

(1998) 09 J&K CK 0049
In the Jammu And Kashmir High Court
Case No : S.W.P. 128/1990

Gh.Rasool Dar and Others	Vs	APPELLANT
State and Others		RESPONDENT

Date of Decision : 08-09-1998

Acts Referred:

Constitution of India, 1950 — Article 14
Constitution of Jammu and Kashmir, 1956 — Section 126

Citation : (2001) KashLJ 57

Hon'ble Judges : T.S.Doabia, J

Bench : Single Bench

Advocate : M.I.Qadiri, J.A.Kawoosa, G.A.Lone, Advocates appearing for the Parties

Judgement

1. 21 petitioners approached this court. Their grievance was that the orders terminating their service tenure, which orders were passed in exercise

of powers conferred under Section 126(2)(c) of the Constitution of Jammu and Kashmir are not in accordance with law. It is these orders which

are being assailed in the joint petition preferred by the aforementioned 21 writ petitioners.

2. As orders are similarly worded and have been passed in similar circumstances, it would be apt to notice the order, which reads as under:

GOVERNMENT OF JAMMU AND KASHMIR. HOME DEPARTMENT Sub: Termination of services. Order No: HomeWSGR of 1990

Dated: 641990

Whereas on the night of 27th/23th of March, 1990 twelve hardcore detenues escaped from the Central Jail Srinagar and this escape has caused

great risk to the security of the State.

Whereas the detenues were able to run away due to gross negligence and dereliction of duty and connivance of Jail authorities with the escapees:

Whereas the Governor is satisfied that in the interest of the security of the State, it is essential to remove the concerned officials from the service;

and

Whereas the Governor is satisfied that in terms of Clause (c) of the Proviso of SubSection 2 of Section 126 of the Constitution of Jammu and

Kashmir and in the interest of the security of the State it is not expedient to hold an inquiry against Shri Abdul Ghani Wani, Warder Central Jail,

Srinagar.

Now, therefore, the Governor in accordance with the provisions of Section 126 of the Constitution of Jammu and Kashmir hereby dismisses Shri

Ab. Rahman Dar, Warder, Central Jail, Srinagar from services with immediate effect.

By order of the Governor.

3 A perusal of the order makes it apparent that this has been passed on the ground that the security of the State requires dispensation with the

holding of regular enquiry.

4. Another fact which is brought to the notice of this Court is that during the pendency of this petition, some of the petitioners have been reinstated.

It is contended that when some of the petitioners who similarly situated have been reinstated, then there was no justification to deny the benefit to

all the remaining writ petitioners.

5. In the objections and counter affidavit filed by the State, it is stated that a preliminary enquiry was held with regard to the assessment and

involvement of each of the individuals with regard to the lapses committed by them. The lapse which is attributed to the petitioner is that they were

instrumental in the escape of detenues detained in the Central Jail by the State Government. It is stated that they were also involved in jail break.

The mere fact that some of them were not present in the jail premises would not absolve them of the charge of dereliction of duty on their part

They did not perform the duties of Warder and Head Warder, which they were supposed to perform. On account of remissness on their part, the

detenues had escaped. It is thus urged that the Governor of the State took resort to the power vested in him under Section 126(2)(c) of the

Constitution of Jammu and Kashmir.

6. Is the above order within the four corners of Section 126(2)(b) and (3) of J and K Constitution? This provision 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 enquiry 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 enquiry, 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 reasons, to be recorded by

that authority in writing it is not reasonably practicable to hold such enquiry; or

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

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

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

7. The provisions of Section 126(2) and (3) of J and K Constitution are similar to the provisions of Article 311 (2) of Constitution of India.

