

(1998) 04 J&K CK 0010

In the Jammu And Kashmir High Court

Case No : Writ Petition No. Service Writ Petition (SWP) No. 414/91

Abdul Majid Dar and Others

APPELLANT

Vs

Director, Fire Services and Others

RESPONDENT

Date of Decision : 02-04-1998

Acts Referred:

Civil Services Regulations, 1956 — Article 163
Constitution of India, 1950 — Article 226

Citation : (1998) KashLJ 516 : (1998) SriLJ 171

Hon'ble Judges : Nisar Ahmad Kakru, J

Bench : Single Bench

Judgement

1. The brief facts which are given rise to the instant petition are that the petitioners were appointed as Fireman vide orders dated 3111196,

541966 and 661966 respectively. They were imparted required training, they served the department till they were discharged from services on

161979, 811977 and 2111977 respectively and all of them had a service of more than a decade to their credit at the time of their ouster the

petitioner No. 1 and 2 were discharged on the allegations of unauthorised absence, whereas the petitioner No.3 was discharged on the ground of

resignation. The orders of discharge were represented against and the representation evoked positive response of the respondents, in consequence

thereto the orders of discharge came to be revoked vide Government Order No. Home12I/Fire of 1984 dated 331984, hereinafter called as

'order 121' for brevity, wherein the petitioners figure at serial numbers 3,4 and 6 respectively. The relevant portion of Order 121 is reproduced for

ready reference:

Whereas the case was considered by the Government in the context of the

recommendations of the Director Fire Services and was satisfied that these employees can be gainfully reabsorbed in service;

Now, therefore, it is directed that the orders issued by the Director Fire Services in having discharged the services of the above named employees

be revoke treating the intervening period as diesnon on the condition that the said employees shall observe strict discipline and give no cause for complaint in future.

By order of the Government of Jammu and Kashmir.

2. A plain reading of Order 121 reveals that the intervening period has been treated as diesnon, however, conditions came to be imposed on

beneficiaries of the order which required them to observe discipline and not to give rise to complaint in future. The petitioners contend that they had

preferred a claim for promotion to the Selection Grade on the basis of length of service, but the respondent No. 1 did not concede to, conversely

aimed at denial of promotion to the petitioners and in this direction an order of modification was issued bearing No: Home(FIRE) 228 GR of 1986

dated 2274986, hereinafter referred to as 'the impugned order', by virtue of which order 121 was modified making Order 121 ineffective

excepting to the extent of pensionary benefits. The relevant contents of the order are reproduced hereunder:

In partial modification of Govt. Order No: Home121 (Fire) of 1984 dated 331984, it is hereby ordered that the intervening period treated as

diesnon in respect of the following employees of J and K Fire Services shall count for pensionary benefits only.

3. The petitioners being aggrieved of the impugned order have assailed the same because:

- a) the impugned order has been passed without hearing the petitioners;
- b) the impugned over has deprived the petitioners of their past service and the impugned order is unreasonable, arbitrary and without jurisdiction;
- c) the impugned order denies remuneration for the intervening period;
- d) the impugned order discriminates the petitioners vteaviz., respondent No.4;
- e) Order 121 has been passed after the parties arrived at an agreement, therefore, the same could neither be modified nor reviewed. The respondents having resiled from the agreement, therefore, the petitioners are

entitled to challenge order 121 to the extent of treating the intervening period as dies non, thus entitled to emoluments for the intervening period.

4. The respondents have resisted the petition on the following grounds:

i) The order of modification was issued in the year 1986, whereas the petition has been filed in the year 1991, hence hit by latches;

ii) no right of the petitioners has been violated;

iii) the order of discharge was validly issued;

iv) conduct of petitioners prior to order of discharge was not good;

v) Order 121 is order of reemployment, therefore, the petitioners are not entitled to the benefits of intervening period excepting to the extent of pensionary benefits.

5. I have heard the learned counsel for the parties.

6. The objections pressed into motion by the respondents, if sustainable, can result in dismissal of the writ petition, therefore, it is appropriate to

deal with the objections of the respondents at the very outset in seriatim.

7. Coming to the objection (i), latches it is to be borne in mind that the petitioner No.1 was discharged in the year 1979, whereas petitioners 2 and

3 were discharged in the year 1977. The petitioners represented against and the respondents took about more than half a decade to consider the

same an the impugned order which has been issued in 1986 was also represented against by the petitioners and the petitioners did not lack any

where in persuading the respondents to accord consideration and they had reasonable belief to expect consideration of the same, but ultimately

they lost the hope, so choose to approach the court, undoubtedly after about more than four years, but considering past conduct of the

respondents which depicts that more than five years were taken by the respondents in according consideration, therefore, the petitioners had

sufficient reason to believe that the same treatment would be accorded and they were justified on such conduct of the respondents to wait for the

outcome of the representation, thus the petitioners cannot be punished for their bonafide conduct and the writ petition cannot be dismissed on the

said objection.

8. Objection (ii) is nothing but a bald assertion. The petitioners have a right not invoke the jurisdiction of the court to seek restoration of their legal

and constitutional rights which have been violated by omissions and commissions of the respondents, obviously, the objection is not tenable.

9. Objection (iii) is quite irrelevant because the order of discharge is not under challenge and the same was set at naught by the respondents vide

Order 121, reference to the same is unwarranted.

