

(2003) 09 J&K CK 0017
In the Jammu And Kashmir High Court
Case No : S.W.P. No. 584-A of 1999

Omkar nath Wakhloo

APPELLANT

Vs

Board of Governors and others

RESPONDENT

Date of Decision : 17-09-2003

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Article 124
Jammu and Kashmir Universities Act, 1969 — Section 40

Citation : (2004) LIC 3644 : (2005) 1 SCT 564

Hon'ble Judges : R.C.Gandhi, J

Bench : Single Bench

Advocate : Anil Bhan, H.U.S. Salathi, M.H. Lone, Advocates appearing for the Parties

Judgement

R.C. Gandhi, J.—The petitioner, Principal, Regional Engineering College, Srinagar by means of this petition seeks issuance of writ of

certiorari to quash order No. 12BOG86 dated 2121986 passed by Board of Governors of Regional Engineering College, Srinagar whereby the

petitioner was retired from service with effect from December 2, 1986 in exercise of the powers under rule 9(a) of the Regional Engineering

College Society, Srinagar read with its bye laws. He also seeks to quash rule 9(a) incorporated by the respondent No. 1 on 2121986 in the

byelaws of the society. He further seeks issuance of writ of Quowarranto against respondent No. 2 who has been appointed in his place as

Principal, Regional Engineering College, Srinagar. He has also prayed for restoration of his status and payment of emoluments treating him into

service till his retirement on attaining the age of 60 years and also grant of other service benefits.

2. Petitioner challenged the impugned order by means of petition before the Supreme Court and on 581997 the Supreme Court converted this

petition under Article 226 and transmitted to this Court for disposal expeditiously. This is how this writ petition has come up before this Court.

3. Petitioner, Professor of the College was promoted as Principal, Regional Engineering College, Srinagar (hereinafter called as ""the College"") on

248 1977. His appointment was rectified by the Board of Governors of the College on 27101977. His appointment was appreciated and

commended by various authorities of the State particularly the then Chief Minister, Sheikh Mohammad Abdullah, S. Narboo, Minister, Works and

Power. Performance of the petitioner was commended by Shri J.R. Desai, the then Member of the Board of Governors. Dr. Farooq Abdullah, the

Erstwhile Chief Minister also appreciated the performance of the petitioner vide his communication dated 1241983. According to the petitioner he

has his meritorious record and his retirement is sheer injustice done to him because of political vendetta.

4. The petitioner challenges the impugned order on the grounds that while the petitioner has performed his duties honestly and diligently as Principal

of the College. Unfortunately the wife of the petitioner was sitting MLA of the J & K Assembly at the relevant time. There was political turmoil in

the State. Thirteen MLAs including the wife of the petitioner withdrew support from Dr. Farooq Abdullah, the then Chief Minister and

consequently the Government headed by Dr. Farooq Abdullah, Chief Minister being rendered in minority was dismissed by the Governor on

271984. It is also stated that thereafter another Government came to be formed in the State of which the wife of the Petitioner was taken as a

member of the Cabinet of Ministers.

5. Dr. Farooq Abdullah again came in power in the year 1986 and formed his Government. The Chief Minister to take revenge, the sword of

wrath fell on the petitioner who was made victim by retiring arbitrarily and discriminately. The petitioner has cited the events that on 7111986,

respondent No. 3 Dr. Farooq Abdullah took oath as Chief Minister. He called the meeting of Board of Governors on 2111986 and introduced

rule 19A in the byelaws of the Society and retired the petitioner on the same day by making payment of three months salary to the petitioner in lieu

of notice. It is also stated at the bar that the orders for preparation of the cheque for payment of salary in lieu of notice was given by respondent

No. 3 on 26111986 though the meeting was called for 2111986.

6. The respondents have not filed the counteraffidavit before this Court but prayed that the reply filed before the Supreme Court be treated as

Counter Affidavit which has been permitted and taken on record. In the Counter Affidavit, it is stated that the petitioner's performance was not up

to the mark and the Task Force was constituted by the Chairman, the then Governor on 11101986. The Task Force in its report has revealed

some misdeeds of the petitioner. It is also stated that the Vigilance Organization has also submitted a report to the respondent No. 3 wherein

irregularities committed by the petitioner have been noticed and highlighted. Considering the report of the Vigilance Organization, performance of

the petitioner, report of the Task Force, the petitioner has been retired.

