

(2018) 02 J&K CK 0008
In the Jammu And Kashmir High Court
Case No : 1913 of 2015

Abdul Gani Rather

APPELLANT

Vs

State of JK and others

RESPONDENT

Date of Decision : 15-02-2018

Acts Referred:

Citation : (2018) 02 J&K CK 0008

Hon'ble Judges : Tashi Rabstan

Bench : Single Bench

Advocate : A. R. Bhat, B. A. Dar

Final Decision : Disposed Off

Judgement

1. Petitioner is working as Constable in J&K Police Department. He was terminated from services by Order no.159 of 1993 dated 03.04.1993;

where to challenge was thrown by him in writ petition (SWP No.1572/1995). A Bench of this Court vide judgement dated 27.04.2005, quashed

termination order, however, respondents were given liberty to hold a regular enquiry against petitioner. It was also made clear that petitioner would

not be entitled to wages/pay or salary for the period he remained out of service and such period would be decided by authorities on the basis of

findings arrived at in the enquiry if held against him. Thereagainst Letters Patent Appeal, being LPA no.101/2006 titled State of J&K and others v.

Abdul Gani Rather, preferred by respondents, did not succeed and learned Writ Court's judgement was upheld.

2. Petitioner pleads that respondents conducted an enquiry, followed by Order no.420 of 2008 dated 02.12.2008, exonerating him of charges

levelled against him. However, for the period commencing from 21.04.1992 to

23.10.2007, petitioner was shown not entitled to any wages in view of the Court orders and the period, he remained out of department, was not counted in his service. Aggrieved, petitioner threw challenge to Order no.420 of 2008 dated 02.12.2008, in SWP no.294/2009. The writ petition succeeded. A Bench of this Court vide judgement dated 27.07.2012, quashed Order no.420 of 2008 dated 02.12.2008, to the extent it attributed a finding to the Court that the period, petitioner was out of service, i.e. 21.04.1992 to 23.10.2007, was not to be counted as part of the service or petitioner was not entitled to any wages for said period. In addition to this, respondents were directed to take a decision vis-a-vis entitlement of petitioner to the wages and with reference to petitioner's status during the period in accordance with Writ Court judgement dated 27.04.2005. It is averred that petitioner had been reinstated into service vide Order no.287 of 2007 dated 23.10.2007. In view of judgement dated 27.07.2012, in SWP no.294/2012, according to petitioner, respondents were simply asked to take a decision with respect to the period of absence (from 21.04.1992 till 23.10.2007) and not to hold a fresh enquiry into the matter. However, respondents, it is stated, have ordered a fresh enquiry into the matter, followed by issuance of Order no.243/2015 dated 12.08.2015, holding petitioner not entitled to wages/salary for the period, commencing from 21.04.1992 till 23.10.2007 and treating this period as ""Dies-non"". It is this order, of which petitioner is aggrieved and he knocks at portals of this Court with writ petition on hand, seeking following relief:

a) Writ of Certiorari, quashing impugned order No. 243/2015 dated 12.08.2015 passed by Inspector General of Police Traffic J&K, Srinagar;

b) Writ of Mandamus, commanding respondents to act upon earlier enquiry report reflected in order No. 420/2008 dated 02.12.2008, whereby the petitioner has been exonerated from all the liabilities and treat the petitioner to be in service for the period commencing from 21.04.1992 to 23.10.2007 for purpose of the payment of is salary for the said period as regular employee of the Department.

3. Respondents in their Reply insist that petitioner remained unauthorizedly absent from duties from 21.04.1992 and due to his continuous absence from his legitimate duties, he was ultimately removed from service vide TPO

order No. 159 of 1993 dated 03.4.1993. It is averred that order of removal of petitioner from service was quashed by this Court vide judgment dated 27.04.2005 with a direction that quashment of removal order would not prevent authorities from holding regular enquiry against petitioner.

