

(1997) 07 J&K CK 0057

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeal Nos. 72/87 and 6895

Rais Ahmad Gazi; Syedan Shafi

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 04-07-1997

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 30

Constitution of India, 1950 — Article 311(2)C

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

Citation : (1997) SriLJ 178

Hon'ble Judges : Bhawani Singh, J and M.Y.Kawoosa, J

Bench : Division Bench

Advocate : Z.A.Shah, R.A.Khan, M.Abdul Qayoom, B.M.Sadiq, Advocates
appearing for the Parties

Judgement

Kawoosa, J.—By way of this common judgment, we propose to dispose of the two LPAS titled ""Rais Ahmad Gazi versus State of J&K

and others"" (LPA No. 72/87) and ""Syedan Shafi versus State of J&K and others"" (LPA No. 68/95), for, these appeals give rise to identical

questions of law and fact for determination by the Court. LPA No. 72/87 has arisen from the writ court judgment dated 8.10.1987 passed in SWP

No. 1192/85 (for short 'Rais Ahmad's case') and LPA No. 68/95 has arisen from the judgment of the writ court dated 22.9.1995 passed in SWP

No. 1326/93 (for short Syedan Shafi's case). The appellants in their aforesaid writ petitions had challenged the orders of termination passed by the

Governor under Section 126(2) (c) of the Constitution of Jammu and Kashmir (shortly put as 'the State Constitution' hereinafter) dated

15.10.1985 and 25.6.1993 respectively. The order of the Governor passed against Shri Rais Ahmad is quoted hereunder:

GOVERNOR OF JAMMU AND KASHMIR CIVIL SECRETARIATE GENERAL DEPTT.

Sub: Termination of the Service of Government servant in the interest of security of the State.

Government Order No. 1586 of GD of 1985 Dated: 15.10.1985.

Whereas the Governor is satisfied that in the interest of the security of the State, it is not expedient to hold an inquiry in the matter.

Now, therefore, in exercise of the powers conferred under clause (c) of the proviso to subsection 92 of Section 12 of the Constitution of J&K, the

Governor dismiss Shri Rayeez Ahmad Gazi S/o ShamasudDin R/o Nawabazar, Srinagar working as Tracer/JA Civil Investigation & Design Wing,

J&K, Srinagar from the Civil services of the State.

By order of the Governor.

Sd/

Commr/Secy to Govt. General Department.

Similarly, the order of termination passed against Shri Syedan Shafi is quoted hereunder:

Governor of Jammu And Kashmir General Administration Deptt.

Sub: Dismissal from Government service. Govt. Order No. 538GAD of 1993 Dated: 2561993

Whereas the Governor is satisfied in terms of proviso of subsection 2 of Section 126 of the J&K Constitution, that it is not expedient in the interest

of security of the State to hold an enquiry against Shri Syedan Shafi, Block Development Officer, Shahabad for various act of commission and

omission constituting misconduct in his capacity as Block Development Officer.

Now, therefore, in exercise of the powers under section 126 of the J& K Constitution vested in the Governor, the said Shri Sydeen Shafi is

dismissed from service.

By order of the Governor.

Sd/

Secretary to Govt. General Administration Deptt.

2. The facts from which LPA No. 72/ 78 emanates are that the petitioner was appointed as a Tracer in the year 1975 in Civil Investigation and

Designs Wing of Power Development Department, Srinagar and was posted as

Sopore. He worked upto 1984 as such and was, thereafter, appointed against the post of Junior Assistant substantively against a clear vacancy. Facts reveal that the petitioner had been detained under the provisions of J&K Public Safety Act, 1978 by District Magistrate, Srinagar in terms of order dated 3rd April, 1985. The order of detention, according to the petitioner, had been issued on improper grounds, therefore, it was quashed by this court vide order dated 5th June, 1985. The petitioner is alleged to have had links with secessionist organizations like Peoples League and other organizations who were to work to try to secede the State of Jammu and Kashmir from the rest of the country. It was alleged that the petitioner had links with antinational activities which had nexus with the security of the State. On the basis of CID diaries, the then Director General of Police, J&K submitted a note to the then Chief Minister at whose behest the Governor felt satisfied that, in the interest of the security of the State, it was not expedient to hold enquiry and, therefore, without such enquiry, passed the aforementioned order under the provisions of Section 126 (2) (c) of the State Constitution dismissing the petitioner from service. This order was challenged by the petitioner in this court through the medium of SWP No. 1192/85. In his writ petition and the detailed Rejoinder, the petitioner refuted the charges that he was linked with any organization which was against the national interests. He categorically declared to be loyal to the country and the State, and refused to accept that he was involved in any antinational activity or had links with any organization which was against the national interests. However, after hearing the learned counsels of both sides, the writ court, vide its judgement dated 8.10.1987, upheld the order passed by respondent No. 2. Hence this appeal against the said order of the writ court dismissing the writ petition.

3. Brief resume of the facts of LPA No. 68/95 (Syedan Shafi's case) is that the appellant was working as a Block Development Officer in Rural Development Department and was posted at Anantnag in 1992. It is alleged that there was a scandal of embezzlement and misappropriation of huge amount in the Rural Development Department, Anantnag, This led to the dismissal of services of fourteen officers, including the appellant, in terms of various orders passed under Section 126(2)(c) of the State

Constitution. Appellant was dismissed in terms of order dated 25.6.1993

quoted hereinabove. The appellant challenged the said order through the medium of SWP No. 1326/93 in the writ court on various legal and

factual grounds. He, inter alia, contended that he was not involved in any misappropriation. According to him, he was allocated an amount of Rs.

61.80 lacs out of which he spent Rs. 41.50 lacs to liquidate the liabilities created by his predecessor Block Development Officers, a part of the

money he did not operate upon. He contended that the Vigilance Organization of the State was seized of the matter, they were investigating into

the matter and that the investigation was not complete. However, two FIRs (No. 10 and 15 of 1993) had been registered relating to the aforesaid

scandal wherein petitioner too had been falsely implicated. According to the appellant, the embezzlement case had no nexus with the security of the

State. There was no reason, nor any occasion, to dispense with the departmental enquiry into the matter under Section 126(2) of the State

Constitution. According to him, it was his fundamental right that before termination of his service, a proper enquiry should have been conducted

giving him an opportunity of being heard. In the writ petition, he had urged that once the case had been registered and it was open to an open

criminal trial, there was no expediency in withholding the enquiry. In the embezzlement case, it is the bounden duty of the Governor to get the

matter probed into and pin point the involvement of accused persons in the public interest. Many other legal points, similar to those taken in Rais

Ahmad's case, were taken before the writ court by the present appellant. However, the pleas taken by the appellant did not find favour with the

writ court. The writ court, therefore, upheld the order passed by the Governor and dismissed the writ petition. Hence this appeal.

