(2013) 06 GAU CK 0023

Gauhati High Court

Case No: Writ Petition (C) No. 2221 of 2011

Union of India and Others	APPELLANT
Vs	
Smt. Jaya Talukdar	RESPONDENT

Date of Decision: June 25, 2013

Citation: (2014) 1 GLT 590 : (2013) LabIC 3378

Hon'ble Judges: Indira Shah, J; I.A. Ansari, J

Bench: Division Bench

Advocate: H. Buragohain, Central Govt, for the Appellant; A.R. Sikdar, Amicus Curiae and M.K. Choudhury, for the Respondent

Final Decision: Allowed

Judgement

I.A. Ansari, J.

We have heard Mr. H. Buragohain, learned Central Government Counsel, appearing on behalf of the petitioners, and Mr. A.R. Sikdar, learned counsel, for the sole respondent. We have also heard Mr. M.K. Choudhury, learned senior counsel, appearing as Amicus Curiae. The material facts, leading to this writ petition, may, in brief, be set out as under:--

(i) Sri. Chakreswar Talukdar, husband of the sole respondent, while functioning as Sub-Post Master (in short, ''SPM'') at Bengtol Sub-Post Office, in the district of Chirang, Bodoland Territorial Autonomous Development Council, was reported by the Post Master, Dhubri Head Post Office, vide letter, dated 07-07-2001, as having been found to have retained excess cash with him. Pursuant to the information, so received by the Divisional Post Office, on 10-07-2001, Sub-Divisional Inspector of Post Offices (hereinafter referred to as ''SDI(P))'', Bongaigaon, visited the Bengtol Sub-Post Office, on 18-07-2001, to ascertain the correctness of the allegation of retention of excess cash by Sri. C. Talukdar, husband of the sole respondent.

(ii) On his visit to Bengtol Sub-Post Office, SDI(P) found Bengtol post office closed and the Sub-Post Master, Sri. Talukdar, absent from duty. On 19-07-2011, SDI(P)

reported to the Superintendent of Post Offices, Goalpara Division, Dhubri, over telephone, that excess cash, if any, retained at Bengtol Sub-Post Office, could not be ascertained due to unauthorized absence of Sri. Talukdar since 17-07-2001. On receipt of this report, Divisional Superintendent of Post Office, Goalpara Division, Dhubri, accompanied by other postal officials, visited, on 20-07-2001, Bengtol Sub-post Office and found the office closed. Nobody could tell the team of the Superintendent of Post Office, Goalpara Division, Dhubri, as to where Sri Talukdar was and/or where the keys of the post office were.

(iii) Having failed to trace out Sri. Talukdar as well as the keys of the post office, which Sri. Talukdar had been holding, information was lodged, on 20.07.2001, with the In-charge, Bengtol Police Outpost, regarding suspension of the work of the said Sub-Post Office (SPO) and unauthorized absence of its SPM, Sri. Talukdar. However, the In-Charge, Bengtol Police Outpost, expressed his inability to help the Superintendent of Post Office, Goalpara Sub-Division, in opening the SPO without assistance/permission of the District Magistrate, Kokrajhar. On the following day, i.e., on 21-07-2001, the Superintendent of Post Office, Goalpara Division, Dhubri, approached the District Magistrate, Kokrajhar, who, in turn, deputed one Magistrate to open the Post Office on 21-07-2001 itself.

(iv) Thus, with the help of the District Magistrate, Kokrajhar, Bengtol SPO was opened, on 21-07-2001, at about 1700 hours, the lock, on the steel almirah, was broken and the Magistrate, on duty, prepared an inventory in presence of witnesses and handed over the articles, including cash, stamps, etc., lying therein, to the Superintendent of Post Office, Goalpara Division. The documents and the books of accounts, so recovered, revealed several anomalies in the books of accounts maintained by Sri. Talukdar, when he had attended the SPO on 13-07-2001 and 14-07-2001.

(v) As the inventory revealed misappropriation of money by Sri. Talukdar, information was lodged, in this regard, in writing, with the Officer-in-Charge, Basugaon Police Station, on 23-07-2001, by the SDI(P), Bongaigaon, and Basugaon Police Station Case No. 71 of 2001, u/s 409, I.P.C., came to be accordingly registered against the said Sri. Chakreswar Talukdar, husband of the sole respondent herein, and the police investigation commenced.

(vi) Apart from a divisional level enquiry, which was conducted, by the Postal Department, the police, on completion of investigation, submitted, eventually, on 30-05-2002, a charge-sheet, in Basugaon Police Station Case No. 71 of 2001 aforementioned, seeking prosecution of Sri. Talukdar, u/s 409, I.P.C., showing him as an absconder.

(vii) Thereafter, the present respondent, as wife of Sri. Talukdar, filed a representation, on 10-11-2003, before the Deputy Commissioner, Bongaigaon, stating to the effect, inter alia, that her husband had been traceless since

17-07-2001 and, in his absence, she, along with her two daughters, had been facing financial hardship and, hence, out of the provident fund, gratuity, pension, etc. some amount may be given to her so as to enable her to meet her critical financial condition. The said representation was forwarded, on 12-11-2003, by the Deputy Commissioner, Bongaigaon, to the Post Master General, Guwahati. This was followed by a report/certificate, dated 29-08-2005, issued by the Superintendent of Police, Kokrajhar, stating to the effect, inter alia, that during investigation of the case, accused Sri. C. Talukdar was found to have misappropriated Government money, while he had been working as SPM at Bengtol SPO, but he could not be arrested during investigation, because he had absconded.