4. It is sturdily insisted by respondents that petitioner has again tried to create confusion as fact of matter is that following orders of this Court,

petitioner was reinstated and enquiry initiated by appointing the then Senior Prosecuting Officer (SPO) as Enquiry Officer. After squaring off the

enquiry, Order No. 420 of 2008 dated 02.12.2008 was passed by respondent no.4, holding petitioner not entitled to wages/ salary during the

period, beginning from 21.04.1992 to 23.10.2007, for the reason that petitioner remained out of service for the said period. Further contention of

respondents is that the order passed by this Court in SWP no.294/2009 on 27.7.2012 provides that respondents shall take a decision as regards

petitioner's status during the period in accordance with the Writ Court judgement dated 27.4.2005. The respondent department in order to reach

to the decision claims to have sought report through its agencies regarding engagement of petitioner during period of absence. The said action on

part of respondent department is purely an executive function and cannot be categorized as enquiry. Since the decision had to be taken, petitioner

was given a show cause notice as an opportunity to represent himself if he could because decision could not have been taken at his back. It is next

avermnt of respondents that the material submitted by petitioner to represent himself was neither logical nor was made wholly and solely a base

for the decision. It is maintained that petitioner was provided a reasonable opportunity of being heard, which is hallmark of principles of natural

justice. Respondent department is stated to have completely relied upon the reports of the agencies, establishing that petitioner was in gainful

employment during the period he remained out of services. The said finding of the agencies, as stated by respondents, is the basis of the Order no.

243 of 2015 dated 12.08.2015 issued by Inspector General of Police, Traffic, disentitling petitioner to wages/ salary during the period he has

remained out of the service unauthorizedly. On the strength of stand taken, respondents beseech dismissal of writ petition.

5. Petitioner filed Rejoinder, in which he has reiterated what he averred in writ

petition.

6. I have heard learned counsel for parties and considered the matter.

7. Learned counsel for petitioner states that respondents pursuant to judgement passed in SWP No. 1472/1995 were directed to hold the formal

enquiry into the case of petitioner to find out the cause for his absence from duty from 21.04.1992 to 23.10.2007. He argues that the fact remains

that respondents pursuant to this judgement got the matter fully enquired through enquiry officer and on the basis of enquiry report, the enquiry

officer recommended that petitioner be exonerated from the charges levelled against him, which include the period during which he remained

absent. On the basis of the report, as maintained by learned counsel, there was no scope for fresh enquiry, by which the period of absence of

petitioner has been treated as Dies-non. Therefore, in the face of earlier enquiry report referred to in Order no. 420 of 2008 dated 02.12.2008,

the subsequent enquiry report, which is impugned in this writ petition, loses its validity under law and cannot be acted upon and, thus, liable to be

quashed. Learned counsel also states that petitioner in terms of his Reply to the show-cause notice, issued upon him by respondents vis-a-vis

second enquiry, spelt out reasons and grounds cogently for his absence from duty including refusal of respondents to petitioner to mark his

attendance in the office. These grounds, according to learned counsel, have been taken up by petitioner in the Reply to show-cause notice, but

same were not dealt with by enquiry officer, who illegally conducted second enquiry against petitioner.

8. Per contra, learned counsel for respondents states that writ petition warrants dismissal for the reason that none of fundamental, constitutional,

statutory and legal rights of petitioner stands infringed by respondents and that petitioner has not approached this Court with clean hands.

Impugned order, to the saying of learned counsel, does not suffer from any legal infirmity, as such, challenge thrown to it, is misconceived/

misplaced both in law as well as on facts.

9. Petitioner's services were terminated by Order no.159 of 1993 dated 03.04.1993. He challenged termination order in SWP no.1472/1995.

Challenge succeeded and termination order quashed. However, respondents were given liberty to hold a regular enquiry against petitioner. It was

also made clear that quashment of termination order would not entitle petitioner to any wages/pay or salary for the period he remained "out of

service" and the said period would be decided by the authorities on the basis of findings arrived at in enquiry if held against petitioner. Challenge to

the Writ Court Order did not succeed. Petitioner was reinstated vide Order no.287 of 2007 dated 23.10.2007, pending enquiry into his conduct.

SPO, Traffic Court, Srinagar, was appointed as Enquiry Officer into the matter. Enquiry was conducted. Enquiry Officer submitted his findings.

