

(2019) 12 J&K CK 0013

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 20 Of 2017, MP No. 01 Of 2017

Ghulam Mohi-Ud-Din Khan

APPELLANT

Vs

State Of Jammu And Kashmir & Ors

RESPONDENT

Date of Decision : 07-12-2019

Acts Referred:

Constitution Of India, 1950 — Article 311, 311(1), 311(2), 311(2)(b), 311(2)(c)
Jammu And Kashmir Government Employees (Conduct) Rules, 1971 — Rule 14, 20
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 147, 148, 149, 307
Constitution Of Jammu And Kashmir, 1956 — Section 126, 126(2)(b), 126(2)(c),
311(2)(b)

Citation : (2019) 12 J&K CK 0013

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : Shahbaz Sikander Mir, N. H. Shah

Final Decision : Allowed/Disposed Of

Judgement

Ali Mohammad Magrey, J

1. When this matter was heard and judgment was reserved on 25th of November, 2019, Mr N. H. Shah, the learned Senior Additional Advocate General, who appeared and argued in the matter on behalf of the respondents, was directed to submit the relevant records within two days. However, despite lapse of almost two weeks, no records were submitted, constraining this Court to decide the matter in absence of such records.

2. By this petition, the petitioner has beseeched for the grant of following relief(s) in his favour:

"By issuance of writ, of certiorari, or any other writ, order or direction quashing the impugned dismissal order No. 142-Rev/NG/2016 dated 18.10.2016 issued by respondent No. 1.

By issuance of mandamus, or any other writ, order, or direction commanding

upon the respondents to reinstate the petitioner with retrospective effect including releasing his all benefits, arrears and salaries in favour of the petitioner.

Any other writ, order or direction though not specifically prayed for be issued in favour of the petitioner and against the respondents."

3. The case of the petitioner, as stated by him in his petition, is that various Patwari posts were created in Kashmir Valley, including district Anantnag, and that in view of the fact that the petitioner, among others, had successfully completed the Patwari training, the respondents absorbed/appointed the trained Patwaris in various districts, including the petitioner in district Anantnag vide order dated 28th of March, 1991. Consequent to the said order the petitioner joined the respondent department as Patwari and discharged his functions to the best satisfaction of not only the general public, but also his superiors. It is stated that the petitioner during this time served at various places in district Anantnag, latest being Patwari Halqa, Larm, Ganjipora, Tehsil Anantnag. It is further stated that during his entire service tenure, spanning for about more than 25 years, the petitioner has never earned any kind of adverse observation from the department nor was he ever indicted for any kind of misconduct, etc. The petitioner has proceeded to state that unfortunately the entire Kashmir Valley was caught in law and order crises in the month of July, 2016, which crises were unprecedented in nature resulting in huge loss of human life and destruction of property, besides all the Government/semi - Government departments non-functional. Thereafter, as stated, strict curfew was imposed throughout the Valley for about three months and, during this period, the entire district of Anantnag was handed over to the Indian Army for ensuring maintenance of law and order. Under such circumstances, the petitioner claims that like other peaceful common citizens he always tried to remain inside his home so as to ensure protection of his own self as well as of his family members. It is pleaded that the respondent No.1, completely at the back of the petitioner, issued a Government Order No. 142 - Rev/NG/2016 dated 18th of October, 2016, pursuant to which the petitioner has been dismissed from service. This order has been called in question by the petitioner in the instant petition on varied grounds detailed out in the petition.

4. Objections stand filed on behalf of the respondents, resisting and controverting the averments made in the petition. It is stated that the Additional Director General of Police, CID, vide communication No. CID/BR/GE/ 2016/2000 dated 22nd of September, 2016, forwarded copy of dossier and other related documents in respect of the petitioner, thereby reporting the adverse activities of the petitioner. On perusal of the dossier and other related documents, it transpired that the petitioner has been found involved in anti-national activities including, taking part in causing disturbance and disorder to the public peace; intimidating general public/shopkeepers to observe shutdown/ calls given by separatists; and instigating youth to indulge in stone pelting. The material also brought to fore that as President of the local Masjid Committee, the petitioner