(viii) Non-Bailable Warrant of Arrest as well as Proclamation & Attachment, issued by the Chief Judicial Magistrate, Kokrajhar, to apprehend the accused, Sri C Talukdar, too, proved futile as his where about could not be found out.

(ix) The Disciplinary Authority, therefore, decided to keep the petitioner''s husband as suspended. Though the suspension order was sent to the delinquent official, through registered post, to his last place of duty as SPM, Bengtol SPO, the same was returned unserved with the remark, ''addressee absconded''.

2. In course of time, charges were framed and as the charge-sheet could not be served on the petitioner''s husband, an order was made, on 10-02-2006, by the disciplinary authority dismissing the petitioner''s husband from duty in terms of the provisions of Rule 19(ii) of the Central Civil Services (Classification, Conduct and Appeal) Rules, 1965, (hereinafter referred to as the CCS (CCA) Rules, 1965), read with Article 311(2)(b) of the Constitution of India, dispensing with the requirement of holding of enquiry against Sri Talukdar on the charges, which had been framed against him, the enquiry having been dispensed with on the ground that it was not ''reasonably practicable'' to hold an enquiry in terms of Rule 14 of the CCS (CCA) Rules, 1965.

3. Subsequent to the dismissal of her husband from service, the respondent herein filed Original Application (in short, ''OA'') under Rule 19 of the CCS (CCA) Rules, which gave rise to OA No. 66 of 2009, wherein her case, briefly stated, was as under:

Her husband, Sri Chakreswar Talukdar, had not been heard of since 17-07-2001 and, hence, he can be presumed to have not remained alive and that she apprehends that her husband had been kidnapped by the extremists for demanding money as Bengtol area had been affected by extremist elements and though she had lodged a missing report, in this regard, requesting the police to trace out her husband, the police had refused to entertain such a request on the plea that a case had already been registered against her husband. This apart, the Chief Judicial Magistrate came to declare her husband as an absconder as late as on 20-06-2006; whereas the disciplinary authority, having treated the petitioner''s husband as an absconder, dismissed him from service, without holding enquiry, as early as on 10.02.2006, i.e.,

about four months before the petitioner''s husband was formally declared as absconder by the Chief Judicial Magistrate, Kokrajhar.

4. The petitioners herein, who were respondents in the OA, filed their written statement resisting the OA and pointing out that in the facts and attending circumstances of the case, the disciplinary authority was wholly justified and acted within the ambit of its powers in not holding the enquiry as envisaged by Rule 14 of the CCS (CCA) Rules, 1965, because the said Sri. Talukdar had been found absconding and it was not reasonably practicable to hold enquiry and that having found the said Sri. Talukdar responsible for misappropriation of Government money, he had to be dismissed and, hence, the order of his dismissal, passed, on 10-02-2006, may not be interfered with.

5. By order, dated 08-07-2010, the learned Tribunal, however, took the view that since the learned Chief Judicial Magistrate, Kokrajhar, had declared the petitioner''s husband absconder as late as on 20.06.2006, the present respondent''s husband, Sri. Talukdar, could not have been treated, on 10.02.2006, by the disciplinary authority, as absconder. This apart, according to the learned Tribunal, the disciplinary authority had not paid subsistence allowance during the period of suspension of Sri. Talukdar, the charge-sheet had not been served on him and no opportunity of hearing had been accorded to him and, hence, his dismissal from service was wholly illegal and untenable in law.

6. Aggrieved by the order, dated 08-07-2010, aforementioned, this writ petition has been made, under Article 226 of the Constitution of India, by the petitioners herein, who were, as already indicated above, respondents in the OA. With the help of this writ petition, the present petitioners, who were respondents in the OA, have put into challenge the correctness and validity of the order, dated 08-07-2010, aforementioned, passed by the learned Tribunal, and seek issuance of appropriate direction or directions.

7. Presenting the case on behalf of the petitioners, Mr. H. Buragohain, learned Central Government Counsel, submits that if the facts and circumstances, as were available before the disciplinary authority, on 10-02-2006 (when the order of dismissal of the respondent''s husband was made by the disciplinary authority), are borne in mind, it would be unfair and incorrect to say that the order, dated 10.02.2006, passed by the disciplinary authority, does not give sufficient reason as to why the disciplinary authority considered that it was not ''reasonably practicable'' to hold an enquiry in terms of the requirements of Rule 14 of CCS (CCA) Rules, 1965, and as to why the order of dismissal had to be made without holding enquiry. The learned Tribunal, according to Mr. Buragohain, learned Central Government Counsel, fell in serious error in considering the case against the present petitioners not in the light of the facts as were available before the disciplinary authority on 10-02-2006, when the impugned order, dispensing with the enquiry and dismissing the respondent''s husband from service, was made inasmuch as the learned

Tribunal has passed the presently impugned order on the basis of the materials as became available, before the learned Tribunal, on the date of the passing of the order; whereas the correctness and/or legality of the order, dated 10.02.2006, which the disciplinary authority had passed, ought to have been considered in the light of the materials, which were available before the disciplinary authority on the date of making of the order, dated 10.02.2006, aforementioned.

8. In support of his submission that the petitioners had acted within the ambit of their powers and with full justification in dismissing the petitioner''s husband by taking the view that it was not reasonably practicable to hold an enquiry into the charges, which were framed against the respondent''s husband as regards his unauthorized absence from duty and also misappropriation of Government money, Mr. Buragohain has placed reliance on Union of India and Another Vs. Tulsiram Patel and Others,

9. Controverting the submissions made on behalf of the petitioners, Mr. Sikdar, learned counsel, submits that the learned Tribunal has clearly and correctly noted, in its order, which stands impugned in the present writ petition, that the learned Chief Judicial Magistrate had declared the petitioner''s husband as an absconder by order, dated 20-06-2006, whereas the disciplinary authority had passed an order, dismissing the petitioner''s husband, as far back as on 10-02-2006, treating the petitioner''s husband as an absconder, though until a declaration from the Chief Judicial Magistrate, Kokrajhar, was made to the effect that the respondent''s husband had been an absconder, he (i.e., the respondent''s husband) could not have been, and must not have been, treated and described by the disciplinary authority as an absconder.

