holding of the court which stated that the right of appeal under the service rules fully safeguarded the interest of the delinquent, appears to be rather incongruous. The Supreme Court ignored the constitutional mandate of Articles 14, 16 and 21. But later on, the apex
court in *Ram Chander vs Union of India*\textsuperscript{24} in spite of being bound by the decision in *Union of India vs Tulsiram Patel and others*\textsuperscript{25}, enlarged the scope and content of the statutory right of appeal.

**Probation of Offenders Act.**

It has been observed that Tulsiram Patel\textsuperscript{26}, in spite of his release on Probation, came to be visited with penal consequences. Hence, it would be apposite to consider the effect of the Probation of Offenders Act, 1958 with a view to finding out whether it has any effect in respect of the civil servants under its purview.

Section 12 of the Act lays down that, 'when a person is convicted and dwelt with under the Act, it shall not be regarded as a disqualification arising out of conviction'. The apex court has observed in *Aitha Chander Rao vs. State of Andhra Pradesh*\textsuperscript{27}, that when a delinquent civil servant convicted by a criminal court is released on probation, the conviction should not affect his service career in view of section 12 of the Probation of Offenders Act, 1958. Such an interpretation raises the question, whether a provision of such an Act can have the effect of altering the provisions of Article 311 (2) of the Constitution. Since a statutory
provision cannot override a constitutional provision, it is competent for a disciplinary authority to impose the punishment on the basis of conduct which has led to his conviction. Similarly, where service rules and regulations are taken into consideration, certainly a statutory enactment should stand on a firmer footing to such rules and regulations.

Notwithstanding the aforesaid views, it has to be observed that it is the conduct of the civil servant which is the primary factor. Where a civil servant is found to be involved in acts affecting his moral turpitude, such conduct may render his retention in service untenable. Therefore, when conduct is proved, there may emerge no necessity for any departmental authority to record a finding on the same charges. In Director Postal Services Vs. Dayanand, it has been observed that the benefit given under the Probation of Offenders Act, 1958 does not entitle a civil servant to contend that no punishment may be imposed on the basis of such a conviction. Similarly, if in the assessment of the competent authority the conduct of the civil servant which led to conviction warrants punishment, he cannot avail the protection under section 12 of the Probation of Offenders Act, 1958. However it has to be kept in mind that the right
to impose the penalty carries with it a power to act justly.\textsuperscript{30}

Subsequently, in \textit{Trikha Ram Vs K. Seth and anr}\textsuperscript{31} the Supreme Court has recognised the limited applicability of the Probation of Offenders Act, 1958. The Court held as follows:

Since it is statutorily provided that an offender who has been released on probation shall not suffer disqualification attaching to a conviction of an offense for which he has been convicted, notwithstanding anything in any other law, instead of dismissing him from service he should have been removed from service so that the order of punishment did not operate as a bar and disqualification for future employment with the government. Under the circumstances, the impugned order of dismissal is converted into an order of removal from service.

Before invoking the power of judicial review, an employee should agitate his case by way a departmental appeal, revision or review as the case may be. He can contend before the departmental authorities, that the penalty is too severe or excessive, and not warranted by the facts and circumstances of the case\textsuperscript{32}.

An order of dismissal during the pendency of an appeal against a sentence of conviction may be considered illegal if such appeal happens to be allowed\textsuperscript{33}. But in \textit{Dhanji vs Union}
of India, the Punjab High court has held that if a sentence of conviction is set aside on appeal, the order of dismissal ceases to have effect.

Normally, it is expected that in appealing against an order of conviction, the delinquent civil servant would seek a stay of the operation of the departmental order also. But if the delinquent fails to obtain any such interim order, the department may proceed to terminate the services of the concerned civil servant. The better view seems to be that no action should be taken under clause (a) to the second proviso of Article 311, during the pendency of an appeal against it.

Impracticability of Holding Enquiry

Proviso (b) to clause (2) of Article 311 of the Constitution too provides for dispensation of enquiry. The Government may dispense with an enquiry, if it considers the holding of such an enquiry to be reasonably impracticable. But while dispensing with the enquiry, the disciplinary authority is required to record in writing the reasons for dispensing with the enquiry.

An enquiry under Article 311 (2) of the Constitution has been provided to ensure security of tenure to a civil
servant, which is very much in the interest of the public service. Dispensing with an enquiry entails serious consequences, both to the concerned official and the public as well. The clause requires the recording of reasons in writing, for the impracticability of holding the enquiry. Therefore, if reasons are not recorded, the power to impose penalty without enquiry would be unavailable.

