

(2005) 07 J&K CK 0005

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1819 of 1994

Mohd. Baqir

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 25-07-2005

Acts Referred:

Citation : (2010) 3 JKJ 124

Hon'ble Judges : Mansoor Ahmad Mir, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Mansoor Ahmad Mir, Judge

1. It appears that petitioner was appointed as a driver in terms of annexure-P 1. The 1. petitioner applied for 10 days casual leave on 11.05.1985,

which was duly sanctioned by respondent no. 2 in his favour. The petitioner had to resume his duties on 21st of May, 1985, but due to domestic

problems the petitioner applied for extension of leave. The petitioner reported back in the office of respondent no. 3 on 21.07.1985 and he was

informed that extension of leave sought by him has been rejected and he has been placed under suspension by respondent no. 4 vide Order No.

217-18/Coop dated 31.05.1985 and one Ghulam Mohammad was appointed on adhoc basis for a period of three months in terms of annexure

P2. In the said order, it is mentioned that petitioner was called for duty after availing ten days casual leave vide letter No. 125/Coop/DR dated

17.05.1985 and No. 132/Coop-DRDK dated 20.05.1985 and the petitioner refused to attend duty and which amounted to noncompliance of the

orders and warranted disciplinary action under Jammu and Kashmir Civil Service

Regulations and, therefore, the petitioner was placed under suspension with immediate effect from 21.05.1985. The suspension allowance was not paid to the petitioner. He made representations contained in annexures P3 to P5. The petitioner filed a writ petition No. 1011 of 1994, the said petition was admitted to hearing on 10th May, 1994. The order was served to respondent no. 4, instead of paying subsistence allowance to the petitioner, the respondent no. 4 addressed a communication dated 21.05.1994 to the petitioner, wherein the petitioner was informed that petitioner has been discharged from service nine years back and as such, payment of subsistence allowance does not arise. The said communication is contained in annexure-P6. Neither the order of discharge was served upon the petitioner nor was he informed that his services have been discharged till 21st May, 1995.

2. It appears that SWP No. 1819/1994 has been filed on 14th July, 1994. Notice was issued to respondents 3 and 4 at the first instance vide

order dated 18th July, 1994 and the respondents were directed to produce record relating to discharge of the petitioner. The respondents have

failed to produce record. It appears that objections have been filed on 7th September, 1994 by Mr. G. Mustafa, GA and the copy of the said

termination order was given to Mr. Beigh, learned counsel for the petitioner and Mr. Beigh stated at Bar that he was not aware about passing of

the order and sought permission to amend the writ petition. The permission was granted. Petitioner filed amended petition on 14th July, 1995. Mr.

G. Mustafa made a statement that objections already filed be treated as objections to the amended petition, same was allowed vide order dated

21st December, 1995. The petition stands admitted vide order dated 9th August, 2000. It is profitable to reproduce said order herein:-

Admit. Objections filed on behalf of the respondents 1 to 4 are treated as counter. Rejoinder, if any, within three weeks. Process for hearing thereafter.

3. The petitioner filed rejoinder on 19th September, 2002 and this is how the case has ripen up for final hearing.

Mr. Wani argued that petition be dismissed on the ground of laches and delay.

4. It appears that petitioner has applied for leave which was admittedly sanctioned by the respondents and the messages have been issued on 17'

May 1995 and 20th May, 1995, when the petitioner was on leave. The petitioner has applied for extension in leave from 21st May, 1995 as

pleaded in paras-5 and 6 of the writ petition. It is profitable to reproduce the reply of the respondents to the said paras herein;

5. That in reply to para 5 it is submitted that the extension in favour of the petitioner was not granted and the same was informed to the petitioner.

But the petitioner deliberately failed to resume his duties back.

6. Para 6 of the petition is denied. It is submitted that after availing the sanctioned leave the petitioner never attended the duties physically, which

compelled the authorities to place the petitioner under suspension.