10. Before the declaration was made by the learned Chief Judicial Magistrate as regards the fact that the petitioner''s husband was an absconder, treating the petitioner''s husband, as an absconder, by the disciplinary authority, was, contends Mr. Sikdar, wholly illegal and untenable in law. Relying upon the decision in Tulsi Ram Patel (supra), Mr. Sikdar submits that Tulsi Ram Patel (supra) clearly lays down that an order, dispensing with an enquiry on the ground that holding of the enquiry was not reasonably practicable, ought to have preceded the order of dismissal; but in the case at hand, the order dispensing with the enquiry and dismissing the respondent''s husband from service, came to be made by a consolidated order, passed on 10-02-2006.

11. As far as the learned Amicus Curiae is concerned, he has submitted that dispensing with enquiry on the ground that holding of enquiry was not reasonably practicable can be taken before the enquiry is commenced and the decision, dispensing with the enquiry on the ground that it is not reasonably practicable to hold the enquiry, can be taken even after an enquiry has commenced. This apart, the reasons, assigned by a disciplinary authority, for taking the view that it is not reasonably practicable to hold enquiry is an act, which is justiciable in nature.

12. Mr. Choudhury, learned amicus curiae, also submits that justification and/or legality or validity of an order, dispensing with a disciplinary enquiry, has to be adjudged by referring to the facts and circumstances, which were in existence on the day, when the decision, not to hold enquiry, was taken on the ground that it was not reasonably practicable to hold the enquiry and that the correctness or validity of an order, dispensing with the enquiry, cannot be considered and determined with reference to a date or situation subsequent to the date, when the decision to dispense with the enquiry was taken.

13. Mr. Choudhury, learned amicus curiae, further submits that in the case at hand, the petitioners do not appear to have committed any error, in the light of the decision in Tulsi Ram Patel (supra), in passing a consolidated order, on 10-02-2006, holding that it was not reasonably practicable to hold an enquiry and also in dismissing the petitioner''s husband from service inasmuch as the enquiry, in the absence of the petitioner''s husband, was, rightly concluded the disciplinary authority, not reasonably practicable.

14. While considering the present writ petition, it needs to be noted that dismissal from service is, admittedly, a major penalty as specified in Clause (v) of Rule 11 of the CCS (CCA) Rules, 1965, and this major penalty cannot, in the light of the provisions of Rule 14 of CCS (CCA) Rules, 1965, be imposed on a delinquent employee without holding an enquiry inasmuch as Rule 14(i) clearly lays down that no order, imposing any of the penalties specified in Clauses (v) to (ix) of Rule 11, shall be made except after an enquiry is held, as far as may be, in the manner provided in this Rule. Sub-rule (1) of Rule 14 is reproduced below:

14. Procedure for Imposing Major Penalties:--

(1) No order imposing any of the penalties specified in clauses (v) to (ix) of Rule 11 shall be made except after an enquiry held, as far as may be in the manner provided in this rule and Rule 15, or in the manner provided by the Public Servants (Inquiries) Act, 1850 (37 of 18501 where such enquiry is held under that Act.

(Emphasis is added)

15. However, Rule 19 of the CCS (CCA) Rules, 1965, provides for imposition of major penalty without holding any enquiry, though enquiry is, otherwise, required by Rule 14 inasmuch as Rule 19 of CCS (CCA) Rules, 1965, lays down as follows:--

19. Special procedure in certain cases : Notwithstanding anything contained in Rule 14 to Rule 18--

(i) where any penalty is imposed on a Government servant on the ground of conduct, which has led to his conviction on a criminal charge, or

(ii) where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an enquiry in the manner

provided in these rules, or

(iii) where the President is satisfied that in the interest of the security of the State, it is not expedient to hold any enquiry in the manner provided in these rules,

the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit:

Provided that the Government servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case under Clause (i):

Provided further that the Commission shall be consulted, where such consultation is necessary, before any orders are made in any case under this rule.

(Emphasis is added)

16. A bare reading of Rule 19 clearly shows that whenever the disciplinary authority is satisfied, for reasons to be recorded by it in writing, that it is not reasonably practicable to hold an enquiry in the manner provided in the Rules, the disciplinary authority may pass an order indicating such circumstances leading to its conclusion that it is not reasonably practicable to hold an enquiry.

17. From a conjoint reading of Rule 14 and Rule 19, it becomes abundantly clear that ordinarily, a Government servant cannot be dismissed from service on the ground of misconduct without holding an enquiry. This general rule is, however, subject to certain exceptions and one of the exceptions, which stands incorporated in Rule 19(ii), is where the disciplinary authority is satisfied, for reasons to be recorded by it in writing, that it is not reasonably practicable to hold an enquiry in the manner provided in the rules.