7. Respondent Nos. 5, 6, 7, 8, 11, 12, 14, 15, 16, 17 and 19 have been deleted from the array of respondents vide order dated 172001.

8. Mr. Anil Bhan, Sr. CGSC, relying on the letter dated 931987 issued by the Assistant Educational Advisor, Department of Education, has made

a statement at the bar that the respondents have not consulted the Central Government before introducing rule 19A in the Byelaws of the Society.

9. I have heard learned counsel for the parties and perused the record.

10. Out of the pleadings of the parties, the points of controversy required to be settled are :

I. Whether rule 19A incorporated in the ByeLaws of the society by amendment has been added in accordance with law observing and the

procedure provided therefor in the Memorandum of Association.

II. Whether the material required to be taken into consideration for retirement of the petitioner, has been taken into consideration by the

respondents and whether the alleged adverse record, if any, put to the petitioner observing the principles of natural justice.

III. Whether the retirement of the petitioner is bona fide and in public interest; and

IV. Whether the petitioner is entitled to consequential benefits.

11. It is seen from the pleadings that the respondent No. 3 was sworn as Chief Minister on 7111986. It is not denied that while his Government

was dismissed by the Governor on 27/1/1984, the wife of the petitioner was one of the 13 MLAs who withdrew the support and in consequence

thereof the Government came to be dismissed. It is also not disputed that the performance of the petitioner during the period of his being Principal,

Regional College, Srinagar has been appreciated by relevant authorities including the then Chief Minister, Sheikh Mohammad Abdullah, the

respondent No. 3, Dr. Farooq Abdullah and the Governor of the State. It is also not in dispute that there is no bad or adverse entry recorded in

the annual performance report or other service record of the petitioner. It is also not made out by the respondent that the report of the Vigilance

Organization received by them with regard to the allegations or misdeeds of the petitioner, has been furnished or served upon the petitioner for

reply or show cause providing him an opportunity to meet or rebut the allegations.

12. I have also perused the Counter Affidavit filed by respondents wherein they have taken a plea that the Task Force was constituted by the

Governor on 11/10/1986 and it has pointed out irregularities committed by the petitioner. Perusal of the relevant petition of the Counter Affidavit

reveals that Task Force was created to suggest the ways and means for improvement of College and the petitioner was also one of the members of

the Task Force. Task Force has gone into the functioning and working of the College and suggested improvements. Task Force has not recorded

any adverse remarks or allegations against the petitioner.

13. Out of pleadings of the parties what is required to be seen is whether the retirement of the petitioner is in public interest or to wreak vengeance

arising out of withdrawal of support by the wife of the petitioner on account of which the respondent No. 3's Government was dismissed.

14. The Byelaws of the Society contained the provisions with regard to the retirement of the servant of the Society in terms of rule 12 of the

Society Byelaws of Regional Engineering College, Srinagar enacted in pursuance of Rule 6 (xv) and (xix) of the Rules by the Board of Governors

of the Society Rule 12 reads as :

12(a). All appointments to full time posts under the Society shall ordinarily be made on probation for a period of one year after which period the

appointee, if confirmed, shall continue to hold his/her office till the date of his/

her superannuation i.e. on attaining the age of 60 years. In the event the services of a member of the teaching staff can be dispensed with on attainment of the age of superannuation, the said employee be reemployed till such time his/her services are required with the approval of the competent authority.

In terms of this rule, the petitioner was to superannuate at the age of 60 years. The post held by the petitioner is pensionable which is not disputed.

A public servant who is appointed to be service has a right to continue against the post till he is superannuated provided he is visited by a cloud of

adverse record or performance disabling him to continue in terms of the service rules. There is no other provision shown to the Court to

superannuate the employee of the College except till he attains the age of 60 years.

