
(2004) 09 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : SWP 1427 of 2004

Rajeev Soi

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 06-09-2004

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Article 311, 124, 126, 45, 456
Jammu and Kashmir Police Rules, 1960 — Rule 359

Citation : (2004) 09 J&K CK 0005

Hon'ble Judges : Y.P. Nargotra, J

Bench : Single Bench

Advocate : Sunil Sethi, for the Appellant;

Final Decision : Allowed

Judgement

Y.P. Nargotra, J.—Government Order No. 209(Hyd)of 2003 dated 10.12.2003 one Anil Kumar Sharma, Junior Engineer, was transferred

to PWD Nyoma(Leh). Said order has however been modified by Govt. order No.317 PW(Hyd) of 2004 dated 13.8.2004 whereby said Anil

Kumar Sharma has been posted to PHE Jammu and the petitioner, Rajeev Soi, Junior Engineer, has been transferred to Nyoma(Leh). The

petitioner has questioned his transfer through the present writ petition on the ground that the Government had not implemented the order of transfer

of said Anil Kumar Sharma because the same, in his opinion, might have been found to be in violation of Government policy relating to transfers for

Ladakh region envisaged by Govt. order No.LA(A)25/89 dated 31.3.1989. The case of the petitioner is that under the said policy the petitioner

also could not have been transferred to Leh, therefore the order impugned merits to be quashed. Learned counsel for the petitioner submits that

clause (iii) of the policy provides for the time table and the manner in which transfers can be ordered which reads as under:-

Time table for posting to Ladakh. District Development Commissioner Leh and Kargil will furnish lists of employees due for transfer from Ladakh

by 31st December to Ladakh Affairs Department. These lists will be forwarded by Ladakh Affairs Department to the Administrative Department

concerned up to 15th February and notices to their substitutes shall be issued by the Administrative Deptts. In February every year. Their lists will

be sent to Ladakh Affairs Department shall constitute two Central Medical Boards separately for Kashmir and Jammu Divisions and in such case

any eligible employee pleads illness, such employee or his/her spouse/children be got examined through Ladakh Affairs Department by the

concerned Medical Board upto 15th April so that lists of transfer to Ladakh and finalized by or before 30th April by the concerned Deptts. And

posting orders are issued latest by end of April every year;

2. The date wherefrom the tenure of posting in Ladakh will reckon shall continue to remain as 30th of June by or before which Govt. employees

transferred to Ladakh must report over there Mr. Sethi learned counsel for the petitioner submits that after the month of April no transfer could be

ordered ! by the Government to Ladakh district. Moreover, according to him, the petitioner in the present case suffers from such ailments, which

make it hazardous for him to go to Ladakh for rendering service on the post to which he has been transferred.

3. The petitioner therefore seeks to bind the Government with its policy issued under Government order dated 31.3.1989. It may be mentioned

here that transfer order of the petitioner has been issued by the Government of J&K. Whether the Government is bound by its own policy is the

question to which answer to the claim of the petitioner depends.

4. The issue came to be considered by this court in case titled Syed Khurshid Ahmed vs State of J&K and others, reported in 1985 KLJ 47

wherein this court observed:-

Dwelling on the first submission, learned counsel for the petitioner submitted that the circular has been issued u/s 45 of the constitution of Jammu

and Kashmir. Section 45 envisages that all executive actions of the Government shall be expressed to be taken in the name of Governor of the