18. The exception, as provided by Clause (ii) of Rule 19, is broadly in tune with Clause (b) of the Second Proviso to Clause (2) of Article 311 of the Constitution of India. For clarity of the purpose, Article 311 is reproduced below:--

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 enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges: Provided that where it is proposed after such enquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such enquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply--

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(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 reasonably practicable to hold such enquiry: or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such enquiry as is referred to in Clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

(Emphasis is added)

19. From a cautious reading of Article 311, as a whole, and Clause (b) of the Second Proviso to Clause (2) of Article 311, in particular, it becomes abundantly clear that no member of civil service of the Union or State or who holds a civil post, under the Union or State, can be dismissed or removed except upon holding an enquiry in which the Government servant is informed of the charges against him and given reasonable opportunity of being heard in respect of the charges. This general rule, requiring hearing of the Government servant, on the charges, by holding an enquiry, is subject to the conditions as contemplated by the Second Proviso to Clause (2) of Article 311. One of such exceptions is incorporated in Clause (b) of the Second proviso to Clause (2) of Article 311 of the Constitution of India.

20. Clause (b) of the Second proviso to Clause (2) of Article 311 of the Constitution of India clearly lays down that 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, that it is not reasonably practicable to hold such enquiry, the enquiry may be dispensed with.

21. What follows from the above discussion is that ordinarily, no Government servant can be dismissed or removed from service until after an enquiry is held, wherein he is informed of the charges against him and has been given reasonable opportunity of being heard in respect of the charges, which are levelled against him. The safeguard, so provided to a Government servant, by Clause (2) of Article 311 is, however, taken away, when the Second proviso to Clause (2) of Article 311 of the Constitution of India becomes applicable. The Constitution Bench, in Tulsi Ram Patel (supra), has clearly held, in this regard, as follows:--

70. The position which emerges from the above discussion is that the keywords of the second proviso govern each and every clause of that proviso and leave no scope

for any kind of opportunity to be given to a Government servant. The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of a constitutional prohibitory injunction restraining the disciplinary authority from holding an enquiry under Article 311(2) or from giving any kind of opportunity to the concerned Government servant. There is thus no scope for introducing into the second proviso some kind of enquiry or opportunity by a process of inference or implication. The maxim "expressum facit cessare taciturn" ("when there is express mention of certain things, then anything not mentioned is excluded") applies to the case. As pointed out by this Court in B. Shankara Rao Badami and Others Vs. The State of Mysore and Another, this well-known maxim is a principle of logic and common sense and not merely a technical rule of construction. The second proviso expressly mentions that Clause (2) shall not apply where one of the clauses of that proviso becomes applicable. This express mention excludes everything that Clause (2) contains and there can be no scope for once again introducing the opportunities provided by Clause (2) or any one of them into the second proviso.....Equally, where a public servant by himself or in concert with others has brought about a situation in which it is not reasonably practicable to hold an enquiry and his conduct is such as to justify his dismissal, removal or reduction in rank, both public interest and public good demand that such penalty should forthwith and summarily be imposed upon him: and similarly where in the interest of the security of the State, it is not expedient to hold an enquiry, it is in the public interest and for public good that where one of the three punishments of dismissal, removal or reduction in rank is called for, it should be summarily imposed upon the concerned Government servant..... Much as this may seem harsh and oppressive to a Government servant, this Court must not forget that the object underlying the second proviso is public policy, public interest and public good and the Court must, therefore, repel the temptation to be carried away by feelings of commiseration and sympathy for those Government servants, who have been dismissed, removed or reduced in rank by applying the second proviso. Sympathy and commiseration cannot be allowed to outweigh considerations of public policy, concern for public interest, regard for public good and the peremptory dictate of a constitutional prohibition.....After all, it is not as if a Government servant is without any remedy when the second proviso has been applied to him. There are two remedies open to him, namely, departmental appeal and judicial review.
(Emphasis is added)

22. From the above observations, what emerges is that a Government servant can be dismissed from service without holding enquiry if the disciplinary authority finds, for reasons to be recorded by it in writing, that it is not reasonably practicable to hold an enquiry in the manner provided in the Rules. Though this Rule, permitting enquiry to be dispensed with, appears to be harsh, the fact remains, as indicated in Tulsi Ram Patel (supra), that this Rule has been made, as a matter of public policy, in

public interest and for public good. Where a public servant places himself in a situation, wherein it is not reasonably practicable to hold an enquiry and his conduct, at the same time, is such as would warrant and justify his dismissal from service, there is no impediment in taking recourse to this power by a disciplinary authority in public interest and public good inasmuch as removing a Government servant without holding any enquiry, in such a case, would be in public interest and public good.

23. As observed in Tulsi Ram Patel (supra), the condition precedent for the application of clause (b) to the second Proviso to Clause (2) of Article 311 is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the enquiry contemplated by Clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". The Oxford English Dictionary defines "practicable" to mean "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". According to the Webster''s Third New International Dictionary, the word "practicable" means, inter alia, "possible to practice or perform : capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster''s Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent.

24. Thus, whether it was practicable to hold enquiry or not, in a given case, must be adjudged in the context of facts, which were in existence or available before the disciplinary authority at the time, when the decision as regards dismissal or removal of service of a Government servant is required to be taken by the disciplinary authority. It is not a total or absolute impracticability, which is required by Clause (b). What is requisite is that the holding of the enquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.

