
(2002) 09 J&K CK 0015

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeal No.313 of 1998 And LPA NO.68 Of 2000

Mohd.Ashraf Mufti

APPELLANT

Vs

State of J&K and Another

RESPONDENT

Date of Decision : 16-09-2002

Acts Referred:

Civil Services Regulations, 1956 — Article 128

Jammu and Kashmir Civil Services (Leave) Rules, 1979 — Rule 15, 17, 27

Citation : (2003) JKJ 727 Supp : (2003) KashLJ 382 : (2003) SriLJ 76

Hon'ble Judges : B.C.Patel, C.J and Muzaffar Jan, J

Bench : Division Bench

Advocate : M.Abdul Qayoom, A.M.Magray, Advocates appearing for the Parties

Judgement

1. Cross appeals have been submitted,

One by Dr. Mohd. Ashraf Mufti, under LPA no.258 of 1998 titled Dr. Mohd. Ashraf v. State and another and other by the state under LPA no.

68 of 2000 titled director and exofficio Secretary to govt. V. Dr. Mohd. Ashraf Mufti and in both the appeals the order of learned single judge

dated ,24.09.1998 passed in SWP no.312 of 1989 has been challenged.

2. Since common question of fact and law are involved in both the appeals, the appeals are decided by this common judgment.

3. Facts revealed from the record of LPA 313 of 1998 are that the appellant Dr. Mohammad Ashraf Mufti was initially employed as a lecturer in

the discipline of paediatrics in SherI Kashmir institute of medical sciences, soura, and subsequently was promoted to the post of professor in the

department of paediatrics. The appellant, on 07.02.1988, while availing the second half period of winter vacations, commencing from 4.2.1988 to

3.3.1988, applied for ten weeks earned leave, to take effect from 15.3.1988, in

order to proceed to Saudi Arabia for performing Umrah. The appellant further submits that although, he left the leave application with the respondents, he was given to understand that the leave would be sanctioned to enable him to perform Umrah, but when he returned from Saudi Arabia on 28.02.1989, he was served with the order of termination no: IMS/ 4/1989 dated 16.01.1989. The order of termination was challenged in SWP no.312 of 1989. The appellant, while admitting that he overstayed in Saudi Arabia, in order to meet his relations and friends, asserts that he initially applied for extension of leave for six months, and then again for six months telegraphically. The leave requested by the appellant was not rejected and no charge sheet, show cause notice, any decision of punishment or order or termination was received or served on him at his home address. Enquiry conducted at his back, submits the appellant, constituted violation of art.311 of the constitution of India corresponding to section 126 of the constitution of Jammu and Kashmir, and as such the order or termination dated 16.01.1989 was bad in law. The learned single judge, after considering the controversy on merits, disposed of the writ petition (SPW) 312 of 1989 on 24.9.1998 with the following directions:this petition is disposed of with the direction that the petitioner would stand reinstated in service. He would start getting wages with effect from the date he produces copy of the order passed by this court before appointing authority, that authority would be at liberty to come to conclusion as to whether further enquiry is required to be held in this case or not. If it comes to the conclusion that further enquiry is required to be held then charge sheet would be served on the petitioner and enquiry officer would also be appointed. In case it is not proposed to proceed further in the matter then petitioner be reinstated and given all benefits minus back wages." aggrieved of the directions of the learned single judge in refusing to direct payment of back wages, letters patent appeal no.313/98 has been filed by the appellant.

4. The plea taken in the memo of appeal No.313 of 1998 are that no enquiry was conducted by the respondents which fact has been observed by the learned single bench, and once it is held that the order of termination is bad because of noncompliance with the mandatory requirement of article 311 of the constitution of India corresponding to section 126 of the

constitution of state, and the writ petition was allowed with direction to reinstate, the appellant would be entitled to back wages and other consequential benefits. Further plea is that absence from duty has been held to be a technical misconduct, but it is obligatory for respondents to conduct a regular enquiry before awarding punishment. Withholding of back wages, on a clear finding that no valid enquiry, in accordance with law, has been conducted with directions to reinstate, would not, under law, justify the order of withholding back wages urges the counsel for the appellant. The respondents were granted liberty to conduct fresh enquiry by writ court but as no fresh enquiry has been conducted, therefore, the respondents are bound to pay back wages and the order of the writ court, to the extent it denies the said relief to the appellant, is liable to be set aside argues the counsel.