The practicability of holding an enquiry is a matter of assessment to be made by the disciplinary authority. It has to be taken in the light of the prevailing circumstances and without any ulterior motive or consideration. Such a decision has to be arrived at by the disciplinary authority only. If such an authority without proper application of mind simply carries out orders of his superior authority, the validity of such an order cannot be sustained.

In *Jayantilal vs Mahinder*, the Gujrat High court has observed that where an elaborate enquiry is not practicable, an enquiry may be dispensed with. Besides, it may not be reasonably practicable for the disciplinary authority to hold any enquiry by complying with the minimum requirements of reasonable opportunity, as contemplated by Article 311 (2) of the Constitution. An order dispensing with an enquiry, may be
passed only upon proper application of mind and after recording reasons in writing. Failure on either count vitiates an order, for not being in conformity with proviso (b) to Article 311 (2) of the Constitution. Under such circumstances, removal of a civil servant is regarded to be unconstitutional and ultra vires Article 311 (2) of the Constitution.40

Dispensation of enquiry under proviso (b) of Article 311 (2) of the Constitution cannot be invoked lightly or arbitrarily or with ulterior motive. While recording reasons, a mere repetition of the requirements of the constitutional provisions is not sufficient. The reasons recorded must be valid and constitute a rational basis for dispensing with the enquiry.41 If the court finds that the enquiry is being dispensed with without any basis, without recording reasons or reasons recorded do not bear any nexus with the dispensation of enquiry, the order is liable to be set aside by the court.42

It is obligatory on the part of the punishing authority to pass a separate and independent order dispensing with the enquiry, in exercise of the power under sub clause (b') of the proviso to clause (2) of Article 311. It is imperative for
the disciplinary authority to record the reasons in writing, stating the grounds of his satisfaction for holding that it is not reasonably practicable to hold the enquiry. If the reasons are not recorded earlier, it needs to be recorded in the final order itself. However, the reasons need not be recorded in the order imposing the penalty.

If a penal order under clause (b) of the second proviso is issued without furnishing reasons, it would be considered to be bad in law and liable to be struck down. Likewise, if the authority fails to produce the reasons on being challenged in a court of law, there would be a presumption that reasons were not recorded. As such, it is imperative on the part of the disciplinary authority to record reasons while dispensing with an enquiry.

The reasons must be germane to the issue and should clearly spell out that the enquiry if held, would be counter productive. Besides, the object of recording reasons serves another important purpose. It enables the superior officers of the disciplinary authority, to judge whether the authority has properly exercised his powers under clause (b) of the second proviso to Article 311 of the Constitution.

There is no obligation to communicate the reasons for
dispensing with the enquiry. But it is advisable for the disciplinary authority to communicate the reasons, though non-communication does not render the order invalid. Such an action preempts the possibility of any allegation being made, that the reasons had not been recorded, but subsequently fabricated. There may, however, be circumstances in which it may not be reasonably practicable to give detailed reasons.

A situation envisaged under proviso (b) of Article 311 (2) of the Constitution, may also come into existence subsequently, during the course of an enquiry. An enquiry may be dispensed with even during the course of an enquiry. It may be dispensed with, if the authority comes to the conclusion that the continuance of the enquiry becomes reasonably impracticable. In such circumstances the government servant cannot complain that he has been dismissed, removed or reduced in rank in violation of the safeguards provided under Article 311 (2) of the Constitution. Therefore, it is not a total or absolute impracticability which is required by proviso (b) to Article 311(2) of the Constitution. What is required is that, the holding of the enquiry is not practicable in the opinion of a reasonable man in the prevailing circumstances. A similar situation may arise during the course of an enquiry or even
at the commencement of an enquiry if the government servant absconds or refuses to participate in the enquiry. In such a situation an enquiry may have to be conducted *ex parte*, simply on the basis of materials or proviso (b) of Article 311(2) of the Constitution.

An enquiry under clause (b) may also be dispensed with because of non-availability of witnesses, or on account of fear of the officer concerned. The disciplinary authority may dispense with an enquiry if crucial and material evidence are not available, due to intimidation of witnesses who are vital to the enquiry. Where the only evidence is that of police personnel or other senior officers, and relatable to all the charges, the authority would be justified in dispensing with the enquiry\(^{51}\). The holding of an enquiry may not be practicable where an atmosphere of violence or of general indiscipline or insubordination prevails. In such a situation, the authorities need not wait until the incidents of physical injury takes place\(^{52}\).