Enquiry officer mentioned in his report that petitioner was not guilty and recommended exoneration of petitioner from the charged levelled against

him. The Enquiry Officer also recommended that as per court directions the period for which petitioner remained out of service i.e. 21.04.1992 to

23.10.2007, he is not entitled to any wages and the period, he remained out of department, may not be counted in his service. On the basis of

report of Enquiry Officer, order no.420 of 2008 dated 02.12.2008 was issued by respondents, agreeing with the recommendations of Enquiry

Officer. It would be advantageous to reproduce relevant part of Order no.420 of 2008 dated 02.12.2008 hereunder:

Accordingly he was re-instated into service this office order No.287 of 2007 dated 23.10.2007 and Sr. Prosecuting Officer Traffic Court was

nominated an enquiry officer vide instant order. The E.O. after completion the D.E. submitted his findings stating there-in that the official is not

guilty and recommended that he may be exonerated from the charges levelled against him and as per court directions the period he was out of

service i.e. 21.04.1992 to 23.10.2007 he is not entitled to any wages and the period he remained out of department may not be counted in his

service.

Agreeing with the recommendations of E.O. it is hereby ordered that:-

1. Sgct. Abdul Gani No.305/T is exonerated from the charges levelled against him.

2. As per court directions the period he was out of service i.e. 21.04.1992 to 23.10.2007 is not entitled to any wages and the period he remained

out of department is not counted in his service.

10. Above excerpt unequivocally portrays that respondents agreed to the recommendations of Enquiry Officer, exonerating petitioner from charges

levelled against him and holding him not entitled to wages/salary for the period, he remained out of service, viz. 21.04.1992 to 23.10.2007, as per

Court orders. The recommendations were followed by Order no.420 of 2008: (i) exonerating petitioner from charges levelled against him and (ii)

holding petitioner not entitled to wages/salary from 21.04.1992 to 23.10.2007. Petitioner discontented of and challenged second part of Order

no.420 of 2008 dated 02.12.2008, in SWP no.294/2009. A Bench of this Court disposed of SWP no.294/2009 vide order dated 27.07.2012;

concluding paragraph of which is significant to be reproduced infra:

In the circumstance the order No.420 of 2008 dated 02.12.2008 to the extent it attributes a finding to the court that the period petitioner was out

of service i.e. 21.04.1992 to 23.10.2007 is not to be counted as part of the service or the petitioner is not entitled to any wages for the set period

is quashed. The respondents shall take a decision as regards entitlement of the petitioner to the wages and as regards petitioner's status during the

period in accordance with the writ court judgment dated 27th April, 2005.

11. From the above it, therefore, percolates that the Writ Court, vide order dated 27.07.2012 in SWP no.294/2009, has passed two-pronged

directions upon respondents. One, to take a decision concerning entitlement of petitioner to the wages for the period he remained out of service i.e.

21.04.1992 to 23.10.2007, in accordance with the Writ Court judgement dated 27.04.2005 passed in SWP no.1172/1995. And second, to take

a decision qua petitioner's status during the said period in accordance with Writ Court judgement dated 27.04.2005, passed in 1172/1995. In that

view of matter, respondents were required to take a decision in compliance with judgement dated 27th July 2012, in regard to the period of

absence of petitioner and not vis-a-vis exoneration of petitioner of all charges. However, after going through Order no.243 of 2015 dated

12.08.2015, impugned in this petition, it comes to fore that respondent department found that the Order, issued by Senior Superintendent of

Police, Traffic, Kashmir, on the basis of enquiry, was not inconsonance with the orders passed by this Court. And it was in terms of Order no.197

of 2014 dated 20.05.2014, that enquiry into the matter was directed to be initiated and Senior Superintendent of Police, Traffic City, Srinagar,

was appointed as Enquiry Officer to finalise enquiry and submit its finding to

Traffic Police Headquarters. This was followed by enquiry conducted by respondents. Petitioner partook in enquiry and submitted his Reply. Contention of petitioner that respondents could not have initiated or conducted fresh enquiry, is specious inasmuch as it is petitioner, himself, who participated in the enquiry and submitted a detailed Reply (Annexure G to writ petition). Petitioner, in such circumstances, is estopped by his own conduct. Had petitioner been aggrieved of fresh enquiry, he ought to have, at the relevant point of time, thrown challenge to fresh enquiry, and not taken part therein, but he voluntarily partook in fresh enquiry and waited for the decision. But the decision has come inconsistent with his expectations. Nevertheless, these adages will not clinch and put to rest the matter here, for reasons and discussion egressing herein after.