Government of Jammu and Kashmir. Sub-clause(2) of the said section then prescribes the mode of expression of executive actions. The circular contends the learned counsel for the petitioner, is signed by the Secretary to Government, General Department, therefore, it will be a valid circular according to Rules 11 and 12 of the Business Rules. Therefore, the circular will be deemed to have been issued u/s 45 of the constitution of Jammu and Kashmir. From the perusal of the circular in question it is revealed that the circular has been issued in super session of earlier circular of 1980 dated 6.8.1980 and subsequent Government orders and lays down the procedure for transfer to and fro Leh and Kargil districts. The circular does not mention the source from which it flows. Executive has power and it can take action about the administrative matters. Those powers are defined somewhere else in the constitution of Jammu & Kashmir. Section 45 of the constitution of Jammu & Kashmir ! prescribes the mode and manner as to how an executive action is to be expressed. By itself sec.45 of the J&K constitution cannot be held to be the source of executive powers and actions. It can only be held to be a provision relating to the mode of expression for executive action. It is not a source itself. Therefore, the argument of Mr.Shah that sec.45 of the J&K constitution is the source cannot be accepted, the circular has not been issued under any of the provisions of the constitution. It can at best be termed as an instruction of a directory nature laying down guidelines for Heads of the Departments. Regarding services Governor has competence to make rules u/s 124 of the constitution of Jammu & Kashmir. If transfer is a condition of service, which hardly can be accepted, then the Governor has competence to issue rules governing the transfers; State may from time to time issue directions to its Heads of Departments about regulating the transfers. They at best can be instructions so as to keep the Heads of the Departments under check in making transfers. Transfer from one place to another is exigency of service and can be ordered in the interest of administration at any time provided it is not mala fide and by way of punishment. In the present case mala fides are not pleaded nor is transfer said to be by way of punishment. Therefore, the guidelines simpliciter regulating transfers from one place to another or to and fro to Leh and Kargil districts cannot be said to have emanated from any statutory provisions or from any constitutional provision. The first contention of Mr.Z.A. Shah about the circular

having legal force must therefore, fail.

It was further held:-

No right can be claimed on the basis of the circular if the transfer is made in violation of the advice contained therein e.g. if a junior is not available

for transfer, does it mean that a post at Leh or Kargil should remain vacant or if a senior is posted at Srinagar, has he a right to remain at Srinagar

till his super annuation. This type of approach will be absurd and will bring the administration to a stand still. I, therefore, hold that this circular

being No.36-CD of 1983 dated 8.8.1983 is not binding even on the Heads of the Departments and no right can flow from this in the matter of

transfer of the employees. This is just a guide line in the nature of an advice and is only directory and not mandatory.

5. Mr. Sethi tries to draw distinction between the circular referred in that case and the circular of 1989 to which he is placing reliance. He submits

that the present circular is a Government order based upon Cabinet decision and therefore is binding upon the Government. I am not in agreement

with Mr.Sethi. From the aforesaid observations of the court the circular in that case was also deemed to be an order of the Government and that

was not found to be an order, which conferred any right upon the Government servant. Instant Government order also does not disclose the

source under which it has been issued. Transfers are governed by ruled 27 of C.C.A. Rules and transfer orders can be made in respect of

government services, keeping in view the interest of administration. The Government order at the best can be a policy disclosed by the

Government which may or may not be adhered to by the Government. It can only be pressed into service by a Government servant, if it is shown

to have a source from some statutory rules or regulations. As there is no rule or regulation available in any statute which gives powers to the

Government to lay down a policy effecting transfers, therefore, any policy made by the Government cannot be made basis for asserting a right to

oppose a transfer on the ground of its being in violation thereof.

6. Mr. Sethi refers to the following observations of the Supreme court made in a case titled Virender S. Hooda and Others Vs. State of Haryana

and Another, :-

The view taken by the High Court that administrative instructions cannot be

enforced by the appellants and that vacancies became available after initiation of process of recruitment, would be looking at the matter from a narrow and wrong angle. When a policy has been declared by the State as to the manner of filling up the post and that policy declared in terms of rules and instructions issued to the Public Service Commission from time to time and so long as these instructions are not contrary to the rules, the respondents ought to follow the same.

7. The aforesaid observations do not apply in the present case because policy in that case was declared in terms of the rules, which is not the case

in the present petition.

8. Mr. Sethi also relies upon case titled Rameshwar Prasad Vs. Managing Director U.P. Rajkiya Nirman Nigam Limited and Others, . The

reliance is misplaced because in that case pursuant to the policy rules had been framed for absorption.

9. Mr. Sethi has also relied upon a case reported in Union of India (UOI) and Others Vs. D. Mohan and Others, but this case also is

distinguishable and has no application to the facts of the present case.