4. In both the LPAs similar points have been raised before us by learned counsel or the appellants. Firstly, it was argued that the writ courts have

not returned their findings on all points which had been raised in the two writ petitions and argued before the writ courts. It may be observed here

that the judgment impugned in the two LPAs have come from two different benches. Secondly, it has been contended that the law laid down by

the Supreme Court regarding the subject has not been applied correctly or in its right perspective. According to the appellants, High Court has the

power of judicial review and it can look into the records to ascertain whether the powers conferred by Article 311(2) (c) of the Constitution of India, corresponding to Section 126(2)(c) of the State Constitution, to the executive have been exercised judiciously and fairly; and not with malafides. Writ courts have failed to take pains in going into the details of the exercise of such power by the Executive which, according to the appellants, has been exercised by the Governor, in the instant cases, in a colourable manner. According to the learned counsel for the appellants, there was no material in existence or placed before the Governor to enable him to exercise the powers under the aforementioned provisions of the Constitution. It has been contended that even after passing such orders, the respondent has not adhered to the provisions of Classification Control and Appeal Rules, 1956 which, according to the learned counsel, are applicable even in cases where penalty of dismissal is imposed in terms of Section 126(2)(C) of the State Constitution.

5. In both the appeals several points of law have been raised. Learned counsel for the appellants have in detail argued that when such order is passed by the Governor on extraneous considerations or malafides are involved, this can be set right only by judicial review. Judicial review and its scope visavis Article 311(2) (C) of the Constitution of India, which is parameteria to Section 126(2) (C) of the State Constitution, was argued at length.

6. Secondly, it was argued that there must be sufficient material existing before taking such extreme step of dismissal of service without enquiry under the aforementioned provision of the Constitution.

7. Thirdly, it was canvassed before us that the President or the Governor, as the case may be, must be satisfied on the existing material as to why it was not expedient to hold enquiry into the matter before taking such an extreme step.

8. Fourthly, it was fully discussed and debated that the President or the Governor, as the case may be, has to act on the advice of council of Ministers before taking such a step, failing which it would be fatal to the order passed by the Governor.

9. Lastly, it was argued that even after taking such a step, it is the fundamental right of the Government servant to be noticed to show cause

regarding the penalty.

10. Heard learned counsel for the parties in detail. Before entering into Lie discussions regarding the points involved, we deem it feasible to quote

Section 126 of the State Constitution, which read as under:

126. Dismissal, reduction or removal of persons employed in Civil capacities under the State: (1) No person who is a member of a civil service of

the State or holds a civil post under the State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(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 enquiry:

Provided that this Sub Section shall not apply, (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has

led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by

that authority in writing, it is not reasonably practicable to hold such enquiry or

(c) where the Governor is satisfied that in the interest of the security of the State, it is not expedient to hold such enquiry. (3) If, in respect of any

such person, as aforesaid, a question arises whether it is reasonable to hold such an enquiry as is referred to in subsection (2), the decision thereon

of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

11. Learned counsel for the respondents, Mr. Sadiq, has vehemently argued that the action taken under Article 311(2)(C) of the Constitution of

India, corresponding to Section 126(2XC) of the State Constitution, is based on the doctrine of pleasure; and secondly, he has invited our

attention to clause (3) of Section 126 of the Constitution, quoted hereinabove. What he wants to convey is, that it is the pleasure of the President

or the Governor, as the case may be, to see how long his employee holds any post, whether civil or in defence. This doctrine of pleasure originates

from Article 310 of the Constitution of India which says that: ""310. (1) Except as expressly provided by this Constitution, every person who is a member of defence service or of a civil service of the Union or of an allIndia service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

According to the learned counsel for the respondents, the writ courts have rightly not interfered with the satisfaction which the Governor in the instant cases has assumed while passing the orders under Section 126(2)(C) of the State Constitution.

12. Learned counsel the appellants have argued that the matter of judicial review and its scope stands settled by various judgments of the Apex court on the subject. According to them, the doctrine of pleasure is curtailed by Article 311 of the Constitution of India. This provision of the Constitution gives full protection to the Government servants.

13. We have considered the point of view expressed by the counsel for parties in this behalf.

14. So far as the judicial review is concerned, the writ court in Rais Ahmad's case has very rightly observed that the doctrine of pleasure is based on public policy. The High Courts in this country, who are the custodian of the constitutional rights of the citizens, are enjoined to see that the powers conferred upon the executive are not misused and are exercised in a fair manner, and the executive is also under an obligation to satisfy the courts regarding their fair conduct in taking the action against their servants. The unlimited powers conferred upon the executive cannot be made use of for the purpose of depriving their citizens of their fundamental rights merely on the whims and caprice and unguided exercise of the power.

The writ court in this case has based its opinion on the verdict of the Apex court reported in AIR 1977 SC 1361 in which it has been held that judicial review is not excluded where the satisfaction of the President or the Governor, as the case may be, has reached on malafides and is based on extraneous grounds.

15. We need not go in detail regarding the judicial review matter. It is more or less settled now by the Apex Court. This matter has been the

subject of discussion and debate for decades. The need of such discussion and debate arose especially whenever the President exercised the power under Article 356(1) of Constitution of India. In the case, *State of Rajasthan versus Union of India*, reported in 1978 (1) SCR (1) (AIR 1977 SC 1361), one of the important questions for consideration before the Apex Court was whether the satisfaction of the President in the matter of exercise of power to make a proclamation conferred under Article 356(1) of the Constitution of India is amenable to judicial review. At the relevant time, when the proclamation was made, there was an express provision in clause (5) of Article 356 of the Constitution which provided that: "The satisfaction of President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground. In spite of such an express provision, Mr. Justice P.N. Bhagwati {as the Hon'ble Chief Justice then was} held that, if the satisfaction is malafide or based wholly on extraneous or irrelevant grounds, the Court would have jurisdiction to examine it, because, in that case there would be no satisfaction of the President in regard to the matter which is required to be satisfied. Similarly, the other Hon'ble Judges also expressed in the same tone. However, clause (5) of Article 356 of the Constitution of India was deleted by Constitution 44th amendment and this made the scope of judicial review much wider. The matter came up before the Apex Court again in "*Union of India versus Tulsiram Patel*" reported in AIR 1985 SC Page 1416. The matter has been dealt with in detail, especially Articles 310 and 311(2) of the Constitution of India, and the majority view has been laid down, that the Courts have got the power of judicial review in case the orders are malafide, or are based on ipse dixit, or on extraneous considerations. Article 311(2) (b) of Constitution of India has categorically been held to be subject to judicial review while expressing views on Article 311. Article 311(2)(C) of the Constitution, though has not been discussed in detail, they have expressed that they have seen the record on which the satisfaction was based, so did not interfere with the satisfaction reached by the executive. The Apex Court in this case has categorically been of the view that the order passed by the Governor under Article 311 is subject to judicial review. In "*Singhasan, Chief Security Officer and others versus S.R. Dass*" 1991 (1) SCC Page 729 also the Apex Court reviewed the order passed under Article 311(2) (b) of the Constitution. In

S.R. Bomai case, reported in 1994(3) SCC Page 1, the matter of judicial review again came up before the Apex Court and a Nine Judges Bench

heard the case and delivered the judgment in which it was held that the Courts have got the powers of judicial review, especially when the

President or the Governor, as the case may be, exercise the power on extraneous considerations and with malafides. The matter has finally been

set at rest by the Apex Court in ""A.K.Koul and another versus Union of India"", AIR 1995 SC 1403. Briefly stated, the facts of that case were that

appellants were employed as Deputy Central Intelligence Officers in the Intelligence Bureau in the Ministry of Home Affairs, Government of India.