The Supreme Court has observed in *Satyavir Singh vs Union of India*\(^{53}\) that it is not reasonably practicable to hold an enquiry in tense and abnormal situations, making it impracticable for witnesses to
co-operate with the proceedings. Such action in dispensing with an enquiry must not be actuated by malafide intentions, and non-application of mind of the authority. Similarly, in A.K. Sen vs. Union of India, the Supreme Court has held that if attempts on the part of the authorities to serve charge sheets on delinquent employees are thwarted by agitating employees, holding of an enquiry would not be reasonably practicable.

Administrative Finality

Article 311 (3) of the Constitution provides finality to a decision of a disciplinary authority, arrived at under clause (b) of the second proviso to Article 311 (2). This seems to be a very difficult position for a civil servant. But it has been held in Workman of Hindustan Steel vs. Hindustan Steel Limited, that the courts would examine whether the reasons were germane to the issue or merely a cloak, device or pretense to dispense with the enquiry. Thus the reasons have been held to be subject to judicial review.

In Jaswant Singh vs. State of Punjab, the Supreme Court has made the following observation:

The decision to dispense with the departmental enquiry cannot, therefore, be vested solely on the
ipse dixit of the concerned authority. 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 the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the officer concerned.

Earlier, in *Shivaji Atmaji Sawant vs. State of Maharashtra and ors*\(^{57}\), the order of dismissal after dispensation of enquiry under proviso(b), came up for challenge before the Supreme Court. It was being contended by the petitioner that identical cyclostyled orders were served, which *prima facie* show non application of mind, besides contending that reasons for dispensing with the order did not accompany the order. The Supreme Court upholding the dispensation of enquiry observed, that *indiscipline and instigation* by the police force led to a situation making it impossible to hold the enquiry.

It may, therefore be observed that it is up to the judiciary to examine the nature of actions of the disciplinary authorities. The courts are to examine whether the administrative authority acts fairly and justly, while invoking Article 311 (3) of the Constitution. While exercising judicial review in respect of the finality clause, the court has to put itself in the place of the disciplinary
authority. This would enable the court to consider whether
the action under clause (b) to the second proviso to Article
311 (2) of the Constitution has been properly applied by the
disciplinary authority or not. For instance, a case involving
the dispensation of the enquiry for impracticability to serve
notice may arise. In such a situation, the court may
interfere if it appears that the authority did not apply his
mind to the question of practicability of service of notice.
There may not be proper application of mind by the
disciplinary authority by way of negligence on his part to
properly serve the notice\textsuperscript{59}.

The court can interfere where no reasons for dispensing
with the enquiry under clause (b) are given, or the reasons
are simply a reiteration of the wordings of clause (b) of the
second proviso of Article 311 (2) of the Constitution.
Similarly, it can also interfere where the reasons are
irrelevant or are vague, which only reflects the non-
application of mind of the disciplinary authority\textsuperscript{60}.

The finality given to a decision of a disciplinary
authority under Article 311(3) of the Constitution cannot
oust the jurisdiction of the court in exercise of the power
of judicial review. The court in exercise of its power of
judicial review can strike down an order dispensing with an enquiry, as also the order imposing a penalty. Unless such a decision is subject to judicial review, the fear of arbitrary exercise of power would always exist. Extraneous considerations by way of ill will, motive, caprice or whims or even error of proper appreciation may go unchecked.

The second exception is not meant to be applied in ordinary or in normal conditions, but in such situations where it is not reasonably practicable to hold an enquiry.

It seems that proviso (b) dilutes the protection of Article 311(2) of the Constitution to a considerable extent. The safeguards may be denied at the whims or caprice of the disciplinary authorities. If the disciplinary authority records some judicial reasons arbitrarily, and says that he is satisfied for those reasons, that the enquiry is not reasonably practicable, a civil servant stands deprived of his valuable right. Therefore, the courts cannot remain as idle spectators against possible miscarriage of justice. Safeguards against arbitrary action can only be secured by way of judicial review of the orders issued under Article 311(2) (b) of the Constitution.

The disciplinary authorities even if they act bonafide
in dispensing with an enquiry may not always be infallible. Therefore, the sufficiency of recording of reasons to guarantee fair play in the circumstances, should be made subject to judicial review.

