

(2011) 04 J&K CK 0006

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 230 of 2005

Mushtaq Ahmad Rather

APPELLANT

Vs

State of Jammu & Kashmir and others

RESPONDENT

Date of Decision : 22-04-2011

Acts Referred:

Jammu and Kashmir Police Rules, 1960 — Rule 187

Citation : (2011) 04 J&K CK 0006

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hasnain Massodi, Judge

1. The petitioner, appointed as Constable vide order No. 752 of 1998 dated 29.10.1998, in J&K Police Department has been discharged from

services by Senior Superintendent of Police Kulgam respondent No. 4 herein, vide order No. 137/2003 dated 30th January 2003, on the ground

of his having unauthorisedly absent from duty with effect from 19.09.2000 till the date of his discharge order.

2. The order No. 307 of 2002 dated 01.08.2002 is, inter-alia, assailed on the grounds that the petitioner was prevented from reporting to duty

with effect from 19.09.2000 because of his serious illness and hospitalisation. The petitioner claims to have reported to duty after he fully

recovered from illness but was not allowed to resume the duty. It is averred that the petitioner was neither afforded an opportunity to project his

case before the competent authority and explain his absence from duty nor given an opportunity to show cause against the proposed punishment.

3. The writ petition is resisted on the grounds that the petitioner remained unauthorisedly absent from duty and did not submit any convincing material to justify his unauthorised absence. It is insisted that the petitioner after he absented himself from duty was repeatedly requested to resume the duty though without any response from the petitioner. The respondents also question very maintainability of writ petition on the ground that petitioner during his probation period absented from duty and did not have right to question his discharge.

4. Heard and considered.

5. The impugned discharge order is liable to be quashed for the following reasons:

1. The impugned order has been passed in exercise of powers vested under 'Article 126 (Clause-2) of J&K Constitution' and 'Article 187 of J&K

Police Manual'. The order depicts non application of mind inasmuch as neither the provisions of J&K Constitution nor J&K Police Manual are

classified as 'Articles'. The provisions of J&K Constitution are classified as 'Sections' and J&K Police Rules 1960 as 'Rules'. Furthermore, Section

126(2), J&K Constitution does not deal with discharge of a probationer. It prohibits dismissal, removal, reduction in rank of a member of a civil

service of the State or holding a civil post, except after an inquiry in which he has been informed of the charges against him and given reasonable

opportunity of being heard in respect of those charges and where it is proposed to impose such penalty, he is given reasonable opportunity of

making representation as regards the penalty proposed. The inquiry in terms of proviso to Section 126(2) may be dispensed with in the

circumstances set out in Clauses 'a' to 'c' of the proviso to Section 126(2). The respondent No. 4, by relying on Section 126(2) J&K Constitution,

has exhibited lack of application of mind to the facts of the case and failed to arrive at a conclusion on objective appraisal of the material produced

before him.

2. In terms of Rule 187, Police Rules, discharge of a Constable on probation can be ordered only where the Constable is found unlikely to prove

an efficient officer. In other words the authority competent to order discharge has to record satisfaction that on the basis of material placed before

him, he is satisfied that the Constable is 'unlikely to prove an efficient officer'. In

the present case no such satisfaction is recorded by respondent

No. 4 ' author of discharge order. Respondent No. 4 instead has observed that the petitioner has not proved to be an efficient police officer

making a reference to his past conduct and not any opinion as regards his future prospects of proving himself to be an efficient police officer. In

other words respondent No. 4 has not opined or recorded the satisfaction that the petitioner, in his opinion, on the basis of record produced

before him, is 'unlikely to prove an efficient police officer'. It is pertinent to point out that the use of word 'found' implies that the finding must be on

the basis of some material and not merely on the personal opinion of the Officer, directing discharge order. The impugned order thus fails to

comply with the requirement of Rule 187 of J&K Police Rules.

3. The respondent No. 4, while making impugned discharge order, has observed that the petitioner 'is not interested to serve the department'. The

respondent No. 4, while directing discharge of petitioner, was not at all required to comment on the interest of petitioner to serve the department.

Such a comment makes the discharge of petitioner a stigmatic discharge and is punitive in nature. The rule-makers have made room for discharge

of a probationer without any inquiry as such discharge is not to cast any stigma on the discharged Constable and the Constable may very well avail

all opportunities that may come his way to get employment in a government, semi government or private organisation. Once the discharge is made

stigmatic, the law enjoins upon the authority making discharge order to hold an inquiry so that the official has an opportunity to persuade the

competent authority not to cast any stigma on the official while making a discharge order or to convince that whatever is imputed to him is devoid

of any basis and untenable. In the case on hand, if respondent No. 4 intended to discharge petitioner with a stigma, right course for respondent

No. 4 was to hold an inquiry, afford petitioner reasonable opportunity of being heard and thereafter make a representation against proposed

penalty.

6. For the reasons discussed above, the writ petition is allowed and by a writ of certiorari order No. 307 of 2002 dated 01.08.2002, quashed.

The respondents would be at liberty to proceed in the matter in accordance with law. In the event the respondents decide not to conduct inquiry

and proceed against petitioner, the petitioner shall be allowed to resume his duty and the period from the date of impugned order till the date the

petitioner is allowed to resume duty shall be dealt with in accordance with rules. However, in case respondents decide to conduct inquiry against

petitioner, the aforesaid period shall be subject to outcome of inquiry. In any case the respondents shall take decision in the matter within four

weeks from the date copy of the order is made available/served on respondent.

7. Disposed of.