

(1996) 04 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 352/1990

Mohammad Shafi Mir

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 12-04-1996

Acts Referred:

Constitution of India, 1950 — Article 311(2)

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

Citation : (1997) SriLJ 164

Hon'ble Judges : A.Q.Parray, J

Bench : Single Bench

Advocate : H.I.Hussain, Advocates appearing for the Parties

Judgement

1. This case has been listed for final hearing today in the regular cause list and the State is being shown represented by Mr. B.M.Sidiq, Additional

Advocate General, but he is not present.

2. In this petition, petitioner has called in question his order of dismissal from service purported to have been passed by the Governor, dismissing

the person of Mohammad Shafi Mir, SubInspector No. 907/NGO, posted as SHO Police Station Panzla from Service, The impugned order

bearing No: 652GR (Home) of 1990 dated 1951990 reads as under:

JAMMU AND KASHMIR HOME DEPARTMENT.

Sub: Dismissal of Shri Mohd. Shafi SubInspector No. 907/NGO posted as SHO, PS. Panzla from service.

Order No: 652GR (Home) of 1990 Dt: 1951990.

Whereas the Governor is satisfied that the conduct and activities of Shri Mohammad Shafi SubInspector No. 907/NGO posted as SHO PS

Panzla are detrimental and prejudicial to the security of the State and, therefore, it is necessary that the said Shri Mohammad Shafi should be

dismissed from service;

And whereas the Governor is further satisfied that in terms of Clause (c) of the proviso of SubSection (2) of Section 126 of the Constitution of

Jammu and Kashmir, that in the interests of the security of the State it is not expedient to hold an enquiry against the said Shri Mohammad Shafi,

SubInspector.

Now, therefore, the Governor, in accordance with the provisions of Section 126 of the Constitution of the J&K, hereby dismiss the said Shri

Mohammad Shafi SubInspector from service with immediate effect.

By order of Governor.

Sd/Add. Chief Secretary (Home).

3. This order came to be challenged by way of present petition which came to be numbered as SWP No: 352 of 1990. Notice for admission was

issued at the time of motion of the petition. In response to the notice, respondents appeared and the petition seems to have been admitted on

25/9/95 and the notice was again accepted by the respondents, directing them to file counter. Despite clear cut directions, it seems that no

counter has been filed by the respondent/ State, though the matter was adjourned from one date to another. Even records have not been made

available for the perusal of the court. So the averments made in the petition have remained unrebutted by the other side.

4. The petitioner has assailed the order of his termination, impugned in this petition, inter alia, on the grounds that the satisfaction of the Governor to

the effect that conduct and activities of the petitioner are detrimental and prejudicial to the security of the State and that in the interests of security

of State, it is not expedient to hold an enquiry, is based on wholly extraneous and irrelevant grounds. Same has been reached mala fide and without

there being any material which could have formed the basis of such satisfaction.

6. Second ground of attack as pleaded in the petition is that because the various certificates awarded to the petitioner by officials of the Intelligence

Department of the State, forming annexures PVII and PVIII, indicate the dedication of the petitioner for his determination to lay his life for the

security of the State and it negatives the fact that the petitioner would have ever indulged in any activity prejudicial to the security of the State. The

impugned order is based on whims and not on any relevant material. At the cost of repetition, extracts of annexure PVD and PVIH are being

quoted hereunder:

CRIMINAL INVESTIGATION DEPARTMENT, JAMMU AND KASHMIR GOVERNMENT, JAMMU.

Order No: 105 of 1988

Dt: 29/3/1988,

The following officials of Counter Intelligence Kashmir are awarded commendation certificate Class I with cash reward as shown against each for

doing commendable job in effecting the arrest of one Surinder Singh Bali, a member of an underground organisation at the risk of their own life: 2.

Mohd. Shafi a KB.Mulla Rs. 50/ CCI

Sd/

(M.N.Sabharwal) OPS,

Inspector General of Police,

CID, J&K, Jammu.

CRIMINAL INVESTIGATION DEPARTMENT, J&K SRINAGAR.