On July 23, 1979 the employees of the Intelligence Bureau formed an Association, called ""The Intelligence Bureau Employees Association"" (IBEA

for short) for the purpose of ventilating their grievances. Appellants, A.K. Koul and Verghese Joseph, were elected as the General Secretaries of

the Association and appellants, B.B. Raval, was elected as the President. On May 3, 1980 the Joint Director of the Intelligence Bureau issued a

circular memorandum declaring that the formation of the IBEA was in violation of the civil Services (Conduct) Rules and that those who take part

in the activities of the IBEA will attract disciplinary action. Writ petitions were filed challenging the said circular. The Court on July 21, 1980 issued

an order for issue of rule nisi on the said writ petitions and also passed an interim order directing that during the pendency of the writ petitions in the

court, no disciplinary action shall be taken against any member of the IBEA for reasons mentioned in the circular. On December 26, 1980 orders

were passed dismissing the appellants from service. One such order regarding the dismissal of Shri A.K. Koul was passed under Article 311(2)

(C) of the Constitution of India. The orders were that the President was satisfied under SubClause (C) of the proviso to clause (2) of Article 311

of the Constitution that in the interest of the security of the State, it was not expedient to hold an inquiry in the case of Shri A.K. Koul and whereas

the President was satisfied that on the basis of information available, the activities of Shri A.K. Koul were such as to warrant his dismissal from

service. Accordingly, the President dismissed Shri A.K. Koul from service with immediate effect. So many points which are mostly similar as have

been raised in the present petitions were canvassed before the Apex Court and the court returned a detailed finding on every point. Inter alia, the

scope of judicial review also was one of the points and it was held at para 29 of the judgment: ""We are, therefore, of the opinion that an order

passed under clause (C) of the second proviso to Article 311(2) is subject to judicial review and its validity can be examined by the Court on the

ground that the satisfaction of the President or the Governor is vitiated by malafides or is based on wholly extraneous or irrelevant grounds within

the limits laid down in S.R. Bommai (1994 AIR SCW 2946).

It was further laid down that if the courts are competent to adjudicate upon matters relating to the security of the State in respect of restrictions on

the right to freedom of speech and expression under Article 19(2) of the Constitution there appears to be no reason why the Courts should not be

competent to go into the question whether the satisfaction of the President or the Governor for passing an order under Article 311(2)(C) of the

Constitution is based on considerations having bearing on the interest of the security of the State. So taking the totality of circumstances into

consideration, we are of the view that where the Constitution of India vide Article 311(2)(C) and the State Constitution vide Section 126(2)(C)

empower the President and the Governor, as the case may be, with the executive powers to take action against the government servants, but in the

same breath the same Constitutions vest the power with the Courts to interpret the Constitution and to see whether such powers are being

exercised in the true spirit of the aforementioned Constitutions. Therefore, it is the judiciary which is to see whether the powers given to the

executive are being exercised bonafide and in the public interest. In no case it can be said that the powers given to the executive under Article 311

of the Constitution of India are absolute and the President or the Governor, as the case may be, can utilise these powers in any way and in any

manner they choose.

16. So the argument of learned counsel for the respondents is not tenable in law. We hold that exercise of power under Section 126(2)(Q) of the

State Constitution is subject to judicial review.

17. Now we take up the rest of the points those emerge for consideration of this court out of the arguments of the learned counsel and enumerated

at pages 8 and 9 of this judgment. We take them up together, for being closely related. These involve the seriousness of the situation which entails

the extreme punishment of dismissal under the service law governing the employees of the State. Secondly, whether under proviso (c) of

subsection (2) of Section 126 of the State Constitution, there is material which shows satisfaction with regard to the expediency to dispense with

the enquiry in the interest of security of the State. Thirdly, whether the exercise of such power by the Governor under such provision of the

Constitution is to be exercised on the aid and advice of council of Ministers or not.

18. Learned counsel for the appellants have vehemently argued that in the present cases before us, there was no such serious situation which could

result in the dismissal of the appellants. According to them, the Governor has recorded no reasons for being satisfied to dispense with the enquiry,

nor he has acted on the advice of the Council of Ministers. Learned counsel for the respondents has taken a different view of the matter, while

dealing with these points. According to him, it is the subjective satisfaction of the Governor which cannot be penetrated into by the judicial review,

especially when the interests of security of the States are involved. According to them, there was no need to record the reasons for the satisfaction.

Recording such reasons is the requirement of proviso (b) of clause (2) of Section 126 of the State Constitution and not clause (c) thereof. Thirdly,

it was argued by him that not to act on the advice of council of Ministers in such cases is not fatal to the exercise of the power under proviso (c)

subclause (2) of Section 126 of the State Constitution.

19. We have heard learned counsel on all these points. We have considered the judgments under challenge. It appears that the learned Single

Judge in both the judgments have dealt with the questions raised above in a sweeping manner and have not gone into the depth of the matter on

these point. In Syedan Shafi's case, it appears that, the learned writcourt has depended on the judgment of the Apex Court in ""Union of India

versus Tulsi Ram Patel"" (AIR 1985 SC 1416). The paragraphs from the aforesaid judgment of the Apex Court have been quoted by the learned

writcourt at para 17 of its judgment in which it has been held that satisfaction of the Governor or the President in such circumstances is a subjective

satisfaction and expediency involves the matter of policy Satisfaction may be arrived at as a result of secret information received by the Governor

about the brewing danger to the security of the State. Reasons for satisfaction

reached by the President or the Governor, as the case may be, are not required to be recorded in the order of dismissal or removal.