5. In the cross appeal (Ira.no.68/ 2000) while admitting that Dr. Mohd. Ashraf Mufti, respondent in this appeal, was an employee of SherIKashmir institute of medical sciences, soura, holding the status of professor in the department of paediatrics, the submissions made is, that he availed the winter vacations from 4.2.1988 to 3.3.1988 and then applied for extension of his leave on 7.2.1988 during vacation to take effect from 15.3.1988 for performing Umrah. Without waiting for sanction of leave of ten weeks, Dr. Mohd. Ashraf Mufti, left the country for Saudi Arabia without any permission. It is maintained that he has telegraphically informed on 2.4.1988 that the leave applied for by him, has been rejected and he should report back and resume his duties after the expiry of vacations on 5.3.1988. The respondent, Dr. Mohd. Ashraf Mufti, did not return to resume his duty on 5.3.1988 and continued to remain absent and out of country unauthorisedly inspite of notice. He was, accordingly, chargesheeted vide order no.skims/per/620/882411 dated 27.4.1988. He did not reply to the charge Sheet. Subsequently, show cause notice was published in government gazettee dated 14.7.1988. As no cause was shown by Dr. Mohd. Ashraf Mufti for his unauthorised absence, his service were terminated vide order dated 13.1.1989. The order of termination of the services of the respondent was passed after complying with requirement of law. The respondent, Dr. Mohd. Ashraf Mufti, having served in a foreign country, would not be entitled to any benefit either of reinstatement or of

back wages, and as such the order of the learned single bench dated 24.9.1998 passed in SPW no.312 of 1989 is prayed to be set aside.

6. The facts which are not denied in both the appeals but are admitted, are that the appellant Dr. Mohd. Ashraf Mufti, was an employee of

SherIKashmir institution of medical sciences, soura and availed second half period of winter vacations from 04.02.1988 till 03.03.1988. It is also

admitted that during the winter vacation, application was submitted by him on 7.2.1988 requesting for ten weeks earned leave with effect from

15.3.1988. It is also admitted that he did not wait for the leave to be sanctioned but left not only the state but also the country on 6.3.1988 for

Saudi Arabia for performing Umrah.

7. Rule 15,17 and 27 of the Jammu and Kashmir civil services (leave) rules, 1979, govern the grant of sanction of earned leave. The said rules are

reproduced as under:

15 application for leave any application for leave or for extension of leave shall be made in form 1 to the authority competent to grant leave.

17. Verification of title to leave: no leave shall be granted to a government servant until a report regarding its admissibility has been obtained from

the authority maintaining the leave account.

27. Earned leave for persons serving in vacation departments: a government servant serving in a vacation department shall not be entitled to any

earned leave in respect of duty performed in any year in which he availed himself of the full vacation.

8. It is evident that rule 27 does not grant the benefit of 'earned leave' to employees who serve in any vacation department. Admittedly, the

appellant was serving in the department where vacations are permissible, therefore, he was not entitled to any earned leave, having availed winter

vacations. It is also clear from the above rules that in order to avail of leave, the request for leave has to be made after filling up the requisite form.

The earned leave, even if it is due, can be refused by the competent authority, if the exigency of service does not justify granting of the leave. The

situation in the case of employees, responsible for or associated with patient care, are no different footing in the matter of grant of leave.

9. Medical profession requires high degree of personal attention. No rule or precedent has been shown to suggest that it is not obligatory for an

employee to wait for the sanction of the earned leave, or that after submitting the leave application in the office, there is a deemed provision, rule or procedure which would make it mandatory for the competent authority to sanction the leave. Law, on the contrary, postulates that conduct of an employee has to be in accordance with law. Rules provide that leave can be availed only after it is sanctioned. No other interpretation is sustainable on a plain reading of rule. Rule 27, as reproduced above, does not entitle the employee, serving in vacation departments to "'earned leave'. How could the appellant assume that he was entitled to earned leave? The appellant is a doctor holding the post of professor. It is expected of him to know the basic provisions governing the sanction of leave. It will be irrational to presume that the appellant was not aware of the consequences of his overstay in a foreign country that too without permission.