10. Coming to the objection (iv) of the respondents. The contention of the respondents in respect of conduct of the petitioners prior to their

discharge has no relevance and it will be no way useful to deal with this because the respondents have revoked the order of discharge and the

contents of the revocation order depict that the services of the employees can be gainfully reabsorbed, thus there is no possibility of adverse

inference to be drawn Against the conduct of the petitioners.

11. In respect of objection (v) contents of Order 121 are material and perusal of the same disclose the intention of the Government that the order

was revoked and by no stretch of imagination can it be termed as an order of reemployment and such statement of the respondents Hints at an

abortive attempt on their part to import word 'reemployment' into Order 121 which is bereft of any of any reason, hence the objection not tenable.

12. The objections of the respondents are not sustainable, but that alone will not entitle the petitioner to the reliefs prayed for and the petitioners

have to establish their case and the fate of the Writ Petition depends upon the validity or otherwise of the impugned order.

13. Let me deal, in the first instance, with the contention of the petitioners that the Order 121 is outcome of an agreement. The contents of Order

121 do not speak so nor is there any other document which would substantiate this contention of the petitioners, therefore, not tenable. The

petitioners have further contended that the respondents have backed out the agreement, therefore, they have a right to challenge Order 121. This

averment of the petitioners is also not tenable because I have already held that Order 121 has not come into being because of an agreement.

14. It is apt to deal with the relevant orders and attending circumstances thereto. Contents of Orders 121 reveal that order of discharge stands

revoked and intervening period has been declared as diesnon and the order leaves no doubt for the presumption that the Competent Authority

after applying mind has come to such conclusion. Here it becomes necessary to

discuss the ambit of term dies non. In this behalf it is relevant to go

to SRO 80 dated 10021972 by virtue for which a government instruction came to be incorporated to Regulation 163 of the Jammu and Kashmir

Civil Service Regulations and the same is reproduced hereunder for ready reference:

No period of unauthorised leave or absence may be treated as extraordinary leave without allowance when a Government Servant has at his

credit earned leave. Where it is the intention of competent authority not to allow the concerned Government servant any pay and allowances for

the period of unauthorised absence the said period may be treated as "dies on" (not qualifying for any remuneration). The "dies non" in such cases

shall not disturb the title of earned leave nor shall it constitute an interruption for service qualifying for pension, leave and increment unless it is the

intention of the competent authority that a Government servant shall be penalised effectively to the extent that all leaves at his credit should forfeit

or his increment postponed.

The government instruction so inserted in Regulation 163 of the Jammu and Kashmir Civil Service Regulations defines term "dies non" 'not

qualifying for any remuneration' It being so the reasonable presumption available is that the petitioners are entitled to all the benefits of service

excepting remuneration for the intervening period they were out of service. However, the competent authority could have denied benefits by order

of revocation but in such eventuality it was required to make specific mention in Order 121, since Order 121 does not reveal so, therefore, it is

safely presumed that the Government did not have this intention and the contents of Order 121 indicate that outcome of consideration was

revocation of order short of penalty, which has the effect of rendering the order of discharge nonest and the consequence is that the petitioners are

to be treated in service, but disentitled to the remuneration for the intervening period. Thus, I have come to an irresistible conclusion that the

petitioners are not entitled to any remuneration for the period they were out of the job but are entitled to all other service benefits treating them to

be in service without break.

15. Now arises a question, whether the respondents could issue the impugned order without affording an opportunity of hearing to the petitioners?

16. Before dealing with this question, it is relevant to mention that the order of discharge has been revoked subject to the condition that the said employees shall observe strict discipline and give no cause for complaint in future and this condition is to be read as part of order of revocation and in case the petitioners are guilty of violating these conditions they can be dealt with, that apart, the rules which govern the services of the employees of the State are also applicable to the petitioners and violation of conditions incorporated in Order 121 can render the petitioners liable to punishment in terms of the Service Rules but at the same time safeguards enshrined in the Rules are equally available to the petitioners. As regards the question framed hereinabove, it requires to be taken note of that I have returned a finding that the petitioners are entitled to all the benefits for service treating them to have been restored to their original position, of course without remuneration on the strength of order 121, whereas the impugned order provides that the petitioners shall be entitled to pensionary benefits only, thus has the effect of denying the petitioners benefits of service including reckoning of the intervening period towards their service which tantamounts to forfeiture of their past service, besides other benefits, obviously, the impugned order is detrimental to the rights of the petitioners and has been passed at the back of the petitioners without providing them an opportunity of being heard which has rendered the respondents guilty of violating the principles of natural justice, consequent upon the impugned order is not sustainable and is liable to be quashed. Accordingly the question reflected in para 15 supra is replied.

17. The petitioners have made an averment specifically that the impugned order has not been made effective against the respondent No.4 and his past service has been reckoned in terms of Order 121. This fact has not been controverted by the respondents and the presumption is that the averment of the petitioners is correct and leads to a conclusion that the respondents have not treated the petitioners alike their equals, thus are guilty of violating the mandate of the constitution.

18. For the reasons detailed hereinabove, this writ petition is allowed to the following effect:

a) The impugned order bearing No. Home (FIRE) 228 GR of 1986 dated 22/7/1986 is quashed;

- b) The respondents are directed to reckon the intervening period towards seniority of the petitioners and fix their seniority accordingly in accordance with the rules;
- c) Consider the petitioners for promotion scalewise and postwise reckoning the intervening period towards their services retrospectively.
- d) No order as to costs.