

(1992) 11 J&K CK 0005
In the Jammu And Kashmir High Court

Ashok Kumar Sharma

APPELLANT

Vs

Ashok Kumar Sharma

RESPONDENT

Date of Decision : 18-11-1992

Acts Referred:

Civil Services Regulations, 1956 — Regulation 113

Citation : (1994) JKLR 634 : (1994) KashLJ 723

Advocate : S.S.Lehar, Baldev Singh, Advocates appearing for the Parties

Judgement

This petition seeks the indulgence of the Court for the issuance of a writ of mandamus directing the respondents to allow the petitioner to join his

services as teacher. Appointed as a teacher in the year 1980, the petitioner proceeded on sanctioned leave with effect from 8.5.1983 to 11.5.1985.

Subsequently, he applied for extension of leave on the basis of his ailment and did not join for more than a couple of years thereafter. He, by virtue

of his joining report addressed to the Headmaster, High School Brijnagar (Annexure PD) sought permission for allowing him to join the duties.

Respondent No. 5 declined the permission and pointed out that his son was already shifted to a school headed by respondent No. 4. The

petitioner was not allowed to join by respondent No 4 as well. Aggrieved of the respondents, omission to allow him to join the duties, he has filed

the present petition.

Objections have been filed in which the respondents, while admitting the factual position stated that in terms of Art. 133 of the J&K Civil Services

Regulations (hereinafter called Regulations), the petitioner was deemed to have been out of the state employment.

On a plain construction Art. 113 of the Regulations, I am not in a position to agree with Mr. Singh, learned counsel for the respondent State. This is

so because of two reasons: first, that it is after 5 years that a presumption of a person being out of service can be drawn. The period intervening the two dates i.e., 851983 and 351988, falls short of five years, therefore, this rule is not applicable and has been applied in anticipation of its coming into force. Secondly, that Art. 113 of the Regulations proceeds on a presumption. A presumption is an offshoot of fiction of law and can be rebutted. Before drawing a presumption in terms of Art. 113, a finding is to be recorded by the competent authority. That finding is supposed to be based upon some proof and while giving such a finding, the person in respect of whom an order is passed should be heard. I am not inclined to perceive of such a presumption in absence of an inquiry. Law can in no case allow an order to be passed against a person without affording him an opportunity of being heard. If that is done, it is sure to cause miscarriage of justice. T, therefore, am not in a position to agree with Mr. Singh learned counsel for the State in coming to a conclusion that the prolonged absence of the petitioner in the instant case, has debarred him from allowing claim to the past he was holding on substantive basis.

I bay also gone through the counter filed by the respondents, is not their case that the petitioner has been discharged from the service. On the other hand, they seem to have taken a stand all along that his Hen was shifted from one place Jo the other. Existence of lien itself connotes that he is still in service, but, however, I am not inclined to prejudice the competent authority in coming a finding to that effect.

While allowing this petition I direct respondent No. 3, Distt. Education Officer, Jammu, to allow the petitioner to join at the place where his lien stands shifted today. However, with regard to the period of leave or conducting of an inquiry in respect of the period of absence of the petitioner from duty, the respondents shall be at liberty to do so but while holding such an inquiry the petitioner should be afforded sufficient opportunity of being heard and should not be condemned unheard.

This also disposes of C.M.Ps. No. 186364 of 1990 and No. 165 of 1991.