

(1982) 12 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Writ Petitions Nos. 143 and 173 of 1978

Abdul Rashid Khan

APPELLANT

Vs

State of J&K and anr.

RESPONDENT

Date of Decision : 03-12-1982

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Section 126

Citation : (1983) JKLR 78 : (1984) KashLJ 180

Hon'ble Judges : I.K.Kotwal, J

Bench : Single Bench

Advocate : S.L.Kaul, K.N.Raina, Ashok Bhan , Advocates appearing for the Parties

Judgement

1. This Judgement will govern the disposal of writ petitions Nos. 143 and 173 of 1978 which are directed against the same order and raise

common questions of law and fact.

2. Consequent upon their selection by the Inspector General of Police, Jammu & Kashmir State, the petitioners, namely, Abdul Rashid Khan in

Writ petition No. 143 and T. Angchuk in Writ petition No. 173 were temporarily appointed as A.S.I.s by the Deputy General of Police, Kashmir

Range, Srinagar, respondent No. 2 in the writ petitions, with effect from 1.10.1975. Both of them were, however, placed under suspension by the

second respondent on 761978 on a charge of grave misconduct involving Koral turpitude in the discharge of their official duties. Only a couple of

weeks thereafter i.e. on 24.6.1978, their services were terminated by the second respondent by his order impugned in the writ petitions. This

order reads as order:

Order No. 236 of 1978

Dated 24/6/1978.

The Services of probationary Assistant Sub Inspectors Abdul Rashid No. 1265/NGO and T. Anchok No. 1267/NGO are no longer required in

the Police Department They are, therefore, hereby discharged from service with immediate effect.

Sd/ (S.A. Shah) IPS,

Dy. Inspector General of Police, Kashmir.

3. The petitioners have challenged this order on the grounds : firstly, that their services had in fact been terminated with a view to imposing

punishment on them and the impugned order was drafted to circumvent the provisions of Sec. 126 of the Constitution of Jammu and Kashmir;

secondly, that they having continued in service for more than two years as probationers prior to its termination, and their initial appointments too

being against clear vacancies, they had acquired the status of permanent employees under Rule 21, 22 and 24 of the J&K Civil services

(Classification, Control and Appeal) Rules, 1956, and had, therefore, a right to continue in service till the age of superannuation and the impugned

order terminating their services prior to their superannuation had the effect of imposing a penalty on them within the meaning of Sec. 126; thirdly,

that their appointing authority being the Inspector General of Police, and they in fact having been appointed by him, their services could not have

been terminated by the Dy. Inspector General of Police; and fourthly, that their services could not have been terminated without following the

procedure laid down in Rule 349 of the Police Rules.

4. The respondents have resisted the petitions by denying either that services of the petitioners were terminated with a view to imposing any

punishment on them by circumventing the provisions of Sec. 126, or that the petitioners had acquired the status of substantive employees under

Rules 21, 22 and 24 of the J&K Civil Services (Classification, Control and Appeal) Rules, 1956, on the date the impugned order came to be

passed, or that the Dy. Inspector General of Police was not their appointing authority, they have on the other hand contended that the Rules framed

under Police act, as published in the Jammu and Kashmir Police Manual, 1960. They have also denied that the mischief of Rule 349 is attracted to

their cases, and have challenged the maintainability of the petitions on the

preliminary objection that the petitioners have not exhausted the alternative remedy of appeal provided under the Police Rules.

5 It is common ground that an appeal lay against the impugned order. No appeal was, however, taken against it and in this view, an alternative

remedy available to the petitioner was not exhausted by them, before invoking the extra ordinary writ jurisdiction of this court/ The rule that the

petitioner must exhaust any other alternative remedy available to him before filing the writ petition, it is now a settled law, is not a rule of law, rather

a rule which courts themselves have evolved for guiding them in exercising their discretion. Existence of an alternative remedy is, therefore, no bar

to the filing of the writ petition, and the court can exercise its discretion in favour of the petitioner and grant him appropriate relief; even if he is not

shown to have exhausted the alternative remedy available to him, provided the facts and circumstances of the case warrant so Each case has to be

decided on its own facts and no uniform standard can be fixed in this behalf. A. V. Venkateshwaru Vs. Rama Chand Subhraj Wadhvani and

another, AIR 1961 S.C. 1506). The impugned order in these cases was passed on 7.6.1978 and the writ petitions were filed on 4.8.1978 and

23.8.1978 i.e. within the time prescribed for appeal. These writ petitions were admitted by the court without any objection in regard to the

existence of the alternative remedy of appeal. It would be thus much too late in the day, and highly unjust and improper on the part of the court to

refuse to exercise its discretion in favour of the petitioners on the ground that they did not exhaust the alternative remedy of appeal available to

them The objection is, therefore, overruled.