25. A disciplinary authority is not expected to dispense with a disciplinary enquiry lightly or arbitrarily or out of ulterior motives or merely to avoid holding of an enquiry or because the Department''s case against the Government servant is weak and is likely to fail. Consequently, the finality, given to the decision of the disciplinary authority by Article 311(3), is not binding upon the Court so far as its power of judicial review is concerned and, in such a case, the Court will strike down the order, dispensing with the enquiry as also the order imposing penalty if the Court happens to find that it was reasonably practicable to hold enquiry. (See Union of India and Another Vs. Tulsiram Patel and Others,

26. The learned Amicus Curiae is correct, therefore, in submitting that a situation, which makes the holding of an enquiry not reasonably practicable, may even exist before an enquiry is initiated or may arise even after the enquiry has been initiated, i.e., such a situation can develop before the enquiry commences or during the progress of the enquiry or subsequent to initiation of the enquiry. The reference, made, in this regard, by the learned Amicus Curiae to the observations of the

Constitution Bench, appearing at Para 132, in Tulsi Ram Patel (supra), are not at all misplaced inasmuch as the relevant observations read as under:--

132. It is not necessary that a situation which makes the holding of an enquiry not reasonably practicable should exist before the disciplinary enquiry is initiated against a Government servant. Such a situation can also come into existence subsequently during the course of an enquiry, for instance, after the service of a charge-sheet upon the Government servant or after he has filed his written statement thereto or even after evidence has been led in part. In such a case also the disciplinary authority would be entitled to apply Clause (b) of the second proviso because the word "enquiry" in that clause includes part of an enquiry. It would also not be reasonably practicable to afford to the Government servant an opportunity of hearing or further hearing, as the case may be, when at the commencement of the enquiry or pending it the Government servant absconds and cannot be served or will not participate in the enquiry. In such cases, the matter must proceed ex parte and on the materials before the disciplinary authority. Therefore, even where a part of an enquiry has been held and the rest is dispensed with under Clause (b) or a provision in the service rules analogous thereto, the exclusionary words of the second proviso operate in their full vigour and the Government servant cannot complain that he has been dismissed, removed or reduced in rank in violation of the safeguards provided by Article 311(2).
(Emphasis is added)

27. There can be no doubt that when the reasons are not recorded by a disciplinary authority for reaching the satisfaction that it is not ''reasonably practicable'' to hold enquiry, such an order would be bad in law, because it is the obligation of the disciplinary authority to record the reasons as to why holding of an enquiry was not ''reasonably practicable''. In the absence of an order recording satisfaction of the disciplinary authority, dispensing with enquiry, the order of penalty ought to be interfered with.

28. However, contrary to what has been submitted by Mr. Sikdar, learned counsel for the respondent, that an order, dispensing with an enquiry, has to be separately made and such an order has to precede the order of dismissal and that a combined order, dispensing with the enquiry as well as removing a Government servant from service, is bad in law, the Constitution Bench, in Tulsi Ram Patel (supra), has observed, at Para 134, as follows:--

134. It is obvious that the recording in writing of the reason for dispensing with the enquiry must precede the order imposing the penalty. The reason for dispensing with the enquiry need not, therefore, find a place in the final order. It would be usual to record the reason separately and then consider the question of the penalty to be imposed and pass the order imposing the penalty. It would, however be better to record the reason in the final order in order to avoid the allegation that the

reason was not recorded in writing before passing the final order but was subsequently fabricated. The reason for dispensing with the enquiry need not contain detailed particulars but the reason must not be vague or just a repetition of the language of Clause (b) of the second proviso. For instance, it would be no compliance with the requirement of Clause (b) for the disciplinary authority simply to state that he was satisfied that it was not reasonably practicable to hold any enquiry. Sometimes a situation may be such that it is not reasonably practicable to give detailed reasons for dispensing with the enquiry. This would not, however, per se invalidate the order. Each case must be judged on its own merits and in the light of its own facts and circumstances.

(Emphasis is added)

29. A microscopic reading of the observations made above, in Tulsi Ram Patel (supra), clearly shows that although the Constitution Bench has pointed out that the reason, in writing, for dispensing with an enquiry, has to be recorded and such recording of reasons must precede the order imposing penalty and that it is not necessary that the final order, dismissing an employee from service, shall also contain a reason for dispensing with the enquiry and that usually, there would be two separate orders -- one recording the reason for dispensing with the enquiry and the other imposing the penalty, yet the Constitution Bench, having observed this far, has pointed out and made it crystal clear that it would be better to record reason, in the final order itself, so as to avoid possibility of the allegation that the reason, in writing, had not been recorded before the final order was made, but has been subsequently fabricated. The Supreme Court has also pointed out, in Para 135 of Tulsi Ram Patel (supra), that though the reason, dispensing with the enquiry, is necessary to be recorded in writing, there is no obligation to communicate the reason to the Government servant. The relevant observations, appearing at para 135 of Tulsi Ram Patel (supra), read as under:--

135. It was vehemently contended that if reasons are not recorded in the final order, they must be communicated to the concerned Government servant to enable him to challenge the validity of the reasons in a departmental appeal or before a Court of law and that failure to communicate the reasons would invalidate the order. This contention too cannot be accepted. The constitutional requirement in clause (b) is that the reason for dispensing with the enquiry should be recorded in writing. There is no obligation to communicate the reason to the Government servant. As clause (3) of Article 311 makes the decision of the disciplinary authority on this point final, the question cannot be agitated in a departmental appeal, revision or review. The obligation to record the reason in writing is provided in clause (b) so that the superiors of the disciplinary authority may be able to judge whether such authority had exercised its power under clause (b) properly or not with a view to judge the performance and capacity of that officer for the purposes of promotion etc. It would, however, be better for the disciplinary authority to communicate to the

Government servant its reason for dispensing with the enquiry because such communication would eliminate the possibility of an allegation being made that the reasons have been subsequently fabricated. It would also enable the Government servant to approach the High Court under Article 226 or, in a fit case, this Court under Article 32. If the reasons are not communicated to the Government servant and the matter comes to the Court, the Court can direct the reasons to be produced, and furnished to the Government servant and if still not produced, a presumption should be drawn that the reasons were not recorded in writing and the impugned order would then stand invalidated. Such presumption can, however, be rebutted by a satisfactory explanation for the non-production of the written reasons.