20. We have gone through this case. In this case their lordships have discussed this matter visavis proviso (b) of clause (2) of Article 311 of

Constitution of India. While under clause (b) satisfaction has to be met of the disciplinary authority and under clause (c) it has to be that of the

President or the Governor, as the case may be. Under clause (b) the satisfaction is required to be with respect to whether it is practically

reasonable to hold the enquiry and under clause (c) the satisfaction is required to be had as to whether it is not expedient to hold the enquiry when

interests of the security of the State are involved. While clause (b) requires that reasons should be recorded in writing, in clause (c) it is not

required so. In Tulsi Ram Patel's case clause (b) of Subclause (2) of Article 311 of the Constitution of India has been fully discussed, while in

clause (c) the above observations have been made only with regard to recording of the satisfaction, but their lordships have held that proviso (c)

does not require the recording of reasons by the Governor with regard to his satisfaction. We have gone through the whole judgment. It does not

even whisper that the matter cannot be judicially reviewed if the power is exercised under proviso (c). Merely writing the words that "in the

interests of the security of the State, it is not expedient to hold such enquiry" will not suffice. Power of judicial review lays some duties and

obligations on the Courts to see whether there is any material existing which could be a matter of satisfaction to the Governor to dispense with the

enquiry. We agree with the learned counsel for respondents that there is no need for recording the reasons for such satisfaction of the Governor,

but, at the same time, we say that the power is to be exercised with due care and caution, on the basis of existing material. We also agree that the

material also is not necessarily to be made public or the State can seek exemption from producing such material in the Court, but at the same time,

Courts are not debarred to see whether any material is existing on which the Governor could reach to such satisfaction. So, if we take the

interpretation of the learned Single Judges to be correct, then the judicial review becomes meaningless and redundant. We have examined catina of

authorities on the point that the Courts are bound to see, in exercise of power of

judicial review, whether the powers exercised by the Governor under proviso (c) are not based on malafides or extraneous considerations. It is why invariably, the Courts in such cases have called the secret record on which the Governor has reached to the satisfaction and, after examining such records, have framed their opinion as to whether there was sufficient material for recording satisfaction by the Governor for it not being expedient to hold enquiry before dismissal of the government servant.

A duty has been cast upon the Courts under the Constitution to test every administrative order passed by the executive on the touch stone of the constitutional provisions in order to ensure that the authority exercising the power conferred by the Constitution itself on the exercise of such power. So it is why the Apex Court has invariably held that the exercise of powers under proviso 2(c) of Article 311 of the Constitution is subject to judicial review and there must be material existing which could satisfy the Courts to see whether the power has been exercised by the President or the Governor, as the case may be, on some material existing. In ""A.K.Kaul versus Union of India"" (AIR 1995 SC page 1403) the Apex Court has held as under:""31. In our opinion, therefore, in a case where the validity of an order passed under clause (c) of the second proviso to Article 311(2) is assailed before a Court or a Tribunal it is open to the court or the Tribunal to examine whether the satisfaction of the President or the Governor is vitiated by malafides or is based on wholly extraneous or irrelevant grounds and for that purpose the Government is obliged to place before the Court or the Tribunal the relevant material on the basis of which the satisfaction was arrived at subject to a claim of privilege under Sections 123 and 124 of the Evidence Act to withhold production of a particular document or record. Even in cases where such a privilege is claimed the Government concerned must disclose before the Court or Tribunal the nature of the activities in which the Government employee is said to have indulged in.

21. Learned counsel for the appellant; in the cases at hand have rightly argued that the satisfaction of the Governor in exercising such power is not with respect to allegations levelled against a public servant and those allegations which merit his dismissal or removal from service. Whatever may be the nature of the charges against the government servant, the satisfaction of

the Governor should be, and is required by the Constitution, only with regard to holding of an enquiry contemplated by clause (2) (c) of Article 311 of the Constitution being not expedient that too for the reasons that it is not in the interests of the security of the State/The Governor cannot dispense with the enquiry merely because he is satisfied that the charges or the allegations levelled against the public servant merit his dismissal from service, nor can dispense with the enquiry merely because it is otherwise, not expedient to hold such enquiry. The provision of proviso (C) does not lay stress on the seriousness of the allegations for dispensing the enquiry but the stress has been laid and the requirement of this proviso is that, "it is not expedient to hold such an enquiry in the interests of the security of the security of the state." So the obligation is laid upon the Courts not to go only to the seriousness of the charges but to see whether there is material which warrants to dispense with the enquiry only because it not expedient in the interests of the security of the State. The Apex Court has time and again laid stress on this point. In Basker Reddy's case (All India Service Law Journal, 1981 Vol. 1 page 342) of the Andhra High Court, the Division Bench has fully discussed Article 311(2)(c) of the Constitution of India and their lordships have held as under:

.....In this context it must be borne in mind that the satisfaction of the Governor is not with respect to the allegations levelled against the public servant that those allegations merit his dismissal or removal from service. Whatever may be the nature of the charges against the Government servant, the satisfaction of the Governor should be with regard to the holding of an enquiry contemplated by Cl(c) of Article 311 being not expedient; and that too for this reason that it is not in the interest of the security of the State. The Governor cannot dispense with the enquiry merely because he is satisfied that the charges levelled against the public servant merit dismissal. Nor can he dispense with the enquiry merely because it is otherwise inexpedient. Under proviso (c) to Article 311(2) of the Constitution, he can dispense with the enquiry if the conduct of an enquiry into charges is not expedient only in the interest of the security of the State and not on any other ground.

22. Similar view has been expressed in a very famous judgment of Nine Judges in the case "Union of India versus Tulsiram Patel (AIR 1985 SC

1416). At para 141 their lordships of the Apex Court in the aforesaid judgment have held as under:

141. 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."" The interest of the security of the State may be affected, but his satisfaction that in the interest of the

security of the State, it is not expedient to hold an enquiry as contemplated by Article 311(2). The satisfaction of the President or the 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 above observations have again been endorsed by the Apex Court in the latest judgment reported in AIR 1995 SC 1403 (A.K.Kaul and

another versus Union of India). In this judgment clause (c) of second proviso to Article 311 of the Constitution of India corresponding to section

126(2)(c) of the State Constitution has also been discussed at length in light of the observations made in this behalf in Tulsi Ram Patel's case,

reported in AIR 1995 SC 1416. The Apex Court in this case has observed at length the distinction made between the expressions, ""security of the

State"" or ""Public Order"" and ""law and order"" and has endorsed a view expressed by the Apex Court in Tulsi Ram Patel's case (supra). It is

explicitly made clear that situations which affect public order are graver than those which affect law and order and situations which affect the

security of the State are graver than those which affect public order. The President or the Governor, as the case may be, while exercising power

under the said Article of the Constitution, has to bear in mind this distinction between the situations which affect the security of the State and the

situations which affect public order and law and order and for the purpose of passing an order under Article 311(2)(c), the President or the

Governor is to take into consideration only those circumstances which have a bearing on the interest of the security of the State and not on

situations having bearing on law and order or public order. If an order passed under Article 311(2)(c) is assailed before a court of law on the

ground that the satisfaction of the President is not based on circumstances which have a bearing on the security of the State, the Court can examine

the circumstances on which satisfaction of the President or the Governor is based and, if it finds that said satisfaction has no bearing on the security

of the State, the Court can vitiate that the satisfaction of the President or the Governor on the ground that such satisfaction is based on extraneous

or irrelevant considerations. While endorsing the view on the above aspect laid down by the Apex Court in *Tulsi Ram's case*, it was also held that.

Under clause (c) to second proviso to Article 311(2), the President or the Governor has to satisfy himself about the expediency in the security of

the State to hold an enquiry as prescribed under Article 311(2). Are considerations involving the interests of the security of the State of such a

nature as to exclude the satisfaction arrived at by the President or the Governor in respect of matters from the field of justifiability? We don't think

so.