6. Equally untenable is the ground taken on behalf of the petitioners that the Dy. Inspector General of Police not being the appointing authority of

the petitioners he had no right to terminate their services. Under Rule 172, occurring in Chapter: VII of the Police Rules, the Dy. Inspector General

of Police was competent to appoint the petitioners, and their appointment orders also reveal that it is he who had in fact appointed them. In this

view this ground fails.

Section 126 of the Constitution of Jammu & Kashmir which corresponds to article 311 of the Constitution of India, it is well settled, is attracted to only

those cases in which service of a Government servant has been terminated with

a view to imposing punishment on him. It applies with equal force to permanent as well as temporary Government servants, where their services have been terminated as a measure of punishment. Consequently, no Government servant, whether permanent temporary or a probationer, can be removed from service without fulfilling the requirements of this section, it is equally well settled that since a Permanent Government servant has a right to serve till the age of superannuation, termination of his service before he actually reaches that age ipso facto amounts to imposing punishment on him, even if it has been terminated without intending to impose any punishment on him.

8 There is a dispute between the parties, as already noticed, as to whether or not the petitioners had acquired the status of permanent employees when their services came to be terminated by virtue of the impugned order. For the sake of present discussion. I will, however, proceed on the hypothesis that they were not permanent employees. The impugned order, as is clear from its plain language, is an order terminating the services of the petitioners simpliciter, which neither contains any stigma against them, nor does it assign any reason as to why their services were no More required. The crucial question that arises for determination, is: can the court go behind the impugned order to find out as to whether it was passed with a view to imposing punishment on them ? The point is no more res integra. In the famous case of Samsher Singh Vs. State of Punjab, AIR 1974 S.C. 2192, a similar question arose for consideration before a Constitution Bench of the Supreme Court. In that case also the two orders of termination of their services, which had been challenged by the appellants were couched in a language similar to the language in which the order impugned in the present petitions has been couched. These orders read as under: The Governor of Punjab is pleased to terminate the services of Shri Samsher Singh, Subordinate Judge, on probation under Rule 9 of the Punjab Civil Services (Punishment and appeal) Rules, 1952 with immediate effect. It is requested that these orders may please be conveyed to the officer concerned under intimation to the Government:"

'On the recommendation of the High Court of Punjab and Haryana the Governor of Punjab is pleased to dispense with the services of Shri Ishwar Chand Agarwal, PCS (Judicial Branch), with immediate effect under Rule 7 (3) in

Part I of the Punjab Civil services (Judicial Branch) Rules, 1951,
as amended from time to time".

9. Their Lordships held that the court did have power to go behind the orders, and on the facts of the case find out for itself as to whether or not these orders were in fact passed by way of punishment. In other words their Lordships held that the orders themselves could not be decisive of the matter as to whether or not they were passed with a view to imposing any punishment on the appellants. The law to the point was laid down by the Constitution Bench in these words:

No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the reasoning of Article 311(2) of the Constitution.

Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any Rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases, the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Art 311(2) he can claim protection...

10. This question, in terms, again arose in *State of Maharashtra Vs. Veerappa R. Soboji and another*, AIR 1980 S.C. 42 and the law on the

subject was exhaustively stated by Pathak J. in these words:

The law, it seems to me, is that where the services of a temporary Government servant or a probationer Government servant are terminated by an

order which does not ex facie disclose any stigma or penal consequences against the Government servant and is merely a termination order

simpliciter, there is no case ordinarily for assuming that it is anything but what it purports to be. Where, however, the order discloses on the face of

it that a stigma is cast on the Government servant or that it visits him with penal consequences, then plainly the case is one of punishment. There

may still be another kind of case where although the termination of services is intended by way of punishment, the order is framed as a termination

simpliciter. In such a case, if the Government servant is able to establish by material on the record that the order is in fact passed by way of

Punishment, the innocence of the language in which the order is framed will not protect if the procedural safeguards contemplated by Art. 311 (2)

of the Constitution have not been satisfied. In a given case, the Government servant may succeed in making out a prima facie case that the order

was by way of punishment but an attempt to rebut the case by the authorities may necessitate sending for the official records for the purpose of

determining the truth. It is in such a case generally that the official records may be called for by the Court. It is not open to the court to send for the

official records on a mere allegation by the Government servant that the order is by way of punishment. For unless there is material on the record

before the court in support of allegation, an attempt by the court to find out from that the record whether the termination of service is based on the

unsuitability of the Government servant in relation to the post held by him or is in reality an order by way of punishment will in effect by an

unwarranted attempt to delve into the official records for the purpose of determining the nature of the order on the basis of a mere allegation of the

Government servant. On a sufficient case being made out on the merits before the courts by the Govt. servant it is open to the courts to resort to

scrutiny of the official records for the purpose of verifying the truth. I am unable to see why the court should decline to peruse the official records in

an appropriate case and why, where consideration of privilege and confidentiality do not suffer the information set forth in the records should not

be made available to the Government servant. The mere possibility that the official records could conform what the Govt. servant had sent out to

prove and prima facie had, indeed, proved should not shut out disclosure of the information.