8. A Constitution Bench of the Supreme Court in Arjun Chaubey vs. Union of India, AIR 1984 SC 1356 quashed the order passed by the

employer who exercised power under proviso (b) to Article 311 of the Constitution of India on the ground that no material was available with the

said authority for satisfying itself that it was not reasonably practicable to hold inquiry. The scope of Article 311(2) of the Constitution was again

considered by the Supreme Court of India in *Union of India v. Tulsiram Patel*, AIR 1985 SC 1416. It was held that a disciplinary authority is not

expected to dispense with the disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry

because the Department's case against the Government servant is weak and must fail. It was observed that:

The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the Courts so far as its power of judicial review

is concerned and in such case the court can strike down the order dispensing with the enquiry as also the order imposing penalty.

9. In *Sardari Lal (Dead) through L. Rs. v. Union of India*, 1987(4) SCC 114, a challenge was made to an order of dismissal passed under clause

(c) of the second proviso to Article 311(2). After referring to the decision in *Tulsiram Patel* (supra) the Supreme Court of India observed that if

reasonable are recorded though not communicated, that would satisfy the requirements of the law as indicated in *Tulsiram Patel*'s case.

10. In *Jaswant Singh v. State of Punjab*, AIR 1991 SC 385: 1991(1) SCT 125, the provisions of Article 311 were commented upon. It was said

that the English doctrine incorporated in Article 310 which is qualified by the opening words "except as expressly provided by this Constitution" is

subject to Article 311 (1) and (2) which contains safeguards against termination from service. It was held:

However, the second proviso to Article 311(2) is again in the nature of an exception and lays down that in cases catalogue : in Clauses (a), (b)

and (c) thereof the requirement of an inquiry can be dispensed with. The scope of Article 310 and 311 of the Constitution was examined by this

court in *Tulsiram Patel* (supra), wherein by majority this Court held that once the requirements of the relevant clause of the second proviso are

satisfied, the services of a Civil Servant can be terminated without following the audi alteram partem rule. It was held that since the requirement of

Article 311(2) was expressly excluded . by the second proviso, there was no question of introducing the same by the back door. On this line of

reasoning, the majority held that *Challapan's case*, 1976(1) SCR 783, was not correctly decided. It is, therefore, taken the view that it is not

necessary to offer a hearing to the civil servant even on the limited question of punishment, In so far as Clause (b) is concerned, this Court pointed

out that two conditions must be satisfied to sustain any action taken there under. 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 factsituation 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

the 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 malafide or motivated by extraneous considerations or merely a ruse to dispense with the enquiry. Also

see *Satyavir Singh v. Union of India*, 1985(4) SCC 252: AIR 1986 SC 555, *Shivaji Atamji Sawant v. State of Maharashtra*, 1986(2) SCC 112:

AIR 1986 SC 617 and *Ikramuddin Ahmad Borah v. Superintendent of Police, Darrang*, 1988 (Supp. 1) SCC 663: AIR 1988 SC 2245.

It was further observed:

It was incumbent on the respondents to disclose to the Court of 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. Clause (b) of the second proviso to Article 311(2) can

be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental

inquiry.

It was concluded:

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the impse dixit of the concerned authority. 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.

11. In *Chief Security Officer and others v. Singhsan Rabi Das*, 1992 (1) SCT 595 (SC) 140, the Supreme Court of India was of the view that

there is no justification to dispense with the enquiry merely because the disciplinary authority thought that it was not feasible or desirable to procure

witnesses of the security/other railway employees since that will expose these witnesses and make them ineffective in future and if these witnesses

were asked to appear at a confronted enquiry they were likely to suffer personal humiliation and insults and even their family members may also

become targets of violence A.K. Koul v. Union of India, 1995(3) SCT 15. is another decision wherein it was said that in a case where the validity

of an order passed under clause (c) of the second proviso to Article 311(2) is assailed before a court or a tribunal so it can examine whether the

satisfaction of the President or the Governor is vitiated by malafides or is based on wholly extraneous or irrelevant grounds.

12. In Union of India v. Subramanian, 1985(1) SLR 238, the action to dispense with the enquiry by declaring it to be reasonably impracticable to

hold, was declared to be invalid. The court held that the constitutional requirement of Article 311(2) cannot be converted into a dead letter merely

because employees have developed class or group feelings.