10. It is settled principle of law that transfer being an exigency of service, no employee has any right to insist that he will serve only on a particular

post. It is the prerogative of the employer to transfer his employee to a place where it is suitable and beneficial to him. It is also settled principle of

law that courts should not interfere into a transfer order unless the order is in violation of some statutory rules or is actuated by mala fide or that the

authority passing the same is not competent to pass the same. In the present case it is not disputed that the Government is competent to order

transfer of the petitioner. It is also not the case of the petitioner that the order has been actuated by mala fide. No rule or any statute has been cited

by learned counsel for the petitioner, which has been violated by passing the order impugned in the writ petition.

11. Therefore, there is no merit in the writ petition, which is accordingly dismissed, alongwith all connected CMPs.

+ SWP No. 1542 / 2000

% 18.05.2004

Mohd. Aslam !

\$ State of J&K and Others

Coram :

* Y.P. Nargotra, J.

Mr. Rahul Pant, Advocate

For the Respondents: Mr. B.S. Salathia, AAG

1. The petitioner was recruited as a Constable in J&K Armed Police in the year 1993. The petitioner after serving for 4 to 5 years was confirmed

on his post. He absented from his duty on 12th of July 1999 and did not report back so his services were brought to an end by order No.215 of

2000 dated 23.3.2000 issued by the Commandant JKAP XIII BN Draba Poonch. Admittedly the respondents have conducted no enquiry into

the cause of his absence before passing the order of termination of his services. In the order of termination it has been stated that notices were

issued to the petitioner through SHO Police Station Rajouri for directing the petitioner to resume his duty immediately, failing which a legal action

under rules will be taken against the petitioner, but nothing has been heard from SHO concerned meaning thereby that these notices were not

served upon the petitioner. It has further been mentioned in the order that final attendance notice was served upon the petitioner on 4th of January

2000 and copy of the same was received by the petitioner on 5th of January 2000 at his home in presence of the two witnesses. Still the petitioner

did not report back to join duty. Another show cause notice was got published in Daily Excelsior newspaper of its issue dated 9th of February

2000. Despite the publication of such notice the petitioner did not report back for duty, so taking note of the long period of un-authorized absence

of the petitioner and presuming thereby that petitioner was not interested in serving the department petitioner was removed from service w.e.f. the

date of his un-authorized absence from duty i.e. 12.07.1999. The petitioner has challenged the aforesaid order dated 23rd of March 2000 of his

removal from service passed by respondents through the present writ petition. The case projected by the petitioner is that in the month of June-July

1999 he went in severe depression and as a result of which he lost control on his mind. He suffered from severe psychiatric disorder and remained

wandering from one place to another. Ultimately he received treatment under the supervision and guidance of Dr. J. P. Goswamy Assistant

Surgeon, J&K Health Services posted in Psychiatric Hospital, Amphalla and remained under his treatment from 15.7.1999 to 11.7.2000. It has

further been pleaded by the petitioner that during all this period the he was not under control of his senses and was not even aware of the fact of his

being posted as a constable. That he regained control of his senses in the month of July 2000 and thereafter he went to his Unit where he was

informed that he stands removed from service. Mr. Pant learned counsel for the petitioner has argued that absence from duty is not a misconduct

and therefore it is only willful absence from duty amounts to misconduct and under Article 311 of the Constitution of J&K read with Section 126

of the Constitution of J&K and Rule 359 of J&K Police Manual, enquiry before passing the order of removal is a must. According to Mr. Pant, in

the present case no enquiry was conducted by the respondents to determine as to whether the absence of the petitioner was willful or was for the

reasons pleaded by him in the writ petition. He further contends that notices issued by the respondents to the petitioner being issued during the

period of his suffering from severe psychiatric disorder cannot be deemed to be the proper notices because of the reasons that petitioner was not

in a fit stand of mind to understand the implications of the notices or of what was being contemplated thereby. In view of his mental disability he

was not in a position to receive notice from the respondents and therefore service of any such notice during the period cannot be said to be a valid

service. He further submits that the order of! removal of the petitioner from service having been passed without holding any enquiry is bad in law

and merits to be set aside. In support of his contentions he relied upon a decision of this Court reported in 2003(1) SLJ 95 State of J&K and ors