15. The respondent No. 3, the Chairman of the Society, called a meeting of the Board of Governors on 21/2/1986, after circulating an agenda,

containing that rule 19A is to be introduced. The Board of Governors resolved on 21/2/1986 to introduce the amendment to the rule by adding rule

19A which reads :

19A Notwithstanding anything contained in these Byelaws the Board of Governors may, if it is of the opinion that it is in the public interest and in

the interest of the Society to do so, require any employee/official of the College/Society to retire at any time after he/she has completed 22 years of

service on attaining 48 years of age, provided that the competent authority shall give in this behalf a notice to the Employee/official of the

College/Society at least three months before the date on which he/she is required to retire or three months pay and allowance in lieu of such notice.

Such an employee shall be granted pensionary benefits as are admissible to him/her on the date of such retirement under Society Service Rules/Bye

Laws.

This rule clothes the respondents with power to retire an employee in terms of the aforesaid added rule. The petitioner was retired on the same

day. From such events and the history of the case, the intention of the respondents can be gathered to make out as to whether the action is in

public interest or to wreak vengeance.

16. The petitioner has challenged the power of respondent No. 3 and the Board

of Governors to amend the rules to incorporate rule 19A in the Rules of the Society, being incorporated contrary to the procedure and the method prescribed by the rules itself. To appreciate his plea, the rules are required to be examined. The Society, Regional Engineering College has framed the Memorandum of Association. Rule 3 of the Memorandum of Association deals with the objects for which the society has been established. Subrule (ii) to Rule 3(h) of Memorandum of Association reads as :

To make rules for the conduct of the Affairs of the society and to add to amend, vary or rescind them from time to time with the approval of the Government of Jammu and Kashmir State (hereinafter referred to as the State Government) and the Central Government"".

Relying upon the aforesaid provision, learned counsel for the petitioner has submitted that the amendment of the rules and incorporation of rule

19A by the Board of Governors is contrary to the mandate and method prescribed by the Rules of the Society for the reason that the respondents

have not sought the approval of the Central Government as was required in terms of the aforesaid provision of law. Mr. Bhan, learned counsel

representing the Union of India has made a statement at the Bar as noticed earlier that the Central Government has neither been consulted nor

approval is sought from the Central Government to incorporate Rule 19A in the Byelaws of the Society. Learned counsel for the petitioner has also

invited the attention of the Court on the powers of the Board of Governors which is contained in Rule 15(xvi) of the Byelaws of the Society. For

facility of reference it is reproduced hereunder and reads as :

(xvi) To make adopt and vary from time to time byelaws for any purposes connected with the management and for administration of routine affairs of the College and for furtherance of its objects"".

The power contained in the aforesaid rule is to be exercised read with rule 24 (ii) which reads as :

i. These Rules may be altered with the approval of the State and Central Government at any time by a resolution passed by a majority of twothird

of the members present at any meeting of the Society which shall have been only convened for the purpose.

From the aforesaid provision of law it is made out that rule can be altered with

the approval of the State and Central Government and by a resolution passed by the majority of twothird members present at the time of meeting of the Society. Unless the Society by twothird majority approves, the Rule cannot be amended. Assuming that the Board of Governors has power to add or amend the rules, the procedure prescribed is that such amendment or incorporation of the rules cannot be made unless that amendment is approved by the State Government and Central Government. Admittedly Rule 19A has been incorporated without the approval of the Central Government as required in terms of subrule (ii) to Rule 3(h) read with Rule 24(ii) of the Memorandum of Association of the Society. The incorporation of Rule 19A is breach of the procedure provided in the rules and thus cannot be maintained which deserves to be quashed.

