

(2001) 05 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 465/2001

Nazir Ahmad Hamdani

APPELLANT

Vs

State of Jammu & Kashmir & two Others

RESPONDENT

Date of Decision : 31-05-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2002) KashLJ 486

Hon'ble Judges : Nisar Ahmad Kakru, J

Bench : Single Bench

Advocate : J.A.Kawoosa, A.Andrabi, Advocates appearing for the Parties

Judgement

1. The petitioner, a principal of Higher Secondary School, has been placed suspension by Director School Education Kashmir by order No. 350

DSEK of 2001 dated 07/04/2001. It is challenged on the ground of lack of jurisdiction. Admittedly, the petitioner is a member of gazetted service

and the Director School Education is not appointing authority. This being the position, a question arises as to whether Director can exercise such

power and this question needs to be viewed in the light of the mandate of subrule 1 of Rule 31 of Jammu and Kashmir Civil Service (Classification

Control & Appeal) Rules 1956, which reads:

The appointing authority or any authority to which it is subordinate or any other authority empowered by the government in this behalf, may place

a Government Servant under suspension

2. A plain reading of sub rule (1) shows that the power of suspension can also be exercised by an officer to whom it is delegated. Is there any such

delegation of power by the government, reference to Schedule ID J&K Civil

Service Regulations Vol. II page 90 become imperative and for facility of reference, item 6 is extracted hereunder:

S.No. Reference to Nature of Power To Whom Exent

Article in J&K Delegated

C S.R's under

which deligation

made

6. 108 To issue order (i) to (iv)

(v) Director Education Head of

High/Sec.schools/Tehsil Education officers additional tehsil Education Officers deputy Education Officers, Head Assistants and superintendents in the Sub Office.

3. Examining the argument of lack of jurisdiction on the touch stone of the afore mentioned schedule. It emerges that the power to suspend a head

of the Higher Secondary School stand delegated to the Director, therefore, the impugned order cannot be said to be without jurisdiction.

4. It is next contended that the order emanates from malafide considerations. Settled position in law is that onus to prove the malafide lies on one

who alleges it. The inference of malafide action can be drawn from the pleadings and antecedent facts and circumstances. To appreciate the

relevant facts it is pertinent to mention that the petitioner stands booked in Case F.I.R. No. 7/2000 P/S VOK, under Section 5(2) of J&K

Prevention of Corruption Act of 2000. From perusal of the text of the order of suspension it is quite clear that the Director was prompted to place

the petitioner under suspension because of the criminal offence for which he is supposed to face the trial before the competent court of jurisdiction.

This fact is sufficient to frustrate the petitioner's abortive attempt to challenge the order of suspension on the ground of malafide.

5. It is also contended that the order is not a speaking one. Suffice it to say that such omission cannot invalidate the order of suspension, for, it is

always open to the competent authority to show by reference to the contemporaneous record that it had applied its mind to arrive at a conclusion

that a prima facts case existed for such action. In the instant case, the production of contemporaneous record is not a requirement because the

contents of the order of suspension make it very clear that it has been passed in view of the fact that a criminal offence was under investigation for

which the petitioner is to be tried. Need less to say that legality of the investigation of the offence or trial need not be embarked upon because it is not the subject matter of this case.

6. This brings me to the argument that the circular debars the Director from exercising power of suspension. It is pertinent to mention here that

even an indepth examination of the writ petition does not suggest any such ground of challenge and fact of the matter is that only an oral submission

is pressed into service. To appreciate scope of oral submission, it is advantageous to refer to a judicial pronouncement handed down by the apex

court in *S.S. Sharma versus Union of India* (AIR 1981 SC page 588 Para 6). It was held:

No ground has been taken in the writ petitions assailing the validity of the office memorandum on the basis now pressed before us. We are of

opinion that the courts should ordinarily insist on the parties being confined to their specific written pleadings and should not be permitted to deviate

from them by way of modification or supplementation except through the wellknown process of formally applying for amendment. We do not mean

that justice should be available to only those who approach the court confined in a straitjacket. But there is a procedure known to the law and long

established by codified practice and good reason, for seeking amendment of the pleadings. If undue laxity and too easy informality is permitted to

enter the proceedings of a court it will not be long before a contemptuous familiarity assails its institutional dignity and ushers in chaos and confusion

undermining its effectiveness. Like every public institution, the courts function in the security of public confidence, and public confidence resides

most where institutional discipline prevails. Besides this, oral submissions raising new points for the first time tend to do grave injury to a contesting

party by depriving it of the opportunity, to which the principles of natural justice hold it entitled, of adequately preparing its response.

7. Applying, the ratio of the judgement, I am of the opinion that if the oral submission of the petitioner is taken into consideration, the result will be

denial of right to rebut which right is available to the respondents. Since such course is bound to cause violation of principles of natural justice in the

facts and circumstances of this case, therefore, I decline to entertain the oral submission. That apart a circular cannot take away the, power duly and validly delegated to an authority, that too, when it is nobody's case that the power delegated has been withdrawn.

8. In the result this writ petition fails and is accordingly dismissed along with CMPs. However no order as to costs.