5. It is pertinent to mention here that till 20th May, 1985 the petitioner has availed leave which was duly sanctioned by the respondents, which is

admitted by the respondents herein-above. Then under what circumstances, the messages were issued on 17th and 20th May, 1985 and petitioner

was placed under suspension w.e.f. 21st May, 1985. The respondents have nowhere pleaded in the reply that notice was issued to petitioner after

expiry of the sanctioned leave and it is not the case of the respondents that petitioner was informed that his extension of leave was rejected. The

respondents have not made any whisper in their reply that any notice was issued after 21st May, 1985 to the petitioner about the absence from

duty.

6. It appears that respondents have pleaded that charge sheet was served upon the petitioner which the petitioner refused to acknowledge but no

record has been filed suggesting the fact that petitioner has refused to acknowledge the charge sheet. The learned counsel for the respondents was

asked to show whether any notice was served after 21st May, 1985 and whether charge sheet was served. In response, the learned counsel for the

respondents referred to the messages, referred hereinabove, which pertains to the date of 17th and 20th May, 1985. The respondents have not

been able to show that charge sheet was framed and after charge sheet enquiry was conducted and after enquiry services of the petitioner were

terminated. There is nothing on the file suggesting that notices of first stage or second stage were served upon the petitioner. It appears that without

following the due procedure, the services of the petitioner were terminated.

7. Mr. Hussain has relied upon a judgment of this court delivered in case Gh.

Jeelani Mir v. Srinagar Municipal Council (SWP No. 1088/1998).

The facts of the said case are almost similar. This court has held that when the services of the employee are terminated in breach of the law and the

said employee is entitled to opportunity of hearing before termination order is passed which is a major penalty. It is profitable to reproduce relevant

portion of the said judgment herein;-

.....Respondents have not provided an opportunity to the petitioner to show cause and has passed the impugned order in breach of the

principles of natural justice which amounts to abrogation and denial of fundamental right. Not only that, the record does not convey that the

termination order was ever served upon the petitioner.

Under such circumstances, the petitioner was right in his apprehension that his services have not been terminated and applied to the respondents

for permitting him to join the duties. His representation(sic) -- disposed of by the respondents as per record in the year 1997.

It is also seen from the interim orders of the petition that initially suspension order was challenged. Respondents in their objections pleaded that the

petitioner's services stood terminated vide order No. 423 of 1980 dated 6.2.1980. The court vide interim order dated 7.5.1999 directed the

respondents to furnish a copy of the order of termination to the petitioner and also permitted the petitioner to amend the writ petition with a view to

assail the termination order. The amended petition came to be filed, challenging the termination order. Thus it was only through the intervention of

the court that the petitioner came to know about the order of termination as the same was never served upon the petitioner till the filing of the writ

petition. Hence the laches cannot be attributed towards the petitioner especially when there is clear violation of the fundamental rights. The

termination order suffers from another infirmity also of having been passed by an incompetent authority and that too without conducting any

enquiry. "" In the given circumstances, the lapse cannot be attributed to the petitioner.

8. This petition stands admitted, as discussed above, and at the time of admission, the respondents have not taken the plea that petition is caught

by delay and laches. It was for the respondents to take the plea and reserve the right. They are precluded from raising such plea at this stage. My

this view is fortified by the judgment of Division Bench of this Court delivered in LPA No. 138 and 168 of 1999 titled Bashir Ahmad Bhat v. State

of J&K, decided on 03.08.2004. It is profitable to reproduce relevant portion of para-3 of the said judgment herein;-

.....It is also the proposition of law that delay and latches should be considered before admission of the writ petition. The petition has not been

admitted subject to delay and latches, which were not pressed at the time of its admission. Therefore, the writ petition under such circumstances

cannot be dismissed on account of delay and latches.

9. In the given circumstances, the petition is hereby allowed and writ of certiorari, quashing impugned order No. 1251-53/Coop-DRK dated

30.11.1985 passed by respondent no. 4 is issued. Writ of mandamus is also issued commanding the competent authority to hold enquiry, if so

warranted and desired against the petitioner. The enquiry shall be conducted within a period of three months from the date the order is

communicated to the respondents. The quashment of the order shall not entitle the petitioner to claim any back-wages/pay/salary. The period,

however, shall be decided by the authorities on the basis of the finding in the enquiry, if held.