17. So far as the point No. (II) is concerned, petitioner in terms of Rule 12(a) of the Service ByeLaws was to continue in the employment of the Society till he attained the age of 60 years, of course subject to the limitation as contained in the Service ByeLaws. The respondents have retired the petitioner, considering the report of the Task Force, performance of the petitioner and the report of the Vigilance Organization. From the perusal of the report of the Task Force, it is nowhere seen that it contained any adverse remark against the petitioner. So far as the report of the Vigilance Organization is concerned, the learned counsel for the respondents has been asked in the Court to make out as to how and on whose instructions the Vigilance Organization has submitted the report. Mr. Salahi, learned counsel for the respondents has submitted that the Vigilance Organization being the watch dog on the performance of the employees can on its own take notice of the performance of the Officers and that the Vigilance Organization can also be moved by a particular person pointing out the performance of a public servant. It is not coming forth from the record or the pleadings that how and on whose instructions the Vigilance Organization has moved of its own. Report has been submitted by the Vigilance Organization on 1121986 to the respondent No. 3 whereas the petitioner was retired on 2121986. This casts a cloud that the report has been managed. Assuming this report is based on facts, it was to be furnished and served upon the petitioner seeking explanation, providing him an

opportunity to meet or rebut the allegations pointed out by the Vigilance Organization. Respondents in the counter affidavit have stated that the notice was issued to the petitioner to explain his conduct visavis the report of the Vigilance Organization. Learned counsel for the respondents has not been able to point out under what communication the report or notice was served upon the petitioner seeking his explanation. It is only bald assertion made in the counteraffidavit without any specific evidence. The petitioner in his rejoinder has clarified that no notice or report was ever served or sent to the petitioner seeking his explanation. The report was submitted by the Vigilance Organization on 112 1986. Where is the reasonable time provided to the petitioner to reply the notice or the report as he stood retired the next day ? It is not made out from the pleadings that any show cause notice visavis the report of the Vigilance Organization was served upon the petitioner. This observation is made assuming the notice was sent to the petitioner which in fact could not be made out by the respondents. Respondents have acted on the report in haste, without providing opportunity to the petitioner to show cause observing the principles of natural justice. Public servant has safeguards and protection of his rights in terms of the rules governing the service. If any action is required to be taken against an employee, he is required to be provided an opportunity of being heard observing the principles of natural justice. It was incumbent upon the respondents to seek an explanation of the petitioner by furnishing report of the Vigilance Organization to the petitioner, which has not been done. Report of the Vigilance Organization, which has not been put to the petitioner, providing him an opportunity to clear his position and conduct, cannot be made the basis for retirement of the petitioner.

18. Learned counsel for the petitioner relying upon the judgment of the Apex Court reported in *Baikuntha Nath Dass v. Chief District Medical*

Officer, 1992(2) SCT 92 (SC) : AIR 1992 SC 1020 , *State of Gujarat v. Suryakant Chunilal Shah*, 1999(1) SCT 208 (SC) : (1999)1 SCC 529

and *M.S. Bindra v. Union of India*, 1998(4) SCT 325 (SC) : AIR 1998 SC 3058 , has submitted that the respondents have not taken into

consideration the record of the petitioner which was required to be taken into consideration and the petitioner, as consequence of the political

vendetta for withdrawal of the support by his wife from respondent No. 3, has been victimized.

19. In *Baikuntha Nath Dass v. Chief District Medical Officer*, AIR 1992 SC 1020 (supra), the Apex Court was dealing with the proposition of

compulsory retirement of public servant directed on the basis of subjective satisfaction of the Government. The Court in Para 32 after dealing with

the facts of the case and the law has spelt out the principles emerging therefrom for compulsory retirement, which are reproduced hereunder,

The following principles emerge from the above discussion :

i. An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

ii. The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a government servant compulsorily.

The order is passed on the subjective satisfaction of the Government.

iii. Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is

excluded together. While the High Court or this Court would not examine the matter as an appellate Court, they may interfere if they are satisfied

that the order is passed (a) mala fide (b) that it is based on no evidence, or (c) that it is arbitrary in the sense that no reasonable person would form

the requisite opinion on the given material in short, it is found to be a perverse order.

iv. The Government (or Review Committee as the case may be) shall have to consider the entire record of service before taking a decision in the

matter of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally

include the entries on the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post

notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based up on merit (selection) and not upon

seniority.

v. An order of compulsory retirement is not liable to be quashed by a court merely on the showing that while passing it uncommunicated adverse

remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. The object has been discussed in paras 29 to 31 above.