It has been held in R.K.Mishra vs. General Manager Northern Railway,63 that proper investigation and fair enquiry is expected to be the rule and discretion thereof an exception, to be resorted to only when any production of evidence and enquiry is reasonably impossible. Although the proviso (b) to Article 311(2) of the Constitution is to be used in exceptional cases, it is stringent and drastic. But from the amount of case law, it appears that the proviso has been used liberally to the detriment of civil servants. It, therefore, calls for extreme caution to see that this exception is not abused by unscrupulous officials to wreck vengeance on the subordinate officials.

Security of state

The third exception in the form of proviso (c) to Article 311 (2) of the Constitution, confers powers on the President or Governors to remove a civil servant without any enquiry. The proviso has been provided with a view to securing better interests of the State, in cases where the
mere disclosure of a charge might affect the security of a State.\(^6\) The exercise of this power is subject to the satisfaction, that it would be inexpedient to hold the enquiry in the interest of the security of the State.

The expression 'security of the State' and 'in the interests of the security of the State' bear different connotations. The latter expression embraces a wider field than the former, as it includes everything that indirectly helps the security of the state.\(^6\) Security of the state being paramount, all other interests are subordinate to it. The proviso 'in the interest of the security of the state' may be affected by actual acts or by the likelihood of such acts taking place. Therefore, clause (c) to the second proviso may be invoked where the holding of an enquiry is not impracticable, but considered inexpedient, as it would lead to disclosure of sensitive information, as well as the source of such information. In other words, the issue before the President or Governor under clause (c) of the second proviso is whether in the circumstances it would be expedient to hold an enquiry in the prevailing circumstances. It follows therefore, that the reasons for dispensing with the enquiry need not be communicated to the civil servant. Such reasons cannot be recorded in the final order, nor can they be made public.
A conjoint reading of Article 310 with proviso (c) of Article 311(2) of the Constitution indicates that determination of tenure of the civil servant is contemplated, leading to his dismissal or removal from service. Since the interests of the security of the State is affected, there cannot be any question of retaining a delinquent civil servant by imposing the penalty of reduction in rank.66

Cases against civil servants may arise where disclosure of the charges by the Government would affect the security of the state. In such situations, the President or the Governor, may exempt the holding of the enquiry or dispense with the notice to show cause67. An enquiry is immune from judicial scrutiny even on the ground of its being contrary to the principles of natural justice68. In other words, the decision of the President or the Governor has been held to be unjustifiable.

An order under proviso (c) of Article 311(2) of the Constitution should not be invalidated even on unsubstantial or hyphertechnical grounds. In B.C. Das and ors vs. State of Assam69, the Supreme Court has observed that the true meaning of the order has to be deduced from the language used. In
this case, the open court upheld the order of the Governor
effected in terms of clause (c), although the same was issued
on the basis of the unamended wordings of Article 311 (2) of
the Constitution. The court held that it could not sit in
judgement over such state policy.

Since such an order under clause (c) of the second
proviso to Article 311 (2) is not required to be recorded in
writing, the aggrieved civil servant is not left with much
remedy. If the order is made by a delegate of the President
or Governor, the individual civil servant may technically
exercise his right of appeal or revision before the appellate
authority. But such departmental remedy can only be sought,
provided the inexpediency of holding the enquiry no longer
exists. But so long the situation remains unchanged, the
aggrieved civil servant continues to be deprived of any
departmental remedy.

In certain cases, an enquiry may be dispensed with under
clause (c) of the second proviso, in pursuance of departmental
rules made under Article 309 of the Constitution. In
Balakotiah vs Union of India, the Supreme Court has held
that the procedure prescribed under the rules has to be
followed in order to dispense with the enquiry. Where such
rules are not complied with, the President or the Governor cannot fall back upon proviso (c) to Article 311 (2) of the Constitution.

Since the decision to dispense with the enquiry is considered to amount to a subjective satisfaction of the President or Governor, founded on secret information, it is not subject to judicial review.

The matter of delegation of authority to issue orders under proviso (c) came up before the Supreme Court on a number of occasions. While initially the court upon a plain reading of the provision took the view that the power is meant to be exercised personally by the President or Governors, now it has arrived at a contrary view. The position, therefore needs to be looked into in detail, as consequences of dispensation of enquiry under proviso (c) to clause 2 of Article 311 visits the civil servant with grave consequences. This is all the more important, because of the reluctance of the Supreme Court to exercise the power of judicial review in a case involving proviso (c) to Clause 2 of Article 311 of the Constitution.