Order No 242 of 1989

Dt: 12/8/1989

The following officers/officials of CID Counter Intelligence and SB Kashmir did commendable work in collection valuable information/intelligence

to combat the challenge of terrorists posed by the JKLF activists. In recognition of commendable work done by them, they are awarded

commendation certificate Class I alongwith cash reward as shown against each:

3. SI Mohd. Shafi Mir, 907/NEO Rs. 250/Class I

Sd/

(Amar Kapoor) IPS

Inspector General of Police,

CID J&K, Srinagar.

7. By projecting these commendation and Cash reward certificates, learned

counsel for the petitioner submits that instead of having been given due regard and recognition to these certificates, the petitioner has been dismissed from service without any reason muchless sufficient material for satisfaction.

8. The third ground of attack pleaded by the petitioner is that the appointing authority of the petitioner was Director General of Police and it was he, who was only competent to remove him from service. Mr Ishtiaq submitted his arguments alternative though not admitted that there was any material before the Governor sufficient for his satisfaction that in the interests of the security of the State, holding of enquiry was not expedient and in such a case, he ought to have only dispensed with the holding of enquiry and the orders of his dismissal or removal from service should have been passed by the competent authority i.e. Director General of Police and in that context if the order of dismissal or removal would have been passed by the competent authority though without hearing him, but atleast at the time of infliction of punishment, the petitioner had a right of audience and even if the petitioner was not satisfied by the order passed by the competent authority, he had a right of appeal to be preferred before the appellate authority, as per the J&K Police Rules. The contention of the petitioner is that he has been deprived not only of the right of audience but also the right of appeal.

9. The forth ground of attack is that the order impugned is violative of principles of natural justice and mandates of Article 14 of the Constitution of India. The contention that it was not expedient to conduct enquiry, has not been formed by the Governor on bonafide grounds and that there was no relevant material before the Governor to satisfy himself that it is not expedient to hold an enquiry against the petitioner. The satisfaction thus recorded by the Governor is no satisfaction in the eyes of law and so on.

10. Ld. Counsel for the petitioner, while projecting his arguments on the grounds he has taken in the petition, has taken me through the famous case of Tulsi Ram, wherein right of audience has been held by the apex court is a must and even in cases where the competent authority dispenses with holding of enquiry for the reasons, which to be spelt out in the order itself as to what were the reasons that the enquiry was not conducted. It is not on the ipse dixi of the competent authority that the enquiry was not

conducted, but whenever the competent authority dispenses with the holding of enquiry, he must keep it in mind that his order will be subjected to judicial scrutiny and the competent authority must be in a position to satisfy the judicial scrutiny that such enquiry was dispensed with for the reasons which emanate from the very order itself and is supported by the supporting material, so that the judge can also feel satisfied that circumstance were there, why enquiry has been dispensed with. This is regarding the enquiry or dismissal from service under Article 311(2) (b) of the Constitution of India corresponding to Section 126 (2) (b) of the Constitution of the Jammu and Kashmir State.

11. Similarly in the case of dismissal without enquiry under Article 311(2) (c) of the Indian Constitution, corresponding to Section 126(2Xc) of the State Constitution, judicial review is there. It has not been taken away. While delivering their judgment the apex court in AIR 1995 SC 1403 have observed as under :

.. .We are, therefore, of the opinion that an order passed under Clause (c) of the second proviso to Article 311(2) is subject to judicial review

and its validity can be examined by the Court on the ground that the satisfaction of the President or the Governor is vitiated by malafides or is

based on wholly extraneous or irrelevant grounds within the limits laid down in S.R.Bomma, (1994 AIR SCW 2946)

12. So on the basis of judicial pronouncements and the mandates laid down by the apex court, any order passed by the Governor or the President

is subject to judicial review irrespective of the fact whether any privilege with regard to such order is made or not. It has also been laid down that:

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 it is open

to the Court or the Tribunal to examine whether the satisfaction of the President or the Governor is vitiated by malafides or is based on wholly

extraneous or irrelevant grounds and for that purpose the Government is obliged to place before the Court or the Tribunal the relevant material on

the basis of which the satisfaction was arrived at subject to a claim of privilege under Sections 123 and 124 of the Evidence Act to withhold

production of a particular document on record. Even In cases where such a privilege is claimed, the Government concerned must disclose before

the Court or tribunal the nature of the activities in which the Government employee is said to have Indulged in.....