23. So going by law laid down by the Apex Court, from time to time, it is abundantly clear that seriousness of the charge even to the extent that the

government servant is indulging in antinational activities and requirement of proviso (c) to second proviso to Article 311(2) of the Constitution of

India that it is expedient for the Governor not to hold enquiry in the interests of the security of the State are two different things. Governor, while

exercising the power under proviso {c) is to be convinced regarding the latter one that there is material justifying to dispense with the enquiry in the

interests of the security of the State. The Governor has not to base his satisfaction only on the seriousness of the allegations levelled against the

public servant. He can dispense with the enquiry only when circumstances show that in case of holding an enquiry, such informations have to be

made public, the leakage of which will heavily affect the interests of the security of the State and the source of the information which will come out,

may not be available to the Governor in future which will be against the interests of the State.

24. Learned counsel for the appellants have contended that the exercise of the power under proviso (c) is not the personal act of the President or

the Governor. This power is to be exercised on the aid and advice of Council of Ministers envisaged by both Constitution of India as well as

the State Constitution. Learned Counsel for the respondents could not spell out anything against this argument and much is not to be discussed and

debated on this point. However, this is rather an established and settled law that the Governor has to act only on the aid and advice of Council of

Ministers. In Basker Reddy's case (All India Services Law Journal vol.v 1981 (1) page 342), the following observations have been made:

The action of the Governor in such a case is an administrative action which is subject to judicial review. Since the administrative action is still

based on the satisfaction of the Governor, it would not be open to the Court exercising judicial control by way of review to go into the question as

to how far the material placed before the Governor was sufficient to form the opinion. But it would certainly be open to the Court to find out if

there was any material at all and whether the Governor, in reaching the conclusion he did, act bona fide. A limited power of review is vested in the

Court to find out whether the satisfaction of the Governor is not his personal satisfaction, but a satisfaction based on the advice of his Council of

Ministers. The function discharged by the Governor visavis the public servants in the context of Article 311(2) is certainly not the personal

satisfaction of the Governor.

In S.R.Bomai's case (1994 3 SCC 1) it has been fully discussed and held that every power to be exercised by the President or the Governor is to

be exercised on the aid and advice of Council of Ministers. Similarly in Tulsi Ram Patel's case the Apex Court has held that:

It must be borne in mind that the satisfaction required by clause (c) is of the Constitutional Head of the whole Country or of the State. Under

Article 72(1) of the

Constitution, the satisfaction of the President would be arrived at with the aid and advice of his Council of Ministers with the Prime Minister as the

Head and in the case of a State by reason of the provisions of Article 163(1) by the Governor acting with the aid and advice of his Council of

Ministers with the Chief Minister as the Head. Whenever, therefore, the President or the Governor in the Constitutional sense is satisfied that it will

not be advantageous or fit or proper or suitable or politic in the interests of the security of the State to hold an enquiry, he would be entitled to

dispense with it under clause (c).

This judgment has been relied by the Apex Court in A.K.Koul's case (supra) wherein the Apex Court has held as under:

While exercising the power under Article 311(2)(c), the President or the Governor acts in accordance with the advice tendered by the Council of

Ministers.....Article 74(2) and Article 163(3) which preclude the Court from inquiring into the question whether any, and if so, what advice was tendered by the Ministers to the President or the Governor enable the concerned Government to withhold from the Court the advice that was tendered by the Ministers to the President or the Governor. But as laid down in S.R.Bommai (1994 AIR SCW 2946) (supra) the said provisions do not permit the Government to withhold production in the Court of the material on which the advice of the Ministers was based. This is, however, subject to the claim of privilege under sections 123 and 124 of the Evidence Act in respect of a particular document on record. The said claim of privilege will have to be considered by the Court or Tribunal on its own merit. But the upholding of such claim for privilege would not stand in the way of the concerned Government being required to disclose the nature of the activities of the employee on the basis of which the satisfaction of the President or the Governor was arrived at for the purpose of passing an order under clause (c) of the second proviso to Article 311(2) so that the Court or tribunal may be able to determine whether the said activities could be regarded as having reasonable nexus with the interest of the security of the State. In the absence of any indication about the nature of the activities it would not be possible for the Court or tribunal to determine whether the satisfaction was arrived at on the basis of relevant considerations. The nature of activities in which employees is said to have indulged in, must be distinguished from the material which supports his having indulged in such activities. The nondisclosure of such material would be permissible if the claim of privilege is upheld. The said claim of privilege would not extend to the disclosure of the nature of the activities because such disclosure would not involve disclosure of any information connecting the employee with such activities or the source of such information.

25. From these judgments it is apparent that the satisfaction of the Governor is not his personal satisfaction but it is to be reached on the aid and advice of the Council of Ministers and the Courts are within their bounds to See such material if it is not declared to be privileged.

26. From the above discussion, it is clear now that while exercising the power under clause (c) of second proviso of Section 126(2) of the State

Constitution, the Governor is to see:

(i) not only the seriousness of the allegations, but it is imperative on him to see whether the allegations are such serious as merit dismissal or

removal from service of the public servant;

ii) Whether there is material to show that it would not be expedient to hold an enquiry into the matter in the interest of the security of the State;

iii) That such exercise of power by him is not be made in his private capacity, but it is to be exercised on the aid and advice of Council of Ministers

strictly in accordance with the Constitution. Aid and advice of the Council of Ministers is again a constitutional safe guard against the arbitrary

exercise of power by the Governor or the President, as the case may be, in their personal capacity.

Now we apply this law to the present case.

27. So far as Rais Ahmad's case is concerned, we have seen the judgment of the learned writcourt. It appears that the arguments advanced before

such court have not been discussed and points raised have not been adjudicated upon. These have escaped the attention of the writ court. We

should not be swayed by the words used in the order under challenge that it will not be in the ""interests of the security of the State"" to hold the

enquiry or the words that the public servant is indulging in the acts which are antinational or dangerous to the security of the State. A duty is cast

upon the court by power of judicial review to see whether there is any material or secret reliable information which says so or not.

28. The constitutional protection given to the government servants cannot be allowed to be taken away on the pretext or the other, nor the

executive can be permitted to fish out government servants when they apprehend that cases against them are frail and feeble which cannot stand in

a regular enquiry. It is a fact that in this case the petitioner had been detained under the provisions of J&K Public Safety Act where from he was

released in pursuance of the order of the court quashing the detention order. It is also a fact that there is a dossier that he is a member of Islamic

League. It is also alleged that he has attended some meeting at Sopore, as is revealed by the secret file produced before us The question, however,

arises whether this material is worth taking such a drastic step against the public servant. No doubt the security of the State is the first and the

foremost concern of the State, but, at the same time, we are enjoined to see whether under this pretext protection guaranteed by the Constitution

to the public servant is not being taken away. We have called the record and have gone through it. We have not seen anything new which is not

included in the counter. CID Department has basically reported against the petitioner for his antinational activities. It was alleged that he happened

to be the member of Islamic Welfare Organizations. He had contacts with communal organizations. He participated in activities leading even to use

of explosives with a view to create disturbance and was detained twice under J&K Public Safety Act. This note was put up before the Chief

Minister. On this material the Chief Minister wrote that his actions are prejudicial to the security of the State and maintenance of public order. The

same recommendation was made to the Governor who passed the order under challenge. The only addition in the secret file is that the attended

some meeting at Sopore and participated in the antinational activity. The whole action is based on the dossier of the CID. No details are in the file

as to in which meeting he attended, who were the participants, what decisions were taken, what decisions were implemented and what actions

were taken etc. In a broad manner the allegations are there. All these allegations have been denied by the appellant in his rejoinder affidavit

submitted before the writcourt and he has categorically stated that he is loyal to the nation and is not indulging in any activity, nor has any

connections or links with any antinational organization. We are not convinced from seeing the file that there was material on which he could be

dismissed from service.