11. The same learned Judge again dealt with this point in Nepal Singh Vs. State of U. P. AIR 1980 S. C. 1459 and laid down the test in the

following words:

But the question which calls for determination in all such cases is whether the facts satisfy the criterion repeatedly laid down by this court that as

order is not passed by way of punishment, and is merely an order of termination simpliciter, if the material against the Govt. servant on which the

superior authority has acted constitutes the motive and not the foundation for the order. The application of the test is not always easy. In each case

it is necessary to examine the entire range of facts carefully and consider whether in the light of those facts the superior authority intended to punish

the Government servant or, having regard to his character, conduct and suitability in relation to the post held by him it was intended simply to

terminate his services. The function of the court is to discover the nature of the order by attempting to ascertain what was the motivating

consideration in the mind of the authority which prompted the order.

12. The law is thus well settled that an order terminating the service of an employee shall normally be taken to convey that it ex facie states, and the

courts will have no power to find out the reasons which prompted the authority to pass the order. It will, however, not be decisive of the matter

and the court will have power to go into the facts and circumstances of the case which persuaded the authority to pass the order and find out as to

whether it was passed with a view to imposing punishment on the Government Servant, 'provided some material is placed before the court by him

to compel it to go into those facts and circumstances. Mere ipse dixit of the Govt. servant will not be, however, enough to compel the court to look

into those facts and circumstances. In case such material is placed before the court, a duty will be cast upon the Government to explain those

circumstances which impelled it to terminate his service. The mere fact that there were some charges of misconduct against the Govt. servant

involving even moral turpitude which motivated it to terminate his service, will

not vitiate the order and persuade the court to hold that the order was passed as a measure of punishment so long as there is other material also upon which the order of termination of service could be founded. It will hold so only if it comes to the conclusion that the facts constituting grave misconduct on the part of the Government servant are in fact the only basis of the termination of his service.

13. Applying this test to the instant case, it is not possible to hold that services of the petitioners were not terminated with a view to imposing

punishment on them. The petitioners have in deed placed the necessary material before the court that their services were terminated by respondent

No. 2 with a view to imposing punishment on them. This material is the order of their suspension dated 7. 6. 1978 They were placed under

suspension on a charge of embezzling eleven Kgs. of Charas and directed to face an enquiry into the matter. The was impugned order of

termination of their services, as already noticed, passed just two weeks thereafter. In view of this material, it was the duty of the respondents to

have placed before the court all other facts, if any, impelled them to put an end to their services. These facts could have been anything other than

the aforesaid charge of embezzlement. They were bound to explain as to why their services were no more needed. As transpires from Para 14 of

the reply affidavit, these other facts were the unsatisfactory performance and bad conduct of the petitioners during the courses of their probation as

A. S. Is Mr. S. L. Kaul was directed to produce the relevant departmental file to satisfy the court as to whether there was any mention of these

deficiencies in it. No other document has been placed on the record to show that before the petitioners came to be suspended or even removed

from service, their performance was found to be poor or their conduct not good. It is only the ipse dixit of the respondents that the performance of

the petitioners during the period of their probation was not satisfactory, nor was their conduct good. What was that conduct to has not been

explained, nor has the departmental file been produced to satisfy the court that there was something more against the petitioners that the charge of

embezzlement of Charas. In these circumstances, it cannot but be held that the facts constituting the charged of embezzlement of Charas had

provided not only a motive for the termination of the services of the petitioner,

but also the basis for the same. The respondents could not have adopted this short cut and circumvented the provisions of Sec. 126 in that manner. Howsoever bad reprehensible or condemnable the conduct of the petitioners might have been they were still entitled to constitutional protection provided by Sec 126 Their services could have been and perhaps ought to have been terminated on the aforesaid charge of embezzlement, but only after the requirement of Sec. 126 had been fulfilled. I have, therefore, no alternative but to quash the impugned order by issuing a writ of certiorari. The writ is accordingly issued and the order improved in the writ petitions is equashed. This will not however, prevent the respondents from holding a fresh enquiry against. The petitioners this relieves me of examining the merits of the other contentions raised on behalf of the petitioners No costs.