12. One important aspect of the matter needs to be talked about. Respondents, in their Reply at paragraph 13, aver that no regular departmental enquiry has been conducted in the matter and the decision as regards non-entitlement of the wages and petitioner's status during the period, was not done on the basis of fresh departmental enquiry. The fresh enquiry, as maintained by respondents, involves summary of allegations to be served on delinquent official, charge sheet to be framed against delinquent official, witnesses cross-examined and many other facilities, which has not been undertaken in the present case. It is claimed by respondents that in order to reach to the decision, the department sought report through its agencies regarding engagement of petitioner during the period of absence and the said action on part of respondent department is purely an executive function and cannot be categorised as enquiry. Since the decision had to be taken, petitioner, according to respondents, was given a show cause notice as an opportunity to represent himself because the decision could not have been taken at his back. The material, submitted by petitioner to represent himself, it is next insisted by respondents, was neither logical nor made wholly and solely a foundation for the decision. Respondents also maintain in their Reply that petitioner was simply provided a reasonable opportunity of being heard, which is the hallmark of principles of natural justice.

13. Article 108-B of J&K Civil Services Regulations, 1956, envisages that when a government servant, dismissed, removed, compulsorily retired

before attaining age of superannuation or suspended, is reinstated, the authority competent to order reinstatement shall consider and make a specific order regarding pay and allowance to be paid to such government servant for a period of his absence from duty; and whether or not the said period shall be treated as a period spent on duty. Article 108-B (ii) of the Regulations of 1956, stipulates that where the authority is of an opinion that government servant has been fully exonerated or in the case of suspension, that it was wholly unjustified, government servant shall be given full pay and allowances to which he would have been entitled had he not been dismissed, removed, compulsorily retired before attaining age of superannuation or suspended, as the case may be, and the period of absence from duty shall be treated as period spent on duty.

14. Having said so, once a Government employee is fully exonerated of all charges and reinstated, the competent authority shall be under an obligation to consider and make a specific order regarding the pay and allowances to be paid to such Government employee for the period of his absence from duty and the said period shall be treated as the period spent on duty. The words ""shall consider"" cast an obligation upon respondents to consider judiciously and pass appropriate orders in consequence thereof. Any order, passed without such consideration, is in negation to the mandatory provisions of aforesaid Article.

15. This Court, by judgement dated 3rd October 2017, in SWP No.878/2012 titled Ravinder Singh Sambyal v. State and others has, in depth, dealt with and set at rest the subject matter identical to present one. Thus, it would be profitable to reproduce pertinent excerpts of the said judgement hereunder:

8. What is graspable from above referred Article position is that once the government servant has been fully exonerated/ earned acquittal by the competent court of law, in such a situation, the government servant is entitled to reinstatement and also entitled to full pay and allowances and the period of absence/suspension shall be treated as period spent on duty. Similar issue has already been considered and dealt with by the Punjab and Haryana High Court in the case titled Jagmohan Lal v. State of Punjab through Secy to Punjab Govt. Irrigation, reported in [1967] AIR (P&H) 422, whereby it is held that mere filing of the acquittal appeal would not stand in

the way of the reinstatement of the petitioner into the service.

Also, the learned Single Judge of this Court in the case of [1991] JKLR 171 titled *Ab. Majid Khan v. State and Ors* observed in Paras 11, 12 and

13 which are reproduced hereinbelow:

11. Mr. Gandhi has next referred Chapter X with particular reference to Article 107, 108-A, 108-B and 108-C of the Civil

Services Regulations to urge that the respondents had the discretion to pass appropriate orders regarding the pay and allowances of

the petitioners while passing the orders of their reinstatement. It is submitted that the opinion of the respondent authorities cannot be

substituted by this Court. It is contended that where once the authority comes to the conclusion that a government servant has been

reinstated and is not entitled to the pay and allowances, his opinion is binding upon the Court. Article 108-B provides: (1) When a

Government servant who has been dismissed, removed, compulsorily retired before attaining the age of superannuation, or suspended

is reinstated the authority competent to order the reinstatement shall consider and make a specific order: (a) Regarding the pay and

allowances to be paid to such Government servant for the period of his absence from duty; and (b) Whether or not the said period

shall be treated as a period on duty. (II) Where the authority, mentioned in sub-rule (i) is of opinion that the Government servant has

been fully exonerated in the case of suspension, that is was wholly unjustified the Government servant shall be given the pay and

allowances to which he would have been entitled had he not been dismissed, removed, compulsorily retired before attaining before

the age of superannuation or suspended, as the case may be. The period of absence from duty as period spent on duty.

