

(1998) 05 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : S.W.P. No. 213/1995

Barkat Hussain

APPELLANT

Vs

State of J & K

RESPONDENT

Date of Decision : 25-05-1998

Acts Referred:

Constitution of India, 1950 — Article 311(2)(b)

Constitution of Jammu and Kashmir, 1956 — Section 126(2), 126(b), 126(c)

Citation : (1999) 2 SCT 115 : (1998) SriLJ 328

Hon'ble Judges : O.P.Sharma, J

Bench : Single Bench

Judgement

1. The petitioner, Barkat Hussain, a Selection Grade Constable in the State Police, was dismissed from service by order dated 24.01.1995 passed

by the 2nd responded in exercise of powers under section 126(2)(b) of the State Constitution. This order reads as under:

Order No: 53 of 1995.

Dated 24.01.1995.

Whereas, SGCT, Barkat Hussain No: 1355/ J, has indulged in militant/subversive activities.

2. Whereas, his consciously and willingly indulgence in antinational/espionage activities is highly objectionable and prejudicial to the security of the State/Country;

3. Whereas, his retention in the department, in view of antinational activities, is not feasible.

4. Whereas, in view of the present ongoing militancy in the State, I am fully satisfied that it would not be reasonably practicable to hold the regular

departmental enquiry against this official on the reasons that witnesses could not be readily available or in a position to depose against the said

official,

Therefore, I.A.K.Suri, IPS, Inspector General of Police, Jammu Zone, Jammu, accordingly by virtue of the powers vested in me under section

126 of Constitution of J and K read with Article 311 of Constitution of India, do hereby dismiss SG Constable Barkat Hussian No:1355/J from

service by virtue of section 126 clause (2) Proviso(b) of J and K Constitution read with Article 311 of Indian Constitution with immediate effect.

2. Petitioner challenges this order on the ground that the tenor and terms of the order indicate that the petitioner's services have been terminated in

the interest of security of the State, the power which could be exercised only by the Governor under clause(c) of section 126(2) of the State

Constitution and not by the 2nd respondent. Another challenge to the impugned order is thrown on the ground that allegations are based on the

accusations made in the challan filed under sections 3 and 4 of Terrorists and Disruptive Activities Act 1987 pending in the designated Court which

could not be the basis of satisfaction under clause(b) of section 126(2) of the Constitution. It is also averred that since no enquiry could be held

during the pendency of the criminal proceedings, the satisfaction recorded by the disciplinary authority that it is not reasonably practicable to hold

enquiry is without jurisdiction.

3. In the counter filed by the respondents, it is stated that because of the involvement of the petitioner in militant and subversive activities, the

departmental enquiry was dispensed with because it was not reasonably practicable to hold enquiry for the reasons recorded in the order.

Reluctancy of the witness to depose against the petitioner in the existing circumstances is one of the grounds to justify dispensing with the enquiry.

4. The petitioner, it was admitted, was first arrested in FIR No: 50 of 1991 registered under TADA, 1987 and admitted to hail on 14.9.1991.

Meanwhile he was detained under the J and K Public Safety Act, 1987(hereinafter the PSA) for a period of two years, but he was again detained

under PSA for a period of 14 months which expired on 30.10.1993. All this material was available with disciplinary authority who after examining

it, came to the conclusion that it was not reasonably practicable to hold an

enquiry against the petitioner.

5. Mr. Malik, appearing for the petitioner, argued that dismissal order of the petitioner is bad because reluctance of the witnesses to dispose in the

departmental enquiry cannot be a ground to invoke Clause(b) of Section 126(2) of the State Constitution. He also challenges the order impugned

on the ground that such a power could be exercised only under Clause(c) of the second proviso of section 126(2) of the State Constitution and not

by the authority competent to dismiss or remove the petitioner.

6. The argument, though ingenious, is fallacious because para 2 of the order is only the substances of allegations and not the basis on which the

satisfaction that it is not reasonably practicable to hold enquiry is founded. The satisfaction of the authority empowered to dismiss or remove a

person is referable to the power to hold enquiry which he alone exercise under Section 126(1) of the State Constitution. So even where the

Governor does not find it expedient to dispense with the enquiry under clause (c) of the second Proviso to Section 126(2), enquiry is to be only

after charges are framed by the disciplinary authority. It is thus wrong to suggest that satisfaction contemplated by Clause (b) cannot be derived if

the substances of charge is based on the allegations of activities prejudicial to the security of State. Moreover it cannot be disputed that such

allegations constitute serious misconduct which if proved, after holding enquiry, could justify dismissal of the petitioner. Similarly it cannot be

disputed that disciplinary authority could frame the charge and appoint enquiry officer to hold enquiry in to the charges. If that be so, as it really is,

it is he who has to be satisfied whether holding of enquiry is reasonably practicable or not. So while under clause (b) of the proviso to section