10. The appellant was discharging his duties as professor in the department of paediatrics. He being a doctor and professor, was required to train the medical students. He being the professor, he could not have left the institute without previous permission. If a person, like the appellant leaves the place without informing, it becomes very difficult for the institute to take services of other qualified person. In a regular college, if a regular professor is not available, it affects adversely the education of the students. The govt. on account of uncertainty, even can not appoint a person in his place. If permission is granted for a certain period, they by way of locum or temporary arrangement, person can be appointed in his place so as to see that the students may not suffer. Without permission if the person leaves, it becomes very difficult for the institution to make arrangement.

The courts while considering the intentional absence has to take this aspect into consideration. To remain absent, in the facts and circumstances of the present case, can not be considered as technical misconduct, as submitted.

11. There is nothing no record to suggest or show that after performing Umrah, which normally does not take more than a month's time or at the most ten weeks, appellant after expiry of said period approached respondents (SKIMS) Soura, for resumption of his duties. Infact there is no material produced by the appellant, to show that he, at any time, approached the respondents (SKIMS) Soura, for the said purpose.

12. The submission of the learned counsel for the appellant of art.311 of the

constitution of India corresponding to section 126 of the state

constitution, in as much as, no show cause notice, no charge sheet and intimation of the proposed punishment has been communicated to the

appellant. His further submission is that notices published in local newspaper and government gazette have not been received by the appellant, and,

as such, the enquiry is vitiated for non compliance with the procedure. The submission, though attractive, is without any basis and has to be

rejected for multiple reasons. It is the admitted case of the appellant that he left the state and country on 06.03.1988 during winter vacations for

Saudi Arabia. It is also stated in para 6 of the main petition (SWP no.312/1989) that he (appellant) overstayed in Saudi Arabia for more than ten

weeks period for which the leave had been requested. In para 7 of the writ petition, it is further admitted that after the period of six months, he

(appellant) again applied for extension of leave. The relevant portion of the memo of petition of SWP no.312/89 is reproduced asunder:

6. That on reaching Saudi Arabia on 6.3.1988, the petitioner performed Umrah. Since there were other relatives and friends of the petitioner

working or staying in Saudi Arabia, therefore, he extended his stay in Arabia, beyond the prescribed period and submitted an application for leave

telegraphically to the respondents, asking them to grant leave in favour of the petitioner by a further period of six months to enable him to meet his

relatives and friends in Saudi Arabia. The leave applied for telegraphically was also not rejected by the respondents.

7. That after the expiry of the Period of six months, the petitioner extended his leave and gave an intimation of the same to the respondents.

13. Even if the leave application submitted on 17.10.1988 for ten weeks would have been sanctioned, the appellant was not justified to stay in

Saudi Arabia, for further extended period of six months without sanction of leave.

14. The appellant, in para 8 of his writ petition admits that he returned on 28.2.1989, i.e. After a period of one year. This aspect, i.e whether the

appellant by staying in Saudi Arabia, for a period of one year, without giving the particulars of his whereabouts, would be justified in taking benefit

of his unauthorised absence and seek quashment of his termination order, is no longer resintegra. The apex court in syndicate bank vs. General

secretary, syndicate bank staff association and another 2000(5) SCC 65,

considered somewhat similar issue and observed:

notice though sent on correct address, received back with the endorsement ""refused"" in such circumstances the bank held, rightly treated the

employee to have voluntarily retired from service termination of his service without holding any departmental enquiry. Held, was not violative of

principles of natural justice.

15. In this view of the matter, we hold that when a delinquent employee, conceals his whereabouts or proceeds to a foreign country, without

providing his fresh address and the authority, which conducts enquiry, issues notice on the address available in the official record, then, in that

eventuality, the delinquent employee cannot legitimately claim invalidation of his termination order on the grounds that no notice was served on him,

before the order was passed.

16. Learned counsel for the appellant argued that publication of notice in official gazette and daily newspaper are not sufficient compliance with the

procedure. This argument is simply to be stated to be rejected out rightly, it is not the case of the appellant that he was available and could be

reached on the address recorded in the official record during the months of march, April, may, June, July and august of 1988. On the contrary, his

case is that immediately after his departure to Saudi Arabia on 06.03.1988, he continued to be out of country till 28.2.1989. Therefore, the plea,

that the issues in the official gazette and daily newspaper were not sufficient notices to intimate him about the enquiry, is without any substance.

17. Learned counsel for the appellant has further submitted that the enquiry has been conducted without any intimation to the appellant and at his

back, is in violation of principles of natural justice and , therefore, the order of termination contravenes section 126 of the constitution of the state.