(Emphasis is added)

30. Though it had also been contended, in Tulsi Ram. Patel (supra), that holding of an enquiry is necessary in order to determine whether disciplinary enquiry should be dispensed with or not and that in such a preliminary enquiry, the Government servant shall be given an opportunity of hearing by giving him a notice to show-cause, the Supreme Court has remarked that this argument is illogical.

31. It is of immense importance to note that the Supreme Court, in no uncertain words, has pointed out, in Tulsi Ram Patel (supra), that though an order, passed by a disciplinary authority, recording reasons for dispensing with the enquiry, is justiciable, the Court must put itself in the place of the disciplinary authority and consider what was the then prevailing situation and what a reasonable man, acting in a reasonable way, would have done and that the matter will have to be judged in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question -- whether the enquiry should be dispensed with or not -- in cool and detached atmosphere of a Court-room, removed in time, from the situation in question. The Supreme Court has also pointed out, in Tulsi Ram Patel (supra), that where two views are possible, Court will decline to interfere. The relevant observations, appearing in para 137, read as under:--

137. A Government servant who has been dismissed, removed or reduced in rank by applying to his case clause (b) or an analogous provision of a service rule is not wholly without a remedy. As pointed out earlier while dealing with the various service rules, he can claim in a departmental appeal or revision that an enquiry be held with respect to the charges on which the penalty of dismissal, removal or reduction in rank has been imposed upon him unless the same or a similar situation prevails at the time of hearing of the appeal or revision application. If the same situation is continuing or a similar situation arises, it would not then be reasonably practicable to hold an enquiry at the time of the hearing of the appeal or revision. Though in such a case as the Government servant if dismissed or removed from service, is not continuing in service and if reduced in rank, is continuing in service with such reduced rank, no prejudice could be caused to the Government or the Department if the hearing of an appeal or revision application, as the case may be is

postponed for a reasonable time.

(Emphasis is added)

32. In the light of what have been observed and held above, it becomes abundantly clear that while considering the reason, recorded by a disciplinary authority dispensing with an enquiry, a Court must put itself in the place of a disciplinary authority and, then, consider, in the light of the prevailing situation at the relevant point of time, whether a reasonable man, acting in a reasonable way, would have dispensed with the enquiry or not. In fact, even when two views are possible on the course of action, which the disciplinary authority could have had adopted, the Court would decline to interfere if the reason, assigned by a disciplinary authority for choosing to dispense with enquiry, is a reasonably possible view.

33. What logically follows from the above discussion is that the learned Tribunal ought to have considered the correctness, legality and/or validity of the impugned order, dated 10-02-2006, passed by the disciplinary authority, in the light of the facts and attending circumstances as were obtainable on the date of making of the order, i.e., on 10.02.2006, and not on the day of the making of the order by the learned Tribunal on 08.07.2010.

34. Consequently, the view, expressed by the learned Tribunal, that when the learned Chief Judicial Magistrate has declared the husband of the respondent herein as absconder on 02-06-2006, the disciplinary authority could not have treated the petitioner''s husband as an absconder on 02-06-2006, is, in our considered view, a wholly incorrect approach inasmuch as the learned Tribunal misses out the point that it was not at all necessary for the disciplinary authority to wait for the Chief Judicial Magistrate, Kokrajhar, to record as to whether the respondent''s husband was or was not an absconder. It was for the disciplinary authority and the disciplinary authority alone to decide, on 10.02.2006, whether, in the facts and attending circumstances of the case, as existing on 10-02-2006, the enquiry, as contemplated by Rule 19, was or was not reasonably practicable.

35. With regard to the above, we may also point out that long before the learned Chief Judicial Magistrate passed its order declaring the petitioner''s husband as an absconder, several warrants had been issued by the learned Chief Judicial Magistrate against the respondent''s husband treating him as an absconder, because the charge-sheet, which the police had submitted, clearly described the respondent''s husband as an absconder. Whether the respondent''s husband had, in fact, absconded or not is not the question; the question is whether, in the facts and attending circumstances of the case, as obtainable on 10-02-2006, the disciplinary authority''s satisfaction that the respondent''s husband was an absconder and, therefore, it was not reasonably practicable to hold the enquiry is or is not correct. For this purpose, the order, dated 10-02-2006, is reproduced below:--

WHEREAS a statement of articles of charges was framed against Chakreswar Talukdar, Ex-SPM Bengtal S.O. under Rule-14 of CCS (CCA) Rules, 1965 but due to prolonged absconding of Shri Talukdar the said memorandum of charges could not be served to the Official. The article of charges and the statement of imputation of misconduct or misbehaviour on the basis of which the charges were framed against the said Shri Chakreswar Talukdar was as below--

ANNEXURE-I

Statement of articles of charge framed against Shri. Chakreswar Talukdar, the then SPM, Bengtal S.O. (Now deemed to have been placed under suspension and absconder since 17-07-01).

ARTICLE-I

That the said Shri Chakreswar Talukdar while functioning as SPM, Bengtal S.O. during the period from 31-03-2000 onwards remained unauthorizedly absent from duties w.e.f. 17-07-2001 keeping Bengtal S.O. closed and his movements were not known till this day and his continued absence in duty without proper permission unauthorizedly was subversive of discipline which invites disciplinary action against Shri Talukdar as codified in Rules-62 & 63 of Postal Manual Volume-III.

This also attracts the provision of Rules-3(1)(ii) and (iii) of CCS (Conduct) Rules, 1964.