29. In ""B. Bhaskara Reddy v. Government of Andra Pradesh"" {All India Services Law Journal Vol. 1 1981 (!) (Supra) the Division Bench had the

occasion to consider a similar matter Facts of that case were that the petitioner therein was a teacher of a Government College. He was appointed

in 1966. On 18th May, 1974 he was arrested by Police under the charge of being involved in a conspiracy. He was a writer and a Poet in Telugu

Language. He was also a member of Revolutionary Writers' Association. He was suspended under Rule 13(2) of the Andhra Pradesh Civil

Services (Classification, Control and Appeal) Rules, 1963. He was released on bail in the year 1975, but was immediately, thereafter, arrested

under the provisions of Maintenance of Internal Security Act. He was released only when the proclamation of emergency was withdrawn. The petitioner was however, dismissed from service under Article 311(2)(c) of the Constitution of India. Intelligence report was against him that his writings reflected that he had joined hands with Naxalite cadres who were wedded to violence and who were planning murders and dacoities. His continuance in service was not in the interest of the security of the State because he propagated and instigated the School boys to overthrow the Government by force and sustained arms revolution. All this was considered by the Division Bench of the Andhra Pradesh High Court. The Court held that no specific charges were framed or proved against the petitioner. So the order of dismissal was quashed. In the present case before us, for the sake of argument, if it is believed that the activities of the appellant, Rais Ahmad, were antinational and prejudicial to the security of the State, it is certain without any iota of doubt that there is nothing on the record to show any material which could satisfy the Governor to dispense with the enquiry in the interests of the security of the State. As we have held that the Governor, while exercising such power has not to go to the seriousness of the allegations only, a duty is cast upon him to see the material which would allow him to dispense with the enquiry in the interest of the security of the State. Expediency is required for not holding the enquiry in the interest of the State. Not to speak of a sentence, we have not been able to see a word even in the secret file which would show that there is reason that could justify the Governor to dispense with the enquiry in the interest of the security of the State. This part has not at all been touched in the secret file. Not a single reason has been demonstrated to show that it was not expedient to hold enquiry in the interest of security of the State. Moreso this point has not at all been discussed, neither by the learned Single Judge nor by the counsel for the respondents. The basic requirement of clause (c) has totally been ignored though this is the only requirement of this provision of the Constitution. There may be serious allegations against a public servant that is no ground for dispensing with the enquiry. Dispensing with the enquiry has a direct nexus with the interest of the security of State. Dismissal without enquiry under this provision is allowed only if holding the enquiry will not be in the interest of the security of the State. In the confidential file this point has not at all been touched,

nor any reason has been shown. We have seen the cases where the material was there for not holding the enquiry, even then that material was held

by the Courts not to be the ground for dispensing with the enquiry in 1987 Supply. SCC 164 ""S.G.Meheshram versus Union of India"" the case

was under Article 311(2)(b). The enquiry in that case was dispensed with on the plea that the evidence may be destroyed and members of Mehila

Samiti, being a lady folk, may not come to adduce evidence for fear and threat of harassment. This plea was rejected by the Apex Court. In

Jaswant Singh Versus State of Gujarat and others"" (1991 SCC 362) plea for not holding the enquiry was that the appellant had thrown threats

that with the help of other employee he would not allow holding of may departmental enquiry against him and he alongwith his associates would not

hesitate to cause physical injury to the witnesses as well as the enquiry officer. This plea was rejected while holding that decision to dispense with

the departmental enquiry cannot be rested solely on the ipse dixit of the concerned authority. When the decision of the conferment authority is

questioned, it is incumbent upon those who support the order to show that the satisfaction is based on certain subjective facts and is not the

outcome of whim or caprice of the concerned officer. Similarly, the Apex Court in 1991 SCC, ""Chief Security Officer and others versus Singhasan

Rabidass"" the plea for not holding the enquiry on the ground that procuring witnesses will expose the witnesses and make them ineffective for

future. These witnesses if asked to appear at a confronted enquiry are likely to suffer personal humiliation and insults apart from their family

members may become targets of acts of violence. This plea was rejected by the Apex Court.

30. Taking the stock of things into consideration in view of the above judgments in the present case of Rais Ahmad, we have failed to notice even a

word or sentence in the confidential file written by the Director General of Police or by the Criminal Investigation Department (CID) showing the

reason as to why it was not expedient to hold an enquiry and how it will affect the security of the State, if so conducted. It is true that the Governor

is not bound to record reasons under clause (c), but at least in their official file some material should have been there for some officer and some

officer should have written the apprehension as to how the security of the State would be affected in case enquiry is allowed to be conducted. This

part has totally been ignored. The only thing on which focus has been made is, that the public servant indulged in antinational activities but details in

this behalf also do not find place in the official records. Therefore, we are convinced that there was no material to show as to what was the nexus

between the dispensing with the enquiry and the security of the State. Secondly, we have seen the official record. It is clear to show that there was

no satisfaction of the Council of Ministers, This case was never referred to the Council of Ministers and their advice on the subject was not sought

at all. Perusal of the official records shows that similar action of dismissal has been taken with respect to two other persons vide Cabinet Decision

No.55 dated 25th May, 1986. In those two cases the cabinet had discussed the matter and felt satisfied and then such decision was sent to the

Governor through the Chief Minister and the action was taken. But regarding the petitioner, it is an admitted fact that the matter was never referred

to the Council of Ministers, nor there any satisfaction of the Council of Ministers. It has been done by the Governor in his personal capacity, not in

accordance with the Constitution. Exercise of power by the Governor under Section 126(2)(c) of the State Constitution in this case without the

aid and advice of Council of Ministers is not in accordance with the Constitution and such a defect is sufficient to quash the order passed by the

Governor against the appellant.

31. We now come to the other appeal, Syedain Shafi's case. Resume of the facts has already been given above and it finds place in the writ court

judgments also. In addition to the legal points involved in Rais Ahmad's case, some more points have been raised in this case. It has been

contended by learned counsel for the appellant that there is no application of mind of the Governor while passing the impugned order under

Section 126(2)(c) of the State Constitution. Secondly, it has been contended that the embezzlement case has been registered against the petitioner

under FIR Nos. 10 and 15 of 1993 and the Vigilance Organization of the State is also enquiring into the matter, so there was no justification to

dispense with the enquiry as envisaged by Section 126(2) of the Constitution.