For a proper appreciation of the decisional law on the point, the judgements of the Supreme Court in Sardari Lal Vs.
Union of India needs to be reverted to. The apex court held the exercise of powers under clause (c) to be an act of absolute 'pleasure' of the President or Governor, to be exercised personally and not by delegation. The Court further considered it incumbent on the President or Governor to satisfy the necessity for invoking the powers under clause (c) of Article 311(2) of the Constitution. Any order passed in exercise of powers under Articles 311(2) of the Constitution, without such personal application of mind by the President or Governor, would be ultra vires Article 311(2) of the Constitution. The position may also be inferred from the dichotomy of the wordings of clause (b) and (c) of Article 311(2) of the Constitution. In other words, the President or Governor has to be personally satisfied that in the interest of the security of the State, it is not expedient to hold the enquiry prescribed by Article 311(2) of the Constitution. Since the order in the instant case was issued by the joint secretary, ministry of home affairs, the same came to be quashed as being illegal, ultra vires and void as it amounted to a delegation of powers.

But earlier in Kapoor Singh vs Union of India, the apex court opined that the satisfaction need not be the personal satisfaction of the President or Governor as the
case may be. The Supreme Court expressed the opinion that the power to initiate departmental proceedings against a Government servant constitutes an executive power of the state.

In Chhater Singh vs Union of India, the petitioner contended that the President could not delegate his powers under Article 311 (2) (c) of the Constitution to any minister by rules of business or otherwise. The Rajasthan High Court observed in the case that an order, authenticated under Article 77(2) of the Constitution is valid. It further observed that the executive power vested in the President under Article 53 has to be exercised either directly or through officers subordinate to him, in accordance with the Constitution. The President has to act on the aid and advice of the council of ministers as provided under Article 74 of the Constitution, in pursuance of which Article 77 (3) provides for allocation of business of the Government to the ministers.

Subsequently, in a significant judgement a seven judge constitution bench of the Supreme Court in Samsher Singh vs State of Punjab has held the delegation of powers under clause (c) to be permissible. In the process, it expressly
overruled its earlier decision in *Sardari Lal vs Union of India*\(^79\). Speaking through **Chief Justice A.N. Ray**, the court has held "that to say that the President must be satisfied personally was not correct statement of law and against the established and uniform view of this court as embodied in several decisions..."

By now it is fairly established that the satisfaction under clause (c) of the second proviso to Article 311 of the Constitution of the President or Governor as the case may be, is not his personal satisfaction. Such a satisfaction is considered to be that of the council of ministers \(^80\).

The next issue is whether the satisfaction of the President or Governor is justiciable. If the decision is based on the subjective satisfaction of the President or Governor, the reasonableness of such a decision will be immune from a court of law.

In *Chhater Singh vs Union of India*\(^81\), an order issued in the name of the President removing the petitioner from service was placed before the Rajasthan High Court. The court opined that the retention of the petitioner was prejudicial to national security, and therefore in the interest of the security of the state, it was not expedient to hold the
enquiry. The court held that as the order was passed in the name of the President, refusal to hold an enquiry could not be questioned.

Earlier, in *Eshwariah vs State of Andhra Pradesh*\(^\text{82}\), the Supreme Court observed that an order issued under clause (c) of Article 311 (2) is liable to challenge on the ground of malafides. According to the view, the only question which is open to judicial review is whether the clause has been properly applied in a given case\(^\text{83}\). However, if the third exception pertaining to the security of the state is considered as being based on the doctrine of sovereign power, the action of the President or Governor cannot be subjected to judicial scrutiny.

The point whether the satisfaction of the President or Governor is subject to judicial review on the ground of malafides has been left open in *Union of India and ors vs Tulsiram Patel and ors*\(^\text{84}\). It was because the issue of malafides was not directly at issue before the court. But the court made the significant observation: \(^\text{85}\).

the satisfaction reached by the President or Governor under clause(c) is subjective satisfaction and therefore, would not be a fit matter for judicial review. But the question whether the Government is bound to disclose at least the
materials upon which the advice of the council of ministers was based so that the court can examine whether the satisfaction of the President or Governor as the case may be, was arrived at malafide or based on wholly extraneous and irrelevant grounds, would depend upon whether the class of privilege documents and whether in respect of them privilege has been properly claimed.