126(2) it is the disciplinary authority which has to be satisfied that it is not reasonably practicable to hold an enquiry under clause (C). The

Governor is to be satisfied that in the interest of the security of the State it is not expedient to hold an enquiry as is spell out by Section 126 of the

State Constitution which reads as under""126. Dismissal, reduction or removal of persons employed in civil capacities under the State (1) No

person who is a member of a civil service of the State or holds a civil post under the 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 inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry: Provided that this subsection 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 inquiry; or

(c) Where the Governor is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonable to hold such inquiry as is referred to in subsection (2),

the decision thereon on the authority empowered to dismiss or remove such person or to reduce him in rank shall be final).

While the purpose and object of Clause (b) and (c) is the same, the scope is clearly different because the term "reasonably practicable" is not the

same as the expression expediency of holding inquiry. The distinction has been brought home by the Constitution Bench in Union of India and

another Vs. Tulsiram Patel, AIR 1985 SC 1416 by observing that:

139. We now turn to the last clause of the second proviso to Article 311(2), namely, clause (c). Though its exclusionary operation on the

safeguards provided in Article 311(2) is the same as those of the other two clauses, it is very different in content from them. While under clause

(b) the satisfaction is to be of disciplinary authority, under clause (c) it is to be of the President or the Governor of a State, as the case may be.

Further, while under clause (b) the satisfaction has to be with respect to whether it is not reasonably practicable to hold the inquiry, under clause

(c) it is to be with respect to whether it will be expedient in the interest of the security of the State to hold the inquiry. Thus, in one case the test is

of reasonable practicability of holding the inquiry, in the other case it is of the

expediency of holding the inquiry. While clause (b) expressly requires that the reasons for dispensing with the inquiry should be recorded in writing, clause (c) does not so require it, either expressly or impliedly.

After noticing the dictionary meaning of the worked expedient, their Lordships held that:

...Expediency involves matters of policy. Satisfaction may be arrived at as a result of secret information received by the Government about the brewing danger to the security of the State and like matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite satisfaction whether holding an inquiry would be expedient or not. If the requisite satisfaction has been reached as a result of secret information received by the Government, making known such information may very often result in disclosure of the source of such information. Once known, the particular source from which the information was received would no more be available to the Government. The reasons for the satisfaction reached by the President or Governor under clause (c) cannot, therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public.

It is thus clear that on the same set of allegations holding of inquiry can be dispensed either under Clause (b) or Clause (c) and, therefore, the order impugned cannot be assailed on this ground. Moreover decisions of the Apex Court in case involving dismissal under Clause (b) instead of Clause (c) will be more helpful to reach a just conclusion.

7. Mr. Malik next argued that "ongoing militancy in the State" and that "witnesses could not be readily available" or "in a position to depose against the petitioner" cannot be the basis of satisfaction as the witnesses were known as their names figured in the challan pending in the designated court.

However fact situation and circumstances prevailing the State is an important component in the decision making process under clause (b) as laid down in "Jaswant Singh Vs. State of Punjab and Others", AIR 1991 SC 385 holding that:

In so far as Clause (b) is concerned, this Court pointed out that two conditions must be satisfied to sustain any action taken thereunder. These are

(i) there must exist a situation which renders holding of any inquiry "not

reasonably practicable", and (ii) the disciplinary authority must record in writing its reasons in support of its satisfaction. Of course the question of practicability would depend on the existing fact situation and other surrounding circumstances, that is to say, that the question of reasonable practicability must be judged in the light of the circumstances prevailing at the date of the passing of the order. Although clause (3) of that Article makes the decision of the disciplinary authority in this behalf final such finality can certainly be tested in a court of law and interfered with if the action is found to be arbitrary or mala fide or motivated by extraneous consideration or merely a ruse to dispense with the inquiry.

However their Lordships observed that "it was incumbent on the respondents to disclose to the court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent No.3 in the impugned order." it was also held that when the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer.

So the ratio of the decision is two fold. One that fact situation and circumstances prevailing in the State are relevant for the exercise of power under

Clause (b) of the second proviso to Section 126 (2) of the Constitution and two when exercise of power under this Clause is questioned in a

Court, the respondent must show that the satisfaction is based on objective facts.

8. Applying the ratio to the facts of the case it is admitted that FIR No. 50 was registered against him under Sections 3/4 of the TADA Act 1987.