13. So their lordships, while drawing distinction between Article 311(2)(b) and 311(2Xc) of the Constitution, were pleased to observe that:

.....under Article 311(2Xb), it is required

that the authority has to record in writing the reason for its satisfaction that it is not reasonably practicable to hold such inquiry. Clause (c) of the

second proviso does not prescribe for the recording of reasons for the satisfaction. But the absence of such a requirement or record reason for the

satisfaction does not dispense with the obligation on the part of the concerned Government to satisfy the Court or the Tribunal if an order passed

under Clause (c) of the second proviso to Article 311(2) is challenged before such Court or Tribunal that the satisfaction was arrived at after

taking into account relevant facts and circumstances and was not vitiated by malafides and was not based on extraneous or irrelevant

considerations. In the absence of the said circumstances being placed before the Court or the Tribunal it may not be possible for the concerned

employee to establish his case that the satisfaction was vitiated by malafides or was based on extraneous or irrelevant considerations. While

exercising the power under Article 311(2) (c), the President or the Governor acts in accordance with the advice tendered by the Council of

Ministers, Article 74(2) and Article 163(3) which preclude the Court from inquiring into the question whether and, and if so, what advice was

tendered by the Ministers to the President or the Governor .enable the concerned Government to withhold from the court the advice that was

tendered by the Minister to the President or the Governor. But as laid down in S.R. Bommai (1994 AIR SCW 2946) (supra), the said provisions

does not permit the Government to withhold production in the Court of the material on which the advice of the Ministers was based. This is,

however, subject to the claim of privilege under sections 123 and 124 of the Evidence Act in respect of a particular document or record. The said

claim of privilege will have to be considered by the court or tribunal on its own merits. But the upholding of such claim for privilege would not stand

in the way of the concerned Govt. being required to disclose the nature of the activities of the employee on the basis of the which the satisfaction of

the President or the Governor was arrived at for the purpose of passing an order under Clause (c) of the second proviso to Article 311(2) so that

the court or tribunal may be able to determine whether the said activities could be regarded as having a reasonable nexus with the interest of the

security of the State. In the absence of any indication about the nature of the activities it would not be possible for the Court or the Tribunal to

determine whether the satisfaction was arrived at on the basis of relevant considerations. The nature of activities in which employee is said to have

indulged in must be distinguished from the material which supports his having indulged in such activities. The nondisclosure of such material would

be permissible if the claim of privilege is upheld.....

14. In the present case, I don't find any of such plea being taken or raised or projected by the respondent State. Even they had not produced or

had the cheek to put any defence whatsoever was in their possession to justify the order passed by the Governor, dispensing with the services of

the petitioner under Section 126(2)(c) of the State Constitution, which is corresponding to Article 311 (2)(c) of the Constitution of India.

15. Ld. Counsel for the petitioner has also taken me through the judgment passed by a bench of this court reported as 1995 SLJ 19 titled Nazir

Ahmad Dar versus State and others, wherein same view has been taken.

16. In the case in hand, I find that the respondent State has miserably failed to put in any defense or to produce any records to justify the impugned

order passed by the Governor, thereunder services of the petitioner have been dispensed with without holding any enquiry and as such, the order

impugned cannot stand judicial scrutiny. The result is that this petition is allowed and by issuance of a writ of certiorari, the order impugned, bearing

No:652GR(Home) of 1990 dated 1951990 passed by respondent, is quashed and by a writ of mandamus, respondents are directed that the

petitioner be taken back in service, as if the order of his dismissal, impugned in this petition, has never come into existence and the petitioner be

given all the consequential benefits, which have accrued to him from the date of issuance of the impugned order. However, there is no order as to

costs. File be consigned to records.