The court adopted the view that because of Article 74(2) and Article 163(3) of the Constitution, the Government cannot be compelled to produce all materials upon which such satisfaction was reached. Further, the Government cannot be compelled to disclose its secret source of information for obvious reasons.

The Supreme Court through a nine judge Constitution bench in S.R. Bommai and ors vs Union of India and ors has made some significant observations in respect of judicial review of the advice tendered by the council of ministers to the President, in the following words:

Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the Ministers to the President. It does not bar the court from calling upon the Union Council of Ministers (Union Of India) to disclose to the court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice even if the material is looked into by or shown to the President, it does not partake the character of advice.
It is imperative to note that when the materials on the basis of which a proclamation of President's rule under Article 356 of the Constitution can be subject to judicial scrutiny by the court, the same should follow in respect of clause (c) to the second proviso of Article 311. Even if the Government may claim privilege under section 123 of the Evidence Act, 1872 the same should be decided on the facts and circumstances of the case. The court can certainly satisfy itself on the basis of the relevancy of the material leading to an order of dismissal or removal under clause (c) of the second proviso to Article 311 of the Constitution. Such a measure will in no way affect the interest of the security of the state, if the court considers the materials in camera. It is submitted that the delinquent civil servant will in that event have a sense of satisfaction, that the power under clause (c) is fairly used. Further, the court should exercise the power of judicial review to ascertain whether the action under clause (c) of the second proviso to Article 311 of the Constitution is motivated by malafide considerations.

Paradoxically when civil servants are denied the right to defend themselves under proviso (c) to Article 311(2) of
the Constitution, citizens accused of committing offences connected with security of State are given access to defend themselves in a criminal proceeding. Therefore, in order to rule out any possible misuse of powers under clause (c), some amendment is called for. Clause (c) needs to be confined to cases where disclosure of facts might endanger the security of state and no more. Such an action will limit the scope of misuse of clause (c) of Article 311 (2) by the departmental authorities.

General Observations

The constitutional safeguards as provided under Article 311 (2) is fettered by the three exceptions provided therein. Invocation of any of the exceptions provided under clauses (a), (b) and (c) of Article 311 (2), result in dispensation of an enquiry, otherwise available to a delinquent civil servant.

Divergent views have been expressed by the courts in respect of clause (a) which pertain to conviction of civil servants by a criminal court. It provides the holding of a departmental enquiry to be unnecessary and superfluous in respect of a civil servant found guilty of a criminal charge by a court of law. Therefore, there is no need to conduct a departmental enquiry under clause 2 of Article 311 of the
Constitution. When a civil servant is prosecuted for an offence, the proviso does not provide for any safeguards in respect of disproportionate punishment which might be meted out to a civil servant. Besides, clause (a) also does not specify the nature of the conduct in respect of which a civil servant may be deprived of an enquiry. Therefore, any type of judicial conviction may be a sufficient ground for action by the departmental authorities. Even in respect of acquittal of a civil servant, a departmental enquiry may be dispensed with by the disciplinary authority, if the conduct of the civil servant is considered unworthy. Therefore, there is the need to restrict the invocation of clause (a) of Article 311(2) of the Constitution only to cases of conduct of civil servants involved in moral turpitude. Such a restriction will remove the prevailing uncertainty arising out of multiple judicial holdings. Some courts are of the view that except in conviction for trivial matters, conviction *ipso facto* is enough to dismiss a civil servant, while others hold the view that this exception can be invoked only in cases involving moral turpitude.

It has been observed that at times a civil servant on being convicted is extended the benefit of section 12 of the Probation of Offenders Act, 1958. But in spite of refraining
from imposition of any sentence by the court, civil servants have been visited with penal consequence under clause (a) of the second proviso to Article 311 of the Constitution. This has been done on the ground that a statutory enactment cannot override a constitutional provision. In view of the statutory provision, a delinquent civil servant may either be compulsorily retired or removed at best, so that the order of punishment does not act as a bar for future employment with the Government.

The Supreme Court in *Union of India and ors vs Tulsiram Patel and ors*\(^9\) has held that consideration of penalty to be imposed has to be decided *ex parte* by the authority itself. This has totally watered down the view in *D.P.O. Southern Rly. vs Challappan*\(^9\) that the disciplinary authority has to objectively consider the circumstances of the case before deciding upon the penalty. The decision of the Supreme Court in *Ram Chander vs Union of India*\(^9\) which proposes to enlarge the scope of the statutory right of appeal needs to be further strengthened in view of judicial interpretation of Article 21 of the Constitution, as rendered in *Maneka Gandhi vs Union of India*\(^9\). It is submitted, that the courts should act justly in respect of arbitrary or improper exercise of powers under clause (a) of the second proviso to Article 311.
of the Constitution. It should not hesitate to strike down unjust orders, in order to check misuse of the provision by the departmental authorities. In deserving cases, the court may consider to substitute a just and proper penalty, proportionate to the gravity of the offence.