has played a vital role in instigating/mobilizing local people, especially the youth to participate in anti-national and violent processions/protests and that on 9th of July, 2016, on the instigation of the petitioner, an unruly mob, while starting from Nadoora and adjoining localities, marched towards Dooru, during which they attacked a Police party with lathies at Nadoora Bridge, for which case bearing FIR No. 93/2016 for the commission of offences punishable under Sections 147, 148, 149, 307 of the Ranbir Penal Code (RPC) was registered against the petitioner. It is pleaded that being a Government employee, the petitioner was not expected to indulge in the aforesaid activities and, instead, was supposed to maintain absolute integrity, devotion to duty and do nothing unbecoming of a Government employee. The respondents have proceeded to state that the aforesaid activities of the petitioner are not only aimed at questioning the sovereignty and integrity of India, but are also violative of rules 14 and 20 of the Jammu and Kashmir Government Employees (Conduct) Rules, 1971 and that the continuation in service of the petitioner, in these circumstances, will set a bad precedent tantamount to putting a premium on indulging in misconduct, subversion and anti-national activities. It is also contended that in view of the prevailing situation and keeping in view the charged atmosphere, including threat perception to the witnesses, it was not felt feasible for the witnesses to depose in case of any inquiry against the petitioner and, thus, it was felt that holding of any inquiry is not practicable at that stage in the given circumstances and, as such, holding of inquiry against the petitioner was dispensed with. Accordingly, in exercise of powers conferred under Clause(b) of Sub-Section (2) of Section 126 of the Constitution of Jammu and Kashmir, the petitioner who was presently posted as Patwari, Halqa Larm Ganjipora, Tehsil Anantnag, was dismissed from service vide Government Order No. 142-Rev(NG) of 2016 dated 18th of October, 2016.

5. Heard the learned counsel for the parties, perused the pleadings on record and considered the matter.

6. The main plank of the argument of the learned counsel for the petitioner is that no satisfaction has been recorded by the disciplinary authority in the impugned order for coming to the conclusion that it was not reasonably practicable to hold an enquiry into the matter. The learned counsel has further argued that if the inquiry was dispensed with on the ground of security of State, then, under Section 126(2)(c) of the Constitution of Jammu and Kashmir, the power, in such case, was required to be exercised by the Governor and not by the Commissioner Secretary to Government. It is also the case of the learned counsel that any order dispensing with holding of a regular departmental inquiry in pursuance of the provisions of Section 126(2)(b) must be based on some objective criteria and that satisfaction has to be recorded in the order itself for dispensing with such an inquiry.

7. Mr N. H. Shah, the learned Senior Additional Advocate General, appearing on behalf of the respondents, has argued that the inquiry against the petitioner was

dispensed with on the ground that he was involved in anti-national activities and, at that point in time, there was extremely disturbing law and order situation in the Valley, therefore, the petitioner could not have been kept on the rolls of the Department for an indefinite period. According to the learned Senior Additional Advocate General, there were good reasons which made holding of enquiry impracticable, viz. gross negligence shown by the petitioner in performance of his duties; and, secondly, extremely disturbing law and order situation in the Valley.

8. A bare perusal of the order impugned brings it to limelight that the Commissioner/ Secretary to Government, Revenue Department has invoked the powers vested in him by virtue of Section 126(2)(b) of the Constitution of Jammu and Kashmir, corresponding to Section 311(2)(b) of the Constitution of India, which 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.

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 further that this sub-section 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 in sub-section

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

It is well settled legal position, as has been held in a number of cases by Hon'ble the Supreme Court as well as by this Court, that an employee can be terminated

from service only after holding a regular inquiry into his alleged misconduct. There is, however, an exception to this rule provided by the proviso to the said Section. Clause (2) (b) of the Section aforesaid permits a disciplinary authority to terminate the services of an employee without holding an enquiry if the authority is of the opinion that it is not reasonably practicable to hold an enquiry into the matter. It is also well settled, now, that while exercising the powers vested in the said clause, the disciplinary authority has to record his satisfaction that it is not reasonably practicable to hold an enquiry into the matter. The circumstances must be such and the material should be so sufficient that the authority concerned must, on consideration of the same, be satisfied that it is not reasonably practicable to hold the enquiry. In the present case, perusal of the order impugned would show that no such satisfaction is recorded by the disciplinary authority while dismissing the petitioner from service. The Government has found that the petitioner is involved in anti-national activities and that he is likely to be a threat to the security of the State. If the inquiry was dispensed with on the ground of security of the State, under Section 126(2) (c) of the Constitution of Jammu and Kashmir, the powers in such case are to be exercised by the Governor and not by the Commissioner/ Secretary to the Government, Revenue Department. It is beyond the powers and jurisdiction of a Commissioner/ Secretary to the Government to dispense with the enquiry on the ground of security of the State. A Commissioner/ Secretary to the Government, being the disciplinary authority for a Patwari, under the provisions of Section 126(2)(b) can dispense with the inquiry provided he is satisfied, on the basis of circumstances, that it is not reasonably practicable to hold inquiry, but where there is no such satisfaction recorded in the impugned order, the exercise of powers under the said proviso cannot be justified.