20. In AIR 1998 SC 3058 : (1998 Lab IC 3491), the Supreme Court was dealing with the similar proposition and also with regard to the doubtful

integrity of the public servant, the Court observed in Para 13 as under:

While viewing this case from the next angle for judicial scrutiny i.e. want of evidence or material to reach such a conclusion, we may add that want

of any material is almost equivalent to the next situation that from the available materials no reasonable man would reach to such a conclusion.

While evaluating the materials the authority should not altogether ignore the reputation in which the officer was held till recently. The maxim ""Nemo

First Repent Turpissimus"" (no one becomes dishonest all of a sudden) is not unexceptional but still it is salutary guideline to judge human conduct,

particularly in the field of administrative law. The authorities should not keep the eyes totally, based towards the over all estimation in which the

delinquent officer was held in the recent past by those who were supervising him earlier. To dunk an officer into the puddle ""doubtful integrity"" it is

not enough that the doubt fringes a mere hunch. That doubt should be of such a nature as would reasonably and conclusively be entertainable by a

reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of

probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an officer with the label

doubtful integrity.

21. In (1999)1 SCC 529 the Supreme Court was dealing with the proposition where the officer was retired on account of the criminal cases

leading against him. The Court observed as under :

In order, therefore, to find out whether any government servant has outlived his utility and is to be compulsorily retired in public interest for

maintaining an efficient administration, an objective view of overall performance of that government servant has to be taken before deciding, after

he has attained the age of 50 years, either to retain him further in service or to dispense with his services in public interest, by giving him three

months' notice or pay in lieu thereof.

22. From the aforesaid proposition of law it is made out that it was obligatory

upon the respondents to consider the whole record of service of the petitioner and particularly the record of latest years. There is no doubt that the record of the petitioner is up to the mark. Neither the superior officer nor even a member of the Governing Board has pointed out any finger on the performance of the petitioner till the ouster of the petitioner. The respondents have not taken into consideration the record of performance of the petitioner it appears and is gatherable that the respondents wanted to get of the petitioner for obvious reasons of shifting political loyalty by the wife of the petitioner. Rule 19(A) has been introduced with the purpose to retire the petitioner. It is incorporated in the rules on 2121986 and the same day the petitioner is retired otherwise the petitioner in terms of Rule 12 of the Bye Laws was to serve the Society till he attains the age of 60 years.

23. Another aspect noticeable is that the meeting of Board of Governors was held on 2121986 wherein rule 19(A) was introduced. Respondent

No. 3 directed the concerned officer on 26111986 to prepare a cheque for disbursement of the salary of three months in lieu of notice to the

petitioner. There was no cause available to respondent No. 3 to issue such direction for preparation of the cheque while there was no such

provision in the Byelaws of the Society to retire an employee in such manner. The intention, thus, is obvious.

24. For the aforesaid narration, it is held that the performance and service record of the petitioner has not taken into consideration. The report of

Vigilance Organization has not been served up on the petitioner providing him an opportunity to rebut it and show cause, observing the principles

of natural justice. The Task Force has not recorded anything adverse against the petitioner. The retirement of the petitioner is because of the

political vendetta for no fault of the petitioner whose services have been commended by all his superiors. The retirement of the petitioner is not

found in public interest but is an act of mala fide exercise of power.

25. It is also noticed that the petitioner was retired on 2121986 vide the impugned order. The respondents were under legal obligation to sanction

pension, if not substantive pension at least provisional pension in terms of the J & K Civil Services Regulations which have been made applicable

to the Society by rule 49 of the Byelaws of the Society. Pension has not been

sanctioned in favour of the petitioner for all these years for the reasons best known to the respondents. Petitioner has suffered for 16 years on account of inaction on the part of the respondents. Petitioner has made out a case for release of withheld pension with interest at the rate of 6% from the date of this retirement as determined hereinabove.

26. For the aforesaid reasons, the writ petition is allowed. The petitioner is also held entitled to pension with interest @ 6% per annum. The

petitioner is held entitled to continue in service till the date of his retirement with all consequential service benefits Rule 19(A) being enacted

contrary to the provisions of law as stated above, is quashed. No order as to costs.