It is also admitted case of the petitioner that on the date the impugned order was passed, he was being tried by the designated court in the

aforesaid case. It is also admitted by the petitioner that he was detained under Public Safety Act for 14 months in 1992-93. Since all this material

was available before the disciplinary authority, his satisfaction that it was not reasonably practicable to hold inquiry cannot be said to be based on

extraneous or irrelevant grounds. Moreover the scope of judicial review in case involving exercise of power under Proviso (b) to Article 311(2) of

the Constitution of India, which corresponds to clause (b) of Section 126 (2) of the State Constitution, was once again considered by the Apex

Court in Kuldeep Singh Vs. State of Punjab (1996) 10 SCC 659 wherein their Lordships observed that:

It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination

prevails, and it is immaterial whether the government servant concerned is or is not a party to bringing about such an atmosphere. The] reasonable

practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and

knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the

disciplinary authority on this question final... 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....

Where a government servant is dismissed, removed or reduced in rank by applying clause (b) or an analogous provision of the service rules and he

approaches either the High Court under Article 226 or this Court under Article 32, the court will interfere on grounds well established in law for

the exercise of power of judicial review in matters where administrative discretion is exercised. It will consider whether clause (b) or an analogous

provision in the service rules was properly applied or not... In examining the relevancy of the reasons, the court will consider the situation which

according to the disciplinary authority made it come to the conclusion that all was not reasonably practicable to hold the inquiry... In considering

the relevancy of the reasons given by the disciplinary authority, the court will not, however, sit in judgment, over them like a court of first appeal.

While relying on this judgment their lordships upheld the judgment of Punjab and Haryana High Court dismissing the writ petition challenging the

dismissal of Head Constable Kuldeep Singh who was found to have links with the extremists. The order of his dismissal reads as under:

Whereas Head Constable Kuldip Singh No. 2874/T of this District has been found indulging in activities prejudicial to the efficient functioning of

the police force. He has very close links with extremists and has been helping them by providing information of the Police Department;

And whereas it is established that Head Constable Kuldip Singh No. 2874/TT is mixed up with the extremists and had been found responsible for

supplying information relating to the Police Department; And whereas in the interest of maintenance of law and general administration and retention

of Head Constable Kuldip Singh No. 2874/TT of Police District Tarn Taran is considered undesirable; And whereas I am satisfied that the

circumstances of the case are such that it is not reasonably practicable to hold an inquiry in the manner provided in Punjab Police Rules, Rule

16.24 because no witness is likely to depose against him due to fear of injury of his life. Now, therefore, I, Ajit Singh, Senior Superintendent of

Police, Tarn Taran, in exercise of the powers vested in me by virtue of the provisions of the Punjab Police Rules, Rule 16.1 read with Section. 7 of

the Police Act, 1861 and Article 3,11(2) of the Constitution of India, do hereby dismiss from service the Head Constable Kuldip Singh No.

2874/TT with effect from 21.02.1992.

The facts on which the dismissal of the petitioner has been found being almost identical as also the satisfaction recorded by the Inspector General

of Police, the ratio of the judgment applies and therefore the order cannot be questioned on the ground that the satisfaction recorded is either for

extraneous consideration or on irrelevant grounds.

So the basis of satisfaction that due to "ongoing militancy and the reason that witnesses will not be readily available or ready to depose against the

petitioner have not to be examined by this court as a court of first appeal. In the absence of allegation of malafides against the disciplinary authority

who was the man on spot, it cannot be suggested, and much less accepted that the decision has not been arrived fairly. The decision in Kuldeep

Singh case (supra) is also an authority that where the person is involved in militancy, Clause (b) is attracted and the disciplinary authority can act

under it. So the satisfaction recorded by the disciplinary authority not being based on extraneous or irrelevant grounds the order of dismissal

impugned herein does not suffer from any legal infirmity.

9. It was next argued that since the petitioner was being tried by the designated court for his antinational and subversive or militancy related

activities, he could not be proceeded departmentally on the same charges simultaneously as that would prejudice him in the trial. The contention is

fallacious because departmental inquiry is independent of criminal trial and both can proceed simultaneously as laid down.

In State of Rajasthan Vs. B.M.Meena, (1996) 6 SCC 417 it was held that:

In the disciplinary proceedings, the question is whether the respondent is guilty of such conduct as would merit his removal from service or a lesser

punishment, as the case may be, whereas in the criminal proceedings the question is whether the offences registered against him are established and

if established what sentence should be imposed upon him. The standard of proof, the mode of inquiry and the; rules governing the inquiry and trial

in both the cases are distinct and different and as such both could proceed simultaneously.

10. In view of the above, the petition is liable to be dismissed. It is dismissed accordingly without any order as to costs.