13. A learned Single Judge of the Kerala High Court quashed the dismissal of an employee from service which was brought about by invoking

proviso (c) to Article 311 (2) of the Constitution of India on the ground that the petitioner believed in the philosophy of violence and was also an

accused in a murder case and the commission of murders was a part of his philosophy. It was held that there was nothing to show that holding of

an enquiry into the conduct of the petitioner was reasonably linked with the interest of security of the State. This judgment of the learned Single

Judge is reported as (1984) 2 SLR 669 was upheld in President of India v. Kunjappan, 1985(1) SLR 494 by a Division Bench. It was held that

the High Court has the power to ascertain whether the opinion formed by the authority has any factual basis and the conditions precedent to its

formation were there. It was observed:

In this case the President of India has no doubt powers under clause (c) of the 2nd proviso to Article 311(2) of the Constitution to dismiss a

member of the Civil Service of the Union without an enquiry if any only if he is satisfied that in the interest of the security of the State it is not

expedient to hold an enquiry into the charges against him. So, two conditions must exist, namely; (i) the security of the State is involved; and (ii) in

view of that it is inexpedient to conduct enquiry.

14. In *Kedarnath Singh v. Union of India and others*, 1984(2) SLR 347. a Division Bench of the Allahabad High Court while interpreting Rule 47

of the Railway Protection Forces Rules, 1959 which is in pari materia with proviso (b) to Article 311(2) rejected the contention of the Union of

India, that the inquiry was not reasonably practicable because the only eyewitness to the alleged incident was not willing to come forward and give

testimony against the delinquent. It was held that practicability is not to be confused with the expediency or the chances of success of the enquiry

contemplated against the delinquent member of the Force. What was said is being quoted:

Rule 44 embodies a sound principle of natural justice providing for a full and fair opportunity to the employee against whom it is proposed to

award a major penalty which includes dismissal or removal from service. Rule 47(b) has, therefore, to be construed strictly as it enables the

disciplinary authority to give a complete go-by to the aforesaid principles of natural justice embodied in Rule 44 and straightway, on the material

collected ex parte and behind the back of the delinquent member, to remove or dismiss him. In view of what has been stated above we are clearly

of the view that Rule 47(b) was illegally applied in the case of the petitioner. The grounds disclosed by the Assistant Security Officer were not

germane to the consideration on account of which enquiry under Rule 44 could be disposed with.

15. In *Shri Naresh Kumar v. Commissioner of Police*, 1992 (7) SLR 177, it was held that dismissal of constable without holding a regular enquiry

on the ground that the employees were allegedly of desperate character and their continuation in service was hazardous to police was unsustainable

when viewed in the light of the provisions contained in Article 311 (2) (b) of the Constitution of India.

16. The scope of these provisions was considered by Justice Syed Saghir Ahmed, former Chief Justice of this Court and now judge of Supreme

Court of India in *Ghulam MohiudDin v. State of J and K*, 1995 SLJ 212 Paras 6, 8, 9 and 10 deal with the same situation as are there in this case.

These paras read as under:

The proviso of Section 126(1) of the Jammu and Kashmir Constitution contemplates a departure from the normal rule of holding an enquiry into

the charges against the government servant."".

The Constitutional provisions of referred to above require that an enquiry shall be held against a government servant into charges of misconduct

for which he sought to be removed from service and that in that enquiry he shall be afforded an opportunity of hearing which necessarily includes

inter alia the right to file a reply to the charges and to lead evidence in support of the reply and also the right to cross-examine the witnesses if any

produced against him in that inquiry,

The quantum of enquiry required in a given case of the procedure which has to be followed in the enquiry is not under my consideration as the

enquiry itself in this case was dispensed with and therefore, the question whether the enquiry was properly dispensed with is one of the questions

on which the fate of this petition hinges.

As pointed out earlier, a Government servant is entitled to the protection contemplated by Article 311(2) and therefore he cannot be dismissed

from service unless he has been given an opportunity of hearing. The rule of exception is contained in the proviso to Article 311 (2) which is akin to

proviso Section 126(2) of the Jammu and Kashmir Constitution.