32. Learned counsel for the appellant has rightly contended that the writcourt has not dealt with any of the points raised in the petition which are

similar to those which have already been discussed and concluded in Rais

Ahmad's case hereinabove. Learned counsel for the appellant has demonstrated before us that this case has no concern with the security of the State. It is purely an embezzlement case at the most, as it can be.

Fourteen Officers are involved in the embezzlement case and against the petitioner also allegations are that he has overdrawn the bills which he has misappropriated. We have gone through the secret file also which has been placed before us. Law in detail has been discussed and concluded in Rais Ahmad's case. It is not settled that the satisfaction of the Governor is not required with respect to the allegations levelled against the public servant; whether those allegations merit his dismissal or removal from service or not. Whatever may be the nature of charges against the government servant, the satisfaction of the Governor should be with regard to holding of enquiry contemplated by Section 126(2)(c) of the State Constitution being not expedient; and that too for the reason that it is not in the interest of the security of the State to hold such enquiry. The Governor cannot dispense with the enquiry merely because he is satisfied that the charges levelled against the public servant are grave which merit his dismissal, nor he can dispense with the enquiry because it is otherwise inexpedient. It is settled law now that he can dispense with the enquiry if the conduct of enquiry into the charges is not expedient only in the interest of the security of the State and not on any other ground. In this case, we think, the writcourt has wrongly come to the conclusion that the Governor was right in assuming the satisfaction with regard to taking action under Section 126(2)(c) of the State Constitution. In the secret file, where we have found the report of the Director, Rural Development; Chief Secretary; Intelligence Department and the memorandum, not a single word has been written as to why the holding of enquiry is not expedient in the interest of the security of the State. No reason has been shown by the Intelligence people to the Governor, nor the Governor has applied his mind to the facts of the case. We have seen the whole record. It is pure and simple and embezzlement case. Huge amounts have been embezzled allegedly by the Block Development Officers of Anantnag District relating to the Rural Development Directorate. The allegations are the fraudulent bills have been cashed in the year 1992-93 for the works not taken in hand. It is clear that only preliminary enquiry has been held. It is at

the best of two officers, who have held a short preliminary enquiry and have submitted report within days. It has been mentioned by them that they could not go into the details due to paucity of time. The only thing found in the report of intelligence is that Anantnag is a promilitant area. Funds have been misappropriated by the officers for their personal aggrandisement and for keeping up the militancy. Some officers, who are involved in the embezzlement, have nexus with the militancy which they want to keep up. In view of the ongoing militancy in the District, it will to be reasonably practicable to hold detailed impartial enquiry. This is the whole material on which the action has been taken. Even after this, it has been ordered that the Vigilance will make probe into the matter. This is not sufficient requirement of law for taking action under this provision of the Constitution.

We find that even the name of the petitioner is not included in the intelligence report. It is thereafter, that his name has been included in the list of fourteen officers who are charged with the allegations of misappropriation of funds. No reason at all has been given even by the intelligence people or by the Governor as to why it is not expedient to hold the enquiry in the interest of security of the State. Merely saying that the District is promilitancy area and the misappropriation has been made for the personal aggrandisement and to keep up the militancy is not sufficient for the Governor to be satisfied for taking action under Section 126(2)(c) of the State Constitution. In the secret correspondence which is not to be disclosed to public, nor even shown to the court, if the right of privilege is demanded for nonproduction of such documents under the Evidence Act, the things should have been made more clear so that the Governor could apply his mind in accordance with law. In the official correspondence the details could have come from the Intelligence as to why the conduct of enquiry is not expedient and how it affects the security of the State, if it is taken into hand. The whole portion is missing. It ought not to be left to the subjective satisfaction of the intelligence or the Police Department to record a certificate that it is not reasonably practicable to hold the enquiry because the area is a promilitancy. Law entrusts this power to the Governor to be exercised in its right perspective as envisaged by the Constitution. Requirement of the Constitution is that ""where the Governor is satisfied that in the interest of security of the State it is not expedient to hold such an enquiry"" but the Governor has based his

satisfaction on the intelligence report which nowhere says that it is not expedient to hold enquiry in the interest of the security of State. Facts which

have been projected by the intelligence are that it is not practicable to hold inquiry because the area is promilitancy. So the action taken by the

Governor is not based even of intelligence report also. This satisfaction is based on no material. If at all the observations of Intelligence Department

were taken into consideration, then the action court at best have been taken under clause (b) not under clause (c) of second proviso to Section

126 of the State Constitution. Therefore, in this case we are satisfied that the requirement of law has not been fulfilled.

33. Not only this, two FIRs have been registered under Nos, 10 and 15 of 1993. Vigilance Organization has been directed to probe into the

matter. They are probing into the matter. Really it is a big scandal and allegations are very serious about the officers who have allegedly

misappropriated the money for their personal ends. After the investigation, if it is found there is any substance in the charges against the petitioner,

he will have necessarily to be put to criminal trial and the whole evidence will come before the public and will come on record. So the plea of

expediency with regard to security of the State does not apply here. The attention of the writcourt has been invited to Basker Reddy's case

(Basker Reddy Vs. Govt. of Andhra Pradesh; 1981(1) All India Service Law Journal Vol. 1 page 342). In the aforesaid judgment, the Court has

held as under:""When the enquiry into the charges levelled against the public servant could form the subjectmatter of a public trial in Sessions case

No. 10 and of 1975, the enquiry into those allegations in a departmental proceeding could never be against the interests of the internal security.

The departmental proceedings are not open to public. Only the petitioner and the enquiring officer would be present. Whatever material is placed

in support of the charges would be known to the departmental authorities and the delinquent officer. But when that very material and perhaps some

more are placed before the Court at a public trial, it is beyond one's comprehension as to how it can ever be said that it is not expedient to hold a

departmental enquiry and holding of such enquiry is against the interest of the security of the State.

In the above cited case also there was a challan pending before the Sessions Court and the charges levelled against the public servant were subject

matter of public trial, so the court held that in such circumstances it cannot be said that the proceedings can be against the security of the State.

Whatever material is placed before the enquiring authority in support of the charges would be known to the departmental authorities and the

delinquent officer. When that very material and something more is placed before a Court at a public trial, it is beyond one's comprehension as to

how it can ever be said that it is not expedient to hold the departmental enquiry. The writcourt has in its judgment stated that the case is

distinguishable, but we say that it is very much applicable in the present case, the matter is under enquiry before the Vigilance Commission and the

Police also has registered the case and is under investigation. If the Vigilance and the Police come to the conclusion that there is no evidence or the

case is not made out then the whole foundation on the basis of which the Governor has exercised his power is shaken ed. If it is found that, prima

facie, the case is made out, case will necessarily result in a public trial. So whole material of evidence will have to be placed on record in support of

the allegations before the trial in accordance with service Rules and to have a detailed enquiry conducted and not to hushup the matter on the

pretext of security of the State. In the detailed enquiry, if the allegations are proved, not only the punishment of dismissal or removal from service

can be imposed to the delinquent officer, but he can be made to refund the money misappropriated.