12. A perusal of the above provision shows that the Government is under an obligation to consider and make specific order regarding

pay and allowances to be paid to such reinstated government servants for the period of his absence from duty and whether or not

said period shall be treated as period spent on duty. The words, "shall consider" casts an obligation upon the respondent State to

consider judiciously and pass appropriate orders in consequences thereof. The

orders contemplated under the aforesaid rule are considered to be the result of such consideration. Any order passed without such consideration is in negative to the mandatory provision of the aforesaid rule. In the instate case, the language of the orders does not show any consideration and the respondents have failed to produce any relevant record in proof of and to demonstrate such consideration. It is true that the respondents were not under an obligation to show consideration in the orders itself but could also prove such consideration from the relevant record. In the absence of consideration it cannot be said that the Government had exercised the option vested in it under Article 108-B of the CSR.

Withholding of the record speaks volumes and supports the contention as raised by the petitioners. The petitioners case, therefore, has not at all been considered in terms of Article 108-B of the CSR.

13. Sub-rule (ii) of Article 108-B provides that where the authority is of the opinion that the Government servant has been fully

exonerated, such servant shall be given the full pay and allowances to which he would have been otherwise entitled had he not been

dismissed, removed or compulsorily retired and the period of absence from duty shall be treated as a period spent on duty. In case of

exoneration, of the allegations the authority has no option but to grant the salary and treat the period of absence from duty as period

spent on duty. In the instant case services of the petitioners were terminated on the ground of their activities prejudiced to the interest

of the State which was found to be incorrect and the respondents vide the orders reinstating the petitioners held, "The Government is

satisfied that the said Shri (the petitioner) has remained involved in trade union activities and not with the activities prejudicial to the

interest of the State" A perusal of para 6 of the aforesaid orders clearly suggests that the petitioners were exonerated of the charges

on the basis of which they were dismissed from service. It is, therefore, held that the petitioners were reinstated after being

exonerated of the charges on the basis of which they were removed and were entitled to the grant of pay etc in terms of sub-rule(ii) of

Article 108-B of the CSR.

9. The Supreme Court in the case of Commissioner, Karnataka Housing Board v. C. Muddiaiah reported in 2007 AIR (SC) 3100 in paragraph

32 of the judgment held as under:

32. The matter can be looked at from another angle also. It is true that while granting a relief in favour of a party, the Court must

consider the relevant provisions of law and issue appropriate directions keeping in view such provisions. There may, however, be

cases where on the facts and in the circumstances, the Court may issue necessary directions in the larger interest of justice keeping in

view the principles of justice, equity and good conscience. Take a case, where ex facie injustice has been meted out to an employee.

In spite of the fact that he is entitled to certain benefits, they had not been given to him. His representations have been illegally and

unjustifiably turned down. He finally approaches a Court of Law. The Court is convinced that gross injustice has been done to him

and he was wrongfully, unfairly and with oblique motive deprived of those benefits. The Court, in the circumstances, directs the

Authority to extend all benefits which he would have obtained had he not been illegally deprived of them. Is it open to the Authorities

in such case to urge that as he has not worked (but held to be illegally deprived), he would not be granted the benefits? Upholding of

such plea would amount to allowing a party to take undue advantage of his own wrong. It would perpetrate injustice rather than doing

justice to the person wronged. We are conscious and mindful that even in absence of statutory provision, normal rule is "no work for

non pay". In appropriate cases, however, a Court of Law may, nay must, take into account all the facts in their entirety and pass an

appropriate order in consonance with law. The Court, in a given case, may hold that the person was willing to work but was illegally

and unlawfully not allowed to do so. The Court may in the circumstances, direct the Authority to grant him all benefits considering "as

if he had worked". It, therefore, cannot be contended as an absolute proposition of law that no direction of payment of consequential

benefits can be granted by a Court of Law and if such directions are issued by a Court, the Authority can ignore them even if they

had been finally confirmed by the Apex Court of the country (as has been done in the present case). The bald contention of the appellant-Board, therefore, has no substance and must be rejected.