ARTICLE-II

That during the aforesaid period and while functioning as such in the aforesaid office the said Shri Chakreswar Talukdar has kept Bengtal S.O. closed and absconded himself w.e.f. 17-07-2001 keeping shortage of cash to the tune of Rs. 1,03,809.42 (Rupees One Lakh three thousand eight hundred nine and paise forty two) only in the office. The above shortage of cash was charged as U.C.P. on 21-07-2001. By doing the above acts the said Shri Chakreswar Talukdar violated the provision of Rule-58 of P&T FHB Volume-1, Rule -658 of P & T Manual Volume -VI Part III and also Rules 3(1)(i), (ii), (iii) of CCS (Conduct) Rules, 1964.

ANNEXURE-II

Statement of imputation of misconduct or misbehaviour in support of the articles of charge framed against Shri Chakreswar Talukdar the then SPM, Bengtal S.O. Now deemed to have been placed under suspension and absconder since 17-07-01.

ARTICLE-I

That the said Shri Chakreswar Talukdar while functioning as SPM, Bengtal S.O. during the period from 31-03-2000 onwards remained absent unauthorizedly from duties w.e.f. 17-07-2001 keeping in Bengtal S.O. closed without any information. His movement was also not known. On enquiry at Bengtal S.O. on 20-07-2001 it was revealed that Bengtal S.O. remained closed from 17-07-01 and Shri Talukdar is

absconding since 17-07-01. Nobody could tell where about of Shri Talukdar as well as the disposal of office keys. Being failed to open the P.O. on 20-07-01 a report was lodged at Bengtal Police out post regarding suspension of P.O. works and authorized absence of Shri Talukdar. Lastly, the Bengtal S.O. was opened on 21-07-01 in presence of Shri A.K. Tribedi, EAC, Kokrajhar (District Magistrate) and others, after observing all formalities. By doing the above acts the said Shri Talukdar Subversive of discipline which invites disciplinary against him as codified in Rules 62 and 63 of Postal Manual Vol-III and by his continued absence from duty the said Shri Talukdar has also displayed lack of devotion to duty and acted in a manner which is unbecoming of a Govt. Servant violating the provision of Rules 3(1)(ii) & (iii) of CCS (Conduct) Rules, 1964.

ARTICLE-II

That Shri Chakreswar Talukdar while working as SPM Bengtal S.O. during the period from 30-03-2000 onwards absconded himself w.e.f. 17-07-01 keeping the office closed and suspending the P.O. works. The office was then opened with the help of Magistrate after observing necessary formalities on 21-01-2001. As inventory was prepared by the Magistrate himself in presence of the staff and other witnesses and following cash and stamps were found:--

S.O. a/c book of the office (current) was then examined and found that said Shri Talukdar had written up S.O. a/c book upto 13-07-2001 and as per S.O. a/c book D/-13.07.01 closing balance of Bengtal S.O. was as below:--

Said Shri Talukdar was performed his duties on 14.07.01 and written up B.O. summary upto 14.07.01 but did not maintain the S.O. a/c book upto 14.07.01. As per B.O. Summary dated 14.07.01 a sum of Rs. 7080.09 showed ue (sic) from its Branch Offices. Shri Talukdar also issued M.O. for Rs. 1613/- paid M.O. for Rs. 2000/- and paid bill for Rs. 40/- respectively on 14.07.01 as per voucher found available. But all the above amount was not brought into a/c on 14.07.01. Besides stamp worth Rs. 5730/- was remitted to Bengtal S.O. on 10.07.2001 by the SPM, Bongaigaon S.O., but the amount found not acknowledged and brought into a/c till 14.07.01. All the transactions stated above had been taken into account and assessed closing balances as follows.

But on physical verification the executive Magistrate found Rs. 10,877.10 as cash/stamp/Revenue balance in the office. A sum of Rs. 7080.09 was due from its BOs and hence the total shortage was (Rs. 1,21,766.61-17,957.19) = Rs. 1,03,809.42 (Rs. One lakh three thousand eight hundred and paise forty two only).

The above shortage of amount was charged as UCP in the daily a/c of Bengtal S.O. on 21.07.01.

By doing the above acts the said Shri Chakreswar Talukdar violated the provision of Rule 58 of P & T Financial Hand Book Volume-1, Rule-658 of P & T Manual Volume-VI

Part-III and failed to maintain absolute integrity and devotion to duty and acted in a manner of unbecoming a Govt. Servant violating Rule-III(1)(i) (ii) (iii) of CCS (Conduct) Rules, 1964.

ANNEXURE-III

List of documents by which the articles of charges framed against Shri Talukdar the then SPM, Bengtal, S.O. are proposed to be sustained.

(1) Inventory D/- 21.07.01 of Bengtal S.O. prepared by Shri A.K. Tribedi, EAC Kokrajhar in presence of Shri B.K. Marak, SPOs, Dhubri and other witnesses.

(2) S.O. a/c book of Bengtal S.O. D/-21.07.01 Containing period from 31.03.2000 to 21.07.2001.

(3) S.O. daily account of Bengtal S.O. D/-21.07.01 duly accounted by Dhubri H.O. on 26.07.01.

(4) Debit Charge for Rs. 1,03,809.42/-, D/-21.07.01 from Dhubri H.O. dated against UCP.

(5) B.O. Summary of Bengtal S.O. covering period from 18.01.2000 to 23.07.2001.

ANNEXURE-IV

List of witnesses by whom the article of charges framed against Shri Chakreswar Talukdar the then, SPM, Bengtal, S.O. are proposed to be sustained.