This submission has no merit. Principles of natural justice can not be examined in vacuum. Their application depends upon facts and circumstances

of each case.

18. In case, Shahoodul Haque vs. Registrar, cooperative societies Bihar and another air 1974 sc,1896, where an employee applied on

15.11.1963 for leave to proceed to Mecca to perform pilgrimage and actually left without grant of any leave, the employee applied on 27.4.1964

for extension of leave for Mecca, which never granted, and returned after a year

time, communication was sent to the employee by registered post, which was returned with the report that the employee could not be found. Thereafter, two more communication were addressed asking the employee why he should not be removed from service, no reply was submitted, it was held by the apex court as under:

after having been taken through the assertions made by both sides, we have no hesitation in coming to the conclusion that even if the appellant was being punished, so that article 311 could apply he had been, in the circumstances of the case, given sufficient opportunity to explain his conduct. He had failed to avail of that opportunity. It could not, therefore, be said that the article 311 of the constitution had been contravened. In any case, on the facts before us, we think that it will be useless to afford any further opportunity to the appellant to show cause why he should not be removed from service." 19. It is undeniable fact that the appellant, after leaving for Saudi Arabia on 06.03.1998, did not disclose his fresh address non communicated with the respondents and deliberately concealed his whereabouts. In these circumstances appellant can not be permitted to take advantage of his own intentional omission and allowed and claim relief on the basis of violation of rule of natural justice. The notices, at various stages of enquiry, were sent on the address available with the respondents. They were not found, in law, to trace the appellant or defer disciplinary proceedings till his return. We are satisfied, in the facts and circumstances of this case, that there has been no violation of principles of natural justice. Requisite notices were properly sent on the known address, providing opportunity to participate in the enquiry. For his failure to respond to the notices, the appellant has to blame himself and not the respondents. 20. There is another aspect which needs to be examined. Appellant, did not at any point of time, after filing writ petition no.312 of 1989 pray for any direction against the respondents to permit him to resume his duty immediately after his return from Saudi Arabia on 28.02.1989. In CMP no.775 of 1989 filed with SWP 312 of 1989, on 20.03.1989, only prayer made by the petitioner by way of interim direction was to require the respondents not to fill up the post of professor of peadiatrics(surgery) in skims soura, substantively, para no. 5 of the CMP is reproduced below:

.....that the respondents by appointing dr. Rekha Patnaik against the post of

professor, paediatrics (surgery) in the medical institute, Sura, on substantive basis has violated the order of the Hon'ble court dated 20.03.1989 which order provided that the post of professor paediatrics (surgery) should not be filled up on substantive basis." 21. This aspect coupled with the fact that when the order under appeal was passed by the learned single bench on 24.09.1998 directing the respondents to reinstate the petitioner/appellant and take him back in the service, no efforts were made by the appellant either to approach the respondents to permit him to join his duty, in pursuance of the judgement of the learned single bench or to move for contempt on disobedience of the direction. In the letter patent appeal, the only prayer is for a direction to the respondents to release all the consequential benefits, including back wages, in pursuance of the order of the learned single bench dated 24.09.1998, it appears to us that the appellant was not interested to resume his duty on his return on 28.02.1989 or on 24.09.1998, when the order of reinstatement was passed by the learned single bench. If that be so, these glaring circumstances not only suggest, but establish that the appellant had deliberately overstayed at Saudi Arabia and despite of knowledge of repercussions of unauthorised absence, the appellant did not associate with the enquiry. The settled position of law would be, that circumstances constitute surrender of employment as held by apex court in *Air 1999 SC 3219*.

22. Therefore, for the reasons given above, the order of the learned single bench dated 24.9.1998, permitting reinstatement of the appellant is not justified. The order is, accordingly, set aside, letters patent appeal no.313 of 1998 titled *Dr. Mohd Ashraf Mufti vs. State* is accordingly dismissed.

23. Considering the nature of controversy raised in L.P.A. No.313 of 1998, valuable time of the court has been wasted tantamounts to abuse of process of the court. Letters patent appeal no.313 of 1998 is not only dismissed by dismissed with costs quantified at Rs. 5000/- to be deposited by the appellant in the lawyers welfare fund within three months.

24. In view of the finding returned in above L.P.A no.313/98, the letters patent appeal no.68/2000 titled *State vs. Dr. Mohd. Ashraf Mufti* is allowed.