Proviso (b) to Article 311 (2) of the Constitution provides for dispensation of enquiry, if the holding of an enquiry is not considered to be reasonably practicable. It is a matter of assessment of the disciplinary authority to consider whether the holding of an enquiry is practicable or not. Holding of an enquiry may also be dispensed with during the course of an enquiry, in cases where it becomes impracticable to continue with the enquiry. Such an impracticability may arise if the Government servant absconds or if crucial and material evidence are not available.

An enquiry under proviso (b) may be dispensed with by recording the reasons in writing to justify the grounds of dispensation of the enquiry. Even if communication of reasons is not provided for, it is desirable to communicate the reasons to the delinquent.

Recording of reasons is provided for to check possible misuse of the proviso. Such reasons adduced should bear
rational basis for dispensing with the enquiry. Therefore, any order which is not in conformity with proviso (b) of Article 311 (2) of the Constitution vitiates the dispensation of such an enquiry, and as such is liable to be struck down.

Even if the above provision is meant to be applied in exceptional circumstances, it has been observed from the amount of litigation, that it has been taken recourse to rather liberally. This is perhaps because of Article 311 (3) of the Constitution, providing finality to the orders of the department.

The finality clause ousting the jurisdiction of the civil court only dilutes the protection afforded under clause (2) of Article 311 of the Constitution. Giving finality to the decision of the disciplinary authority seems to be a very difficult position for a civil servant. Such a finality leaves wide scope for arbitrary exercise of powers by the disciplinary authority.

Safeguards against abuse of power by the disciplinary authorities lie through judicial scrutiny. The courts are to see whether the disciplinary authorities act fairly and justly. Even by assuming that the disciplinary authority acts fairly, they cannot be expected to be infallible in their
decisions to invoke the exceptions laid down under Article 311(2) of the Constitution. It is, therefore, necessary to provide for explicit review of such administrative action in view of the holding by the apex court through various decisional laws, that finality of administrative action is subject to judicial review. In view of the above, clause (3) of Article 311 of the Constitution needs to be amended, if not deleted. Such an amendment besides giving a sense of confidence to the civil servants, will also restrain any punitive, arbitrary exercise of power by the disciplinary authorities.

It has also been provided that an enquiry may be dispensed with in the interest of the security of the State. That is, where the holding of an enquiry is likely to jeopardize the interest of the security of the state, such an enquiry may be dispensed with. The inexpediency of holding such an enquiry is provided under proviso (c) to Article 311 (2) of the Constitution.

None should dispute the necessity of keeping the security of the State. But at the same time, the civil servant should be provided with some modicum of protection, so that he may not be a victim of official displeasure.
Since the satisfaction of the President of India or the Governor of a State is not circumscribed by any condition under proviso (c), no reasons need be assigned for such an order of dismissal or removal of a civil servant. Such satisfaction reached by the President or Governor is a subjective satisfaction and, therefore, has been held not to be fit for judicial review.

It is submitted, that the power to invoke proviso (c) of Article 311 (2) of the Constitution may be delegated, In such a case, immunity from judicial scrutiny on grounds of exercise of sovereign power should not arise. It is possible that the delegate may exercise this exceptional power for some other purpose, which may not be directly relevant to the interest of the security of the state. It cannot be construed that a delegate can exercise the power of pleasure under Article 310(1) of the Constitution. Moreover, such delegate cannot claim to act on the advice of the council of ministers. Where however, the interests of the security of state prevails, the court may look into the claim of privilege on the basis of facts and circumstances of the case. Further, the court may also look into the relevancy of materials, besides going into the malafide of such orders.
Therefore, the proviso (c) of Article 311 (2) of the Constitution may be amended, so as to remove the mischief.

It has been observed that the provisos (a) (b) and (c) to Article 311(2) of the Constitution providing for dispensation of enquiry appear to be stringent and drastic. Through they are meant to be taken recourse to only in exceptional circumstances, in reality there has been evidence of liberal application of the provisos. This has been made possible because of the finality given to such orders in terms of clause (3) of Article 311 of the Constitution. This has resulted in tilting the balance against the civil servants.