9. In the case on hand, given the aforesaid legal and factual backdrop, I am of the opinion that the basic requirements for dispensing with the inquiry have not been fulfilled. Article 311 of the Constitution of India, corresponding to Section 126 of the Constitution of Jammu and Kashmir, provides a constitutional safeguard to a person holding a civil post from being reduced in rank, removed or dismissed from service. Both Article 311 and Section 126 have imposed constitutional limitations and restrictions on the power of the Government subject to which these three major penalties could be imposed on a government servant. Article 311(1) of the Constitution provides that a member of a civil service of the Union or State could not be dismissed or removed by an authority subordinate to the one who had appointed him. According to Article 311(2), no civil servant can be dismissed or removed or reduced in rank except after an enquiry in which he/she has been informed of the charges against him/her and he/she has been given a reasonable opportunity of being heard in respect of those charges. However, second proviso to clause (2) of Article 311 postulates three situations where holding of such departmental enquiry has not been regarded necessary, viz.:

a.) where an employee has been convicted of a criminal charge;

b.) where the competent authority is satisfied that compliance with the rules of natural justice is not reasonably practicable; and

c.) the President or the Governor is satisfied that holding of an enquiry is not expedient in the interests of the security of the State.

In the present case, the order has been passed by invoking the provisions of Section 126(2) (b), corresponding to Article 311(2)(b), i.e., the competent authority is satisfied that compliance with the rules of natural justice is not reasonably practicable.

10. The question, which confronts the Court, is whether the order dated 18th of October, 2016 fulfills the requirement of Section 126(2)(b), corresponding to Article 311(2)(b). A bare perusal of the order aforesaid makes it axiomatic that the conduct of the petitioner has been described as against the sovereignty and security of the State. There is no satisfaction recorded by the authority in the order disclosing as to how it was not reasonably practicable to hold the departmental inquiry. True it is that the subjective opinion expressed in the order dispensing with the departmental inquiry could always be subject to judicial review by the Courts. In ' Union of India & Anr. v. Tulsiram Patel; (1985) 3 Supreme Court Cases 398', Hon'ble the Supreme Court has, in categorical terms, held that the satisfaction must be recorded to the effect that it was not reasonably practicable to hold the inquiry. What is requisite is that holding of the enquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. The order impugned does not, in any manner, indicate that any satisfaction within the meaning of Article 311(2)(b) of the Constitution of India read with Section 126(2)(b) of the Constitution of Jammu and Kashmir has been recorded by the concerned authority. The only feature highlighted in the impugned order is that the petitioner is likely to be a threat to the security of the State, but, in such a situation, the order was required to be passed by the Governor as per the stipulation made in Article 311(2) (c) of the Constitution of India.

11. The Courts have gone to the extent of holding in a case where a member of the Government Department reported to have thrown threats to the effect that he, with the help of other employees, would not allow holding of a departmental inquiry against him and would not hesitate to cause physical injury to the witnesses as well as to the inquiry Officer, that the satisfaction recorded for dispensing with the holding of inquiry was not valid or proper. In that regard, reliance may be placed on the judgment rendered by the Apex Court of the country in case titled 'Jaswant Singh v. State of Punjab; (1991) 1 SCC 362'. The reason for reaching the conclusion that the satisfaction recorded for dispensing with the inquiry was not valid is that no record was produced to show that the petitioner had thrown threats that he and his companions would not allow holding any departmental inquiry against him and that they would cause physical injury to the witnesses as well as to the inquiry Officer if any such inquiry was held. In absence of any material on record, their Lordships of Hon'ble the

Supreme Court, in the aforesaid judgment, did not allow dispensing of enquiry. It was incumbent upon the respondents to disclose to the Court the material in existence on the date of passing of order impugned in support of the subjective satisfaction recorded in the said order. Clause (b) of the second proviso to Section 126 of the Constitution of Jammu and Kashmir, corresponding to Article 311 of the Constitution of India, 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. This is evident from the observation made at Paragraph No.130 of Tulsiram Patel's case (supra), which is extracted hereinbelow:

"A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the Government servant is weak and must fail."

The decision to dispense with the departmental inquiry cannot, therefore, be rested solely on the ipse 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. It is also pleaded by the respondents that there is a threat perception to witnesses in case a departmental inquiry is held against the petitioner, but no details thereto are given. It is not shown on what material the respondents have come to the conclusion that there is a threat perception to the witnesses, as alleged in the order impugned. On a close scrutiny of the order impugned, it seems the satisfaction was based on the ground that he was indulging in activities prejudicial to the security of the State.

12. In the present case, the decision to dispense with the departmental enquiry in fact, rested solely on the ipse dixit of the Commissioner/ Secretary to Government, Revenue Department. There is no material placed before this Court to 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. The basic requirements of law providing for procedural safeguards to an employee have been completely shelved, therefore, the order impugned is liable to be quashed.

13. For the aforesaid reasons, the petition of the petitioner is allowed and the order impugned dismissing the petitioner from service is quashed. Resultantly, the petitioner shall be reinstated in service forthwith and allowed to continue in the respondent Department with all service benefits. The competent authority, however, shall be free to conduct departmental inquiry against the petitioner, if they so choose, which enquiry shall be completed within a period of six months from today, unless on cause shown, period is extended. In case no inquiry is conducted within the above stipulated period, the petitioner shall be entitled to all service benefits from the date of termination till reinstatement in service and

in future as well.

14. Writ petition disposed of as above, alongwith the connected CM.