34. In this case learned counsel for the appellant has rightly argued that there is no application of mind. The delinquent officer is a Block

Development Officer, but the reply affidavit filed by the respondents 1 to 3 and by the Vigilance organization before the writcourt shows that the

petitioner was holding the post of Junior Engineer when he committed the misappropriation of the said amount, as alleged. Even the High Level

Committee which conducted the preliminary enquiry, has not identified the block Shahbad for misappropriation which was under the petitioner. If

we believe this counter, then the petitioner prima facie is not involved, because he was not the Junior Engineer. Here is the substance in the

arguments of learned counsel for the appellant that the respondents have not applied their mind at the relevant time. According to them

misappropriation was in Shahabad block also which was under the appellant, but Shahabad area was not identified by the High Level Committee

which made the preliminary probe into the matter. Having gone through the whole record, we are of the firm opinion that the satisfaction reached

by the Governor in this case is no satisfaction in law. It is not in accordance with the requirement of Section 126(2)(C) of the State Constitution. It

is pure and simple an embezzlement case for which detailed enquiry should have been conducted before termination. So we hold that the

satisfaction reached at by the Governor, that it is not expedient to hold the enquiry because of the security of the State is involved, is not borne out

from the official files. This is sufficient ground for quashing the order passed by the Governor concerning the present appellant.

35. The second plea taken in Rais Ahmad's case that the satisfaction is not the personal satisfaction, but the satisfaction should be with the aid and

advice of Council of Ministers, is not applicable in this case, because the action taken in this case is not an action by the Governor who had the

Council of Ministers at the relevant time. In the beginning of 1990 Governor had assumed all the powers of executive and legislature under Section

92 of the State Constitution to himself and later on Presidential Rule was imposed and the Governor acted on behalf of the President. So this plea

was not present by the counsel for the appellant.

36. Lastly, the point raised by learned counsel for the appellants is that even if the action is taken under Section 126 (2)(C) of the State

Constitution against a government servant, it is still incumbent on the Governor to issue a show cause notice to the delinquent officer or official with

regard to the penalty sought to be imposed. According to them Section 126(2)(C) of the State Constitution makes it abundantly clear that no

person shall be dismissed or removed or reduced in rank unless an opportunity of being heard is given to him with respect to the penalty proposed

to be imposed upon him. Learned counsel have referred to the J&K Civil Services (Classification, Control and Appeal) Rules, 1956 and the

Jammu and Kashmir Civil Services (Safeguarding of security of State) Rules, 1962 in this behalf. They have contended that in all the service Rules,

a right has been given to the official or officers of the State to make a representation with regard to the penalty before dismissal from service, if

charges are proved. According to the learned counsel, this provision in Article 311 of the Constitution of India has been deleted by 42nd

Constitutional Amendment and it has been made clear in Article 311 of the Constitution of India now that in case action is taken under any of the

clauses of (b) or (c) of second proviso, the government servant is not entitled to make any representation regarding the penalty to be imposed, but

here in our State Constitution this provision is intact and the aforesaid constitutional amendment is not admittedly applicable to the State of J&K.

Learned Counsel have contended that the government servant, even after the decision to dismiss or remove him from service is taken, has a right to

be noticed to make a representation regarding the imposition of penalty. They have also convassed before us that under provisos 2(b) and 2(c) of

Section 126 of the State Constitution there are three options of dismissal, removal and reduction in rank available to the competent authority which

by itself envisages that it is incumbent on the Governor to give an opportunity to a government servant to show cause as to why penalty be not

imposed on him out of these three options. Thirdly, he has referred to Rule 3 of the J&K Civil Services (Safeguarding of Security of State) Rules,

1962 which is quoted hereunder:

3. Where the Governor is of opinion that a Government servant is engaged in or is reasonably suspected to be engaged in subversive activities or

is associated with others in subversive activities and that his retention in the public service is on that account prejudicial to security of the State, the

Governor may make an order compulsorily retiring such Government servant from service.

Rule 4 of the aforesaid Rules also envisages a notice to be given in writing to the government servant before taking such action. Learned counsel,

Mr. Qayoom, in this behalf has raised good points with regard to providing an opportunity of filing a representation with regard to the imposition of

penalty, but we leave it open to be decided in future if and when such a point comes up again for consideration before the court.

37. For the foregoing reasons, we allow the two appeals and make the following orders and directions:

LPA No 72/87

Rais Ahmad's case:

i) The judgment under challenge passed by the writ court dated 8101987 is SWP No. 1192/85 titled ""Rais Ahmad Gazi versus State of Jammu

and Kashmir and others"" is set aside;

ii) Government Order No. 1586GD of 1985 dated 15/10/1985 dismissing the appellant Rais Ahmad Gazi from service is quashed;

iii) Consequently, the appellant Rais Ahmad Gazi shall be reinstated in the Government service against the post which was held by him prior to the

issuance of the aforesaid Government order dated 15/10/1985 with all consequential service benefits, as if the aforesaid Government order had not

at all been issued. However, it shall be open to the Government, if they so choose, to hold an enquiry against him in accordance with the provisions

of J&K Civil Services {Classification, Control and Appeal) Rules, 1956 with regard to the allegations levelled against him. If the Government

decides to proceed against him in accordance with the relevant rules, as aforesaid, such enquiry shall be concluded within six months from the date

of this order.

LPA No. 68/95:

Syedani Shafi's case:

i) The judgment under challenge passed by the writ court dated 22/9/1995 in SWP No. 326/93 titled ""Syedani Shafi versus State of Jammu and

Kashmir and others"" to the extent it relates to him, is quashed,

ii) Government Order No. 538GAD of 1993 dated 25th June, 1993 dismissing the appellant Syedani Shafi from service is quashed.

iii) Since there are serious allegations of misappropriation of public funds against the appellant, Syedani Shafi, and that apart, admittedly two FIR's

are pending investigation in relation to the said embezzlement and misappropriation of Government Funds, therefore, it shall be for the Government

to decide whether it would be desirable to reinstate him against the post which was held by him prior to the passing of the Government order dated

25th June, 1993 or to keep him under suspension till the conclusion of the criminal proceedings. Secondly, it shall also be open to the Government

to proceed against the appellant Syedani Shafi departmentally in accordance with J&K Civil Services {Classification, Control and Appeal) Rules,

1956 and/or such other rules governing the service conditions of government servants, and to hold a detailed enquiry against him into the

allegations levelled against him, either during the pendency of the criminal proceedings or thereafter. However, such departmental enquiry, it

started, shall be concluded within a period of six months from the date of its commencement.

iv) The Government and its concerned agencies are also directed to expedite the investigation and probe into the embezzlement and

misappropriation of Government funds, undertaken by them by virtue of the two FIR's (supra) and ensure that such investigations and probe is

concluded within six months from the date of this judgment.

38. In both the appeals there shall, however, be no order as to costs.