17. In another case reported as *Kuldeep Singh vs. State of Punjab*, 1996(10) SCC 659, departmental enquiry was not held because it was

observed that it is not reasonably practicable to do so. It was said that witnesses are not likely to come forward on account of the fear instilled by

the delinquent. Some confession was also said to have been made by the delinquent. This confession was taken to be voluntary in nature. In these

circumstances, the action taken under Article 311(2)(ii) proviso to clause (b) and 3 of the Constitution of India which proviso is similar to the

provision under which action has been taken in the present case, was upheld. Again in another case reported as *Union of India vs. Mohinder*

Singh, AIR 1977 SC 1201. the requirement of complying with regular departmental enquiry was held to be rightly dispensed with. The delinquent

was held to have created terror in the area. He had intimidated the complainant (victim) and two other persons in presence of the police officials. In

these circumstances, it was held that the opinion formed that no witness is likely to come and depose against the petitioner. It was accordingly held

that holding of enquiry was not possible. The decision so taken was upheld by

the Supreme Court of India. In a still later decision reported as Union of India vs. Balbir Singh AIR 1998 SC 2043, decision to dispense with regular enquiry was held to be not in any way contrary to the provisions of Article 311 referred to above. The position of law in this regard was summarised in paragraph 8. This paragraph reads as under:

If an order passed under Article 311(2) proviso (c) is assailed before a Court of law on the ground that the satisfaction of the President or the Governor is not based on circumstances which have a bearing on the security of the State, the Court can examine the circumstances on which the satisfaction of the President or the Governor is based' and if it finds that the said circumstances have no bearing whatsoever on the security of the State, the Court can hold that the satisfaction of the President or the Governor which is required for passing such an order has been vitiated by wholly extraneous or irrelevant considerations.

18. A perusal of the aforementioned decision indicates that there should be some material on record which should indicate that holding of enquiry is not possible.

19. In the present case the respondent authorities held preliminary enquiry. After holding enquiry it came to the conclusion that the petitioners were remiss in their duties. It is stated that on account of lapses on their part some detenues were able to escape from the Central Jail, Srinagar.

Petitioners have taken a plea that they were not present on the spot. It is urged that if respondent authorities could hold preliminary enquiry then nothing prevented them from holding regular inquiry. Mere observations that enquiry cannot be held because security of the State is likely to be threatened as per the counsel is not sufficient to permit the State Government to bypass the procedural safeguards.

20. There is merit in the above submission.

21. Other aspect of the matter is that the some of the petitioners have since been reinstated. As to how the case of remaining petitioner is not similar to other is a matter which should have gone into by the State Government. This has not been happened in this case. What was said by the Supreme Court of India in case reported as AIR 1984 SC 1499 and 1983 Labour Industrial Cases, 1970 (Sengara Singh v. State of Punjab)

would be attracted to the facts of the case. In the above case large number of

police constables were dismissed. Some of them were reinstated.

Decision to reinstate some of the constables and nonreinstatement of other was held to be discriminatory in nature, Ratio of the above decision be

equally attracted to the facts of the case.

22. I am accordingly of the view:

i) that respondentState was not having sufficient material which would justify its decision not to hold enquiry against the petitioner,

ii) the facts that the preliminary enquiry was held indicates that this was not such a case where enquiry could not be held,

iii) respondentauthorities have reinstated some of the persons similarly situated. Denial of benefits to others and nonconsideration of their cases is

definitely hit article 14 and 15 of the Constitution of India.

23. This petition is accordingly allowed Petitioners shall stand reinstated. They shall start getting their salary when they produce copy of the order

passed by this Court alongwith writ petition and annexures thereof before the officer who passed order of termination. Concerned officer would be

at liberty to proceed further in the matter. If it is decided to proceed further in the matter then chargesheet be served; an enquiry officer be also

appointed. As to how intervening period of the petitioners is to be treated and what consequential benefits are to be given would depend upon the

enquiry which may be held in this regard by the respondentauthorities Disposed of accordingly.