Clause (3) of Article 311 needs to be amended in order to provide for a scope of judicial review as suggested earlier. Further, departmental appeals where provided for needs to be made more effective. In respect of proviso (c) pertaining to interest of the security of the state, it is desirable to compulsorily retire a civil servant, instead of taking recourse to summary dismissal in deserving cases.

If such changes are not effected, the employees will continue to be at the mercy of bureaucrats. Trade unionists and honest employees may be dismissed under the camouflage or
cloak of the public interest and public good, if they happen to take recourse to strikes. Clause (b) is not meant for curbing demands of socio economic justice. In fact, denial of even a modicum of safeguards because of the second proviso is debatable, being totally in negation of fair and just treatment\textsuperscript{96}.

It has to be ensured that the provisos in clause (2) along with clause (3) of Article 311 does not unduly curtail the right guaranteed to public servants under Articles 14, 16 and 21, of the Constitution as well.
NOTES

1. Supra Chapter V.


3. Union of India vs Tulsiram Patel, (1985) 3 SCC 398

4. Ansari vs. Union of India, 1983 (2) kar LT 209 (213)

5. G.L. Wazir 1992 Constitutional safeguards to Civil Servants in India Delhi: Akalank Publications P. 211, Rel B. Nagabhusharam, AIR 1961 AP 72 (73), Om Prokash Vs, Director Postal Services, AIR 1973 P.H.I.


7. Supra n 5 P. 72


9. Ibid.

10. AIR 1975 , SC 2216.


13. Supra n. 3 p 1451.


15. Supra n 10, Gurbachan Das Vs. Chairman P.T Board, SLR 1983 (1) P.H 729.

17. Supra n. 13.
18. Op cit n. 16.
19. Supra n.10.
20. Supra n. 3.
22. Supra n. 3 P 1477.
23. ibid Pp1485-1486.
24. AIR 1986 , SC 1173.
25. Supra n. 21 P. 550.
26. Supra n. 3 Pp 1485-1486.
27. 1981 SCC(vi) 637.
28. SLR 1972 Del 325.
30. Ibid.
33. R.S. Das Vs. Divisional Superintendent, AIR 1960 All 11538.
34. AIR 1965 punj 53.
36. Supra n.4.
37. Supra n.3. Pera 130.


39. 1977 (1) SLR 437.


41. Supra n. 3. P. 1480.

42. Ibid.

43. Ibid para 133.

44. Ibid para 134.


47. Supra n. 3 para 138.

48. Ibid para 134.

49. Ibid p 1480

50. Ibid pp 1478, 1479

51. Supra n. 12 p. 430

52. Supra n. 2.

53. Ibid

54. (1985) 4 SCC 641

55. AIR 1985, SC 251

56. AIR 191 Sc 385 (390)

57. AIR 1986, SC 617

58. Supra n. 30 P 536

60. Supra n 46, Sri Kant Vs. Union of India, (1986) ATC 771 (para) AII


63. 1977 Lab Ic 643 (649) Del

64. Constituent Assembly Debates Vol ix pp 1053, 1105 and 1110.


70. Ibid

71. AIR 1958 Sc 232 (239), Menon Vs. Union of India, AIR 1963, SC 1164

72. Supra n. 3 para 143, 175.

73. AIR 1971, SC 1547

74. Ibid 1551

75. AIR 1960, SC 493 (497)

76. Ibid
77. AIR 1967 Rai 194

78. AIR 1974 Sc 2192 (2204), Union of India Vs. Sripat Ranjan, AIR 1975 , SC 1755, Bakshi Sardari lal (dead) through Legal representative and ors Vs. Union of India and anr, AIR 1987 , SC 2106.

79. Supra n. 93

80. Supra n. 3 p 1483

81. Supra n. 77

82. AIR 1958, SC 288 (291)

83. Supra n. 46 p 293

84. Supra n 3 p 1483- 1484

85. Ibid

86. AIR 1994 , SC 1918 (2112)

87. Ibid

88. Supra n. 1 p. 248

89. Supra n. 31.

90. Supra n. 3 para 115, 116

91. Supra n. 10

92. Supra n. 24

93. (1978) I SCC 248

94. Union of India Vs. R. Raddappa, J.T. 1993 (4) , SC 470; 1994 SCC (L.S) 142

95. Supra n. 3 para 139/ 141