1. Shri A.K. Tribedi, EAC, Kokrajhar

2. Shri B.K. Marak, SPOs, Dhubri

3. Shri B.U. Ahmed, IPOs (PG)/Dhubri

4. Shri J. Karmakar, IPOs Bongaigaon

5. Shri S.K. Choudhury, O/S Mail Bongaigaon

6. Shri Tamir Uddin Ahmed, PA, Kokrajhar, H.O.

The said Shri Chakreswar Talukdar (sic) Govt. money to the tune of Rs. 1,03,809.42/- (Rupees one lakh three thousand eight hundred nine and paise forty two) only in his official capacity and absconded keeping Bengtal S.O. closed from 17.07.01. The matter was reported to Police and the Police authority registered the case against the said Shri Chakreswar Talukdar under Basugaon P.S. Case No. 71/2001 u/s 409, IPC. The police submitted charge-sheet bearing No. 27 dated 30.05.2002 before the Hon''ble Court of CJM, Kokrajhar showing the accused as absconder. The case is now subjudiced in the said Hon''ble Court in case No. GR 450/2001. The Supdt. of Police, Kokrajhar vide his letter No. KJR/Crime/9/2005/5203 D/- 29-08-05 granted a certificate stating that the accused Shri Chakreswar Talukdar is absconding and the Hon''ble CJM, Kokrajhar has also issued order dated 21.11.05 declaring the accused

as prolonged absconder.

Since the where about of the said Shri Chakreswar Talukdar is not known and the Police/Court authority have also certified that the said Shri Chakreswar Talukdar is absconding and therefore, it is not reasonably practicable to hold oral enquiry under Rule-14 of CCS (CCA) Rules, 1965 against the said Shri Chakreswar Talukdar.

In view of the above the undersigned, in exercise of powers conferred by Rule 19(ii) of CCS (CCA) Rules, 1965 decided to finalize the Rule-14 case of Shri Chakreswar Talukdar without conducting oral enquiry.

I have gone through the case very carefully and also examined all the records and relevant facts in the case and observed that the offence committed by Shri Chakreswar Talukdar is of serious nature and due to his misdeeds the department had to sustain huge loss and valued customers of the department had to suffer during the period of unauthorized closing of the office. S.D. Shri Chakreswar Talukdar is not fit perdon retained in service and he deserves severe punishment. So orders are passed against Shri Chakreswar Talukdar as below:--

ORDER

I, Shri R. Rabha, Supdt. of Post Offices, Goalpara Division, Dhubri hereby orders that Shri Chakreswar Talukdar, Ex-SPM, Bengtal S.O. and now under deemed suspension be "dismissed" from service with immediate effect.

36. From a careful reading of the order, dated 10-02-2006, what clearly transpires is that charges were framed against the respondent''s husband by the disciplinary authority in terms of Rule 14 of the CCS (CCA) Rules, 1965; but the enquiry could hot be held, because the respondent''s husband was found absconding and the memorandum of charges could not be served on him. When a Government employee absconds and the charges cannot be served on him, it cannot be said that without service of charges, the disciplinary authority is disempowered from taking a decision dispensing with the holding of the enquiry.

37. The article of charges, as reproduced above, clearly reveal that the charges were very grave and serious inasmuch as the charges relate to misappropriation of Government money and these accusations had not been refuted by the respondent''s husband, because the charge-sheet could not be served on him. On 10-02-2006, the disciplinary authority had, before it, the police report showing that the respondent''s husband was an absconder. The disciplinary authority also had, before it, the materials showing that there was misappropriation of Government money by the respondent''s husband. In such circumstances, when the charges had not been denied and disputed, because of unauthorized absence of the respondent''s husband, the holding of the enquiry, as contemplated by Rule 14, was not only unnecessary, but was wholly impracticable inasmuch as without serving notice on the respondent''s husband, the enquiry could not have been held and

when the notice could not be served on respondent''s husband, the disciplinary authority had no option, but to dispense with the enquiry.

38. The disciplinary authority was, therefore, not wrong in recording in its order, dated 10-02-2006, that since the where about of the respondent''s husband were not known and the police had certified that the respondent''s husband had been absconding, it was not reasonably practicable to hold enquiry in terms of Rule 14 of CCS (CCA) Rules, 1965, against the respondent''s husband and, therefore, the disciplinary authority decided to finalise the disciplinary proceeding by resorting to its power conferred by Rule 19(2) of the CCS (CCA) Rules, 1965, and, having found that the misconduct, committed by the respondent''s husband, was serious in nature and due to his misconduct, the Department concerned had to sustain huge loss and valued customers of the Department had to suffer, during the period, when the post office remained closed, the respondent''s husband was not fit to be retained in service and deserved the severe punishment of dismissal from service with immediate effect. We do not find that the order, so made on 10-02-2006, suffers from any infirmity, legal or factual.

39. In the circumstances mentioned above, it is clear, for the reasons, which we have already discussed above, that the learned Tribunal seriously fell in error in allowing the OA.

40. No doubt, the respondent, as wife of the delinquent employee, or her daughter, would suffer from dismissal of Chakreswar Talukdar, the fact remains that the only question, which was required to be decided was whether dispensing with enquiry was legally valid in the facts and in the light of the then prevailing situation of the case at hand and when the answer to this question was in the affirmative, the act of dispensing with the enquiry, on the part of the disciplinary authority, cannot but be regarded, as observed in Tulsi Ram Patel (supra), an act done in public interest and public good.

41. In the result and for the reasons discussed above, this writ petition succeeds and the order, dated 08-07-2010, passed by the learned Tribunal, is hereby set aside.

42. Before parting with this writ petition, we place on record our great appreciation for the valuable assistance rendered by the learned Amicus Curiae.

43. In terms of the above observations and directions, this writ petition shall stand disposed of. No order as to costs.