
(1997) 05 J&K CK 0008
In the Jammu And Kashmir High Court
Case No : Writ Petition No.1203 of 1988

Mushtaq Hussain Shah

APPELLANT

Vs

State of J & K

RESPONDENT

Date of Decision : 23-05-1997

Acts Referred:

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

Citation : (1997) KashLJ 185 : (1998) 3 SCT 809

Hon'ble Judges : B.A.Khan, J

Bench : Single Bench

Judgement

The matter involves petitioner's removal from service by the Governor in exercise of power under sec. 126(2) (c) of the state Constitution

corresponding to Article 311 (2) (c) of the Federal constitution, by order No. 1GR of 1988 dated 29.8.1988.

During the pendency of the petition, the petitioner who was a teacher in the Education Deptt., died. His legal representatives have been brought on

record and this petition survives for them and is required to be disposed of any way by testing the validity of the impugned order.

No counter has been filed by the respondent to resist the petition. When it was taken up for disposal on 12.5.1995 Mr. Kapoor, Addl. Advocate

General was summoned to assist the court and was granted one week's time to produce the relevant record to indicate the basis on which the

Governor had dispensed with the departmental inquiry against the petitioner on the ground of inexpediency. But, even this opportunity went a

begging and no record or material was produced to justify the action.

Petitioner was appointed as teacher in 1964 He figured in FIR NO. 131/87 under sec. 2/3 of the Egress and Internal Movement control ordinance

and was sent to trial before Judicial Magistrate, Mendhar. According to him, a false case was thereafter concocted against him and he was booked

under sec.3/5 of the Every agents ordinance. This case was later closed against him. He was subsequently detained under the Public safety Act by

the District Magistrate, Poonch but his detention was quashed by this court by order dated 26.2.1988. He was then placed under suspension but

was reinstated and he claims to have worked as a teacher in the Govt. Primarily school at Khundoo till he was dismissed from service by Govt.

Order No. 1 GR of 1988 dated 29.8.1988 which is under challenge in this petition.

Petitioner questions this order on the ground that it was passed on political and mala fide considerations and was extraneous to the mala fide of the

provisions of Sec. 126(2)(c) of the State Constitution . It is also alleged that the action suffered from non application of mind in as much as even

the parentage of the petitioner was wrongly indicated and that he was shown to be under suspension when he stood reinstated in service in March

1988. A distinction is also drawn between the provisions of amended Article 311(2) and sec. 126(2) and it is projected that the latter provision

provides an additional safeguard of representation against the proposed penalty which remains unaffected by the dispensing with the inquiry.

As the fate of this matter hinges on the ambit and scope of sec. 126(2) (c) of the state Constitution, it would be appropriate to extract its relevant

provisions as under:

126. Dismissal, reduction or removal of persons employed in civil capacities under the state:

(2) 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 that this sub section shall not apply:

(a)

(b)

(c) Where the Governor is satisfied that in the interest of the security of the state, it is not expedient to hold such inquiry.

It is elementary that Article 311(1) & (2) corresponding to sec. 126 (1) & (2) of the State constitution provides certain safeguards against the

dismissal or removal from service or reduction in rank of a member of the service of the state or a person who holds a civil post under the state.

These include holding of a departmental inquiry and affording the delinquent employee a reasonable opportunity of being heard. Sec 126(2) goes a

step further to provide a postenquiry additional safeguard of grant of reasonable opportunity to the delinquent employee for making representation

against the proposed penalty. This stands deleted in article 31 (2) by virtue of 42 Amendment of 1976 from 1.3.1977. In the circumstance it

remains to be seen whether the additional safeguard of representation postenquiry against the proposed penalty survives the provisions of cl.(b) &

(c) of sec. 126 (2) which take away the right of enquiry.

The issue is no more *res Integra*. A look at the second provision to sec. 126(2) brings out that it begins with the key expression "This clause shall

not apply", thereby referring to cl.(2) which contains safeguards of inquiry and post inquiry representation for the delinquent employee. The result

is that when the application of cl.(2) is foreclosed all the safeguards provided therein including the right to make representation against the

proposed penalty are taken away and once the inquiry is dispensed with, the right of making representation against the proposed penalty on the

basis of the envisaged departmental inquiry, also dies with it. As such it would be illogical to contend or hold that the additional safeguard of post

enquiry representation against the proposed penalty contemplated by sec. 126 (2) would survive the dispensing of the inquiry under its clauses (b)

& (c).