.....

11. The preferment of an appeal against an acquittal cannot be regarded as a continuance of the trial and cannot be treated to be pendency of judicial proceedings as the initial presumption of innocence gets re-enforced by the order of acquittal. I am of the opinion that after acquittal, which leads to an affirmation of the innocence of the accused, an appeal, as the case may be, being not a continuation of trial, will not amount to a pendency of judicial proceedings. Therefore, the petitioner cannot be deprived of the regularization of the suspension period, endlessly. Disposal of the appeal may take a long time. There is no certainty that the State would be 11 SWP No.878/2012, MP No.1346/2012 c/w SWP No.3338/2014, MP No.4498/2014 Page 11 of 11 satisfied, even if the appeal in the High Court fails. If the State chooses to prefer a further appeal to the Hon"ble Supreme Court, the Deptt./State may again contend that the appeal is pending before the Apex Court. Thus, if the argument of the respondents is to be accepted, then there is no finality of the judgment of acquittal. Therefore, the contentions of respondents are unjustified and I am not inclined to accept the same.

16. The instructive ratio percolating from the above extract envisions entitlement of a government servant ensuant on his exoneration from the charges levelled against him, to full pay and allowances, and treating the period of absence as period spent on duty.

17. In the present case, respondents, though, reinstated petitioner, but his period of absence remained unsettled. Respondents, consequent upon directions of this Court, issued order impugned, treating period of absence of petitioner as Dies-non. Petitioner, as recapitulated herein supra, by Order no.159 of 1993 dated 03.04.1993, was terminated. He challenged it in SWP no.1472/1995. Challenge succeeded. Respondents, however, were given liberty to hold regular enquiry against him. Payment of salary for the period, petitioner remained out of service, was kept dependent upon outcome of enquiry. Writ Court order was challenged in LPA no.101/2006, but that failed. Petitioner was reinstated. Respondents thereafter

conducted enquiry. Petitioner was exonerated of all charges levelled against him and reinstated. However, period, commencing from 21.04.1992

to 23.10.2007 was held not to be counted for service as per the Court directions, albeit such direction had not been passed in SWP

no.1472/1995. Dissatisfied therewith, petitioner preferred SWP no.294/2009. A Bench of this Court, vide judgement dated 27th July 2012,

quashed Order no.420 of 2008 dated 2nd December 2008, to the extent it attributed a finding to the Court that the period, petitioner was out of

service, i.e. 21.04.1992 to 23.10.2007, was not to be counted as part of the service or petitioner was not entitled to any wages for the said

period. Respondents were also asked to take a decision relating to entitlement of petitioner to the wages and as regards petitioner's status during

the period in accordance with the Writ Court judgement dated 27th April 2005. In that view of matter, the period unnecessarily consumed by

respondents in directing LPA and issuing reinstatement order, viz. 27th April 2005 to 23rd October 2007, cannot be attributed to petitioner. The

said period is to be treated in a differential manner, for the reason that from the passing of judgement dated 27th April 2005, till issuance of

reinstatement order dated 23rd October 2007, there was no fault on part of petitioner for remaining out of service. The said period is exclusively

attributable to respondents. Had respondents, well in time, implemented judgement dated 27th April 2005, petitioner would have, at that very

moment, joined his services. But, respondents took time at their ease in preferring Appeal against Writ Court order and upon their failure in Appeal

they issued reinstatement order on 23rd October 2007. So, this period cannot be attributed to petitioner to remain absent from duty. My said

observation is as well fortified by judgement rendered in Mohd. Shafi Ganai v. State & ors 2014 (1) JKJ 418 [HC].

18. Taking all supra discussion, observations and reasons together, writ petition is disposed of in the following manner:

a) Impugned order no.243 of 2015 dated 12th August 2015 issued by Inspector General of Police, Traffic, J&K, Srinagar, is quashed;

b) Quashment of order no.243 of 2015 dated 12th August 2015, however, shall not entitle petitioner to any benefit for the period commencing

from 21st April 1992 to 26th April 2005;

c) Respondents are directed to pay the wages/salary for the period commencing from 27th April 2005 to 23rd October 2017, with all consequential service benefits in favour of petitioner.

19. Disposed of.