Clauses (b) & (c) of sec. 126(2) differ from each other and prescribe their own requirement to deal with the respective situations. Whereas under

cl. (b) competent authority is required to record the reasons in writing for its satisfaction to dispense with an inquiry on the ground that it was not

reasonably practicable to hold it; there is no such requirement for exercise of power by the Governor under cl.(c). The Governor need not give

any reason for dispensing with the inquiry. He can do away with it straightaway,

where he feels satisfied that it would be inexpedient to hold it "in the interests of the security of the state". He is to derive the satisfaction on the inexpediency of holding the departmental inquiry in their interests of the security of the state. It is undoubtedly his satisfaction but it is not his last word on the subject. His satisfaction is to be founded on material/record which must be germane and relevant to the inexpediency to hold an inquiry against the delinquent official arising out of the 'interests of the security of the state' and not for anything else. The in expediency to hold the inquiry must be proximate to the interest of the security of the state. The proposed inquiry must reflect and impinge upon such interests of the security of the state. Where the dispensing of the enquiry is extraneous to such interests and does not bear proximate relation with such interest, it would vitiate the Governor's satisfaction and the resultant penalty imposed. The Supreme Courts dealt with the issue in Tulsi Ram Patel's case (AIR 1985 SC 1416) thus:

The question under clause (c), however, is not whether the security of the state has been affected or not for the expression used in clause (c) is "in the interest of the security of the state may be affected by actual acts or even the likelihood of such acts taking place, Further, what is required under clause (C) is not the satisfaction of the President or the Governor, as the case may be, that the interest of the security of the state, it is not expedient to hold an inquiry as contemplated by Article 311 (2) .The satisfaction of the President or Governor, must therefore be, with respect to the expediency or in expediency of holding an inquiry in the interest of the security of the state.

The satisfaction so reached by the President or the governor must necessarily be a subjective satisfaction Expediency involves matter of policy.

Satisfaction may be arrived at as a result of secret information received by the Government about the brewing danger to the interest of the security of the state and like matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite satisfaction whether holding an inquiry would be expedient or not.

If the requisite satisfaction has been reached as a result of secret information received by the Government, making known such information may very often result in disclosure of the source of such information. Once known, the

particular source from which the information was received would no more be available to the Government. The reason for satisfaction reached by the President or the Governor under clause (c) cannot, therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public.

It is also well settled by now that when the satisfaction of the governor under clause (c) is called in question, it is open to the court to examine

whether such satisfaction was derived from material objectively or whether it was tainted by mala fide or was based on extraneous or irrelevant

grounds. The Governor nor may not be required to record reasons to support his action but that does not absolve the Government to satisfy the

court that his satisfaction was based on relevant facts and circumstances and did not emanate from mala fide or extraneous considerations. The

government is also obliged to place the relevant record material before the court to satisfy it, about the bona fides of the Governor's action. Where

it withholds such material and defaults in coming out clear before the court, it naturally cannot avoid the inevitable. This assumes far more

significance because situations involving "the interests of security of the state" differ from the satisfaction related to the public order and law and

order. All the three are different from each other and the Governor is under the constitutional mandate to bear in mind difference in degree of each

situations to reach the satisfaction whether a particular case falls under the one or the other situation. (See AIR 1985 SC 1416 *Tulsi Ram Patel's*

case, AIR 1995 SC 1403 *A.K. Koul's* case; and AIR 1991 SC 385 *Jaswant Singh's* case).

Viewed thus and considering the default of the State respondent in resisting the Petitioner's case and to produce the relevant record/material to

indicate the basis for Governor's satisfaction in dispensing with the inquiry, it is not possible to uphold the action. The only inference that can be

drawn in the circumstances is that there was either no material placed before the Governor to derive the requisite satisfaction or such material, if

and, was not relevant to "the interests of the security of the state". This is corroborated by the attending circumstances of the case which show

that the petitioner was facing trial before the criminal court and was also served grounds of detention under the public safety Act. If that be taken to

be the material which was available before the Governor, it would hardly constitute a basis for dispensing with the departmental inquiry against the petitioner on the ground of inexpediency and to remove him from service depriving him of a constitutional right of inquiry guaranteed to him by Sec.

126(1) & (2) of the constitution read with Article 311(1) & (2).

The result is that this petition, succeeds and the impugned order No. 1GR of 1988 dated 29.9.1988 is quashed. This may not lead to reinstatement

of the petitioner in service but his legal representatives would certain be entitled to all the consequential benefits under rules. Respondents are

accordingly directed to take steps to provide them such benefits under the rules.

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