Vs. Mohammad Khalil Hajam, in which it has been held that if services of an employee who has remained absent is to be brought to an end, an

enquiry is to be held with a view to determine as to whether act of absence is willful or not. He also relied upon a Division Bench Judgment of this

Court reported in 2000 KLJ 274 Mohd Ishaq Bhat Vs. State and ors, in which it was held that ;

2. No doubt the appellant's tenure was adhoc in nature but some right did vest in him. The position in this case is somewhat similar to that which

existed in Babu Lal's case supra. However this is not the end of matter. The appellant was not attending to his duties. He was absent. He was

involved in a criminal case also. For this the respondents were not responsible. Again acquittal in prosecution does not bar holding of department

enquiry. See State of Karnataka and Another Vs. T. Venkataramanappa, and Senior Superintendent of Post Offices, Pathanamthitta and Others

Vs. A. Gopalan, .Absence from service if not explained can be made a ground for snapping relationship of master and servant, however, an

enquiry has to be held is-a-vis the cause of absence. In Letters Patent Appeal No. 340/1997 decided on 11.2.1999 Shere-I-Kashmir Institute of

Medical Sciences Soura Vs. Mrs. Sarla Jalali, it has been observed:

Mere absence from duty is not perse misconduct.

Whether an employee process on leave and dos not resume duties even then some enquiry is required to be held. Service tenure cannot be

brought to an end without compliance of principles of natural justice.

3. Even in the presence of some service regulation-visualizing concept of automatic termination in case of absence an enquiry is required to be held.

4. The order of termination has to be preceded by hearing and the order so passed has to be ! reasoned one.

5. When order of reinstatement is passed then preponderance of view is that back wages are not to be allowed.

6. The Competent Authority should be left free to decide as to whether it wishes to leave the matter as it is or wants to hold further enquiry where

order of termination is set aside.

Mr. Salathia, learned counsel for the respondents does not dispute the preposition of law that for passing the order of termination or removal from

service on the ground of absence from duty an enquiry is required to be held for determining the question as to whether the absence of the

employee was willful. He however contends that this rule is not of a general application. He argues that in a case where notice is given to the

absentee employee to appear before the competent authority for assuming duty and despite such notice if the absentee employee does not care to

resume duty it can be presumed that he is not interested in the employment and in such circumstances enquire can be dispensed with. He argues

that in the present case also as the petitioner had not joined his duty despite being served with a notice personally and through publication in the

newspaper, therefore his removal from service without holding the enquiry was

justified. In support of his contention he relies upon a judgment of this Court rendered in case Mohd Iqbal Vs. State and anr SWP 1434/2000, in which it has been held;

7. It is admitted case of the parties that no enquiry as contemplated under Rule 359 of the J&K Police Rule was held against the petitioner. In such

a situation the question which arises for consideration is whether the order terminating the services of the petitioner without following the procedure

as laid down under rule 359 is bad in law? . In my considered view the holding of enquiry as envisaged u/s 126 of the Constitution of J&K and

Rule 359 of J&K Police Rules may be necessary before the services of an employee are terminated for absence without leave or absence after

leave, but ! this principle of law has no universal application. In cases where the facts disclose that the employee had absconded or where it is

impossible to communicate with him, then the order in my view does not suffer from any legal infirmity.

8. In my considered view the observation made in the above said case cannot be applied to the facts of the present case because for the simple

reason that it is not a case where the petitioner has absconded or it was impossible for the employer to communicate with him. Here the notice

stands served upon the petitioner but despite notice he had not appeared before the respondents. The question of enquiry in the present case

depends upon the validity of the service of the notice. Petitioner's case is that he was mentally sick and was suffering from psychiatric disorder and

therefore was in a legal disability to acknowledge the service of the notice. Can a notice served upon a mentally sick person be a valid service of

notice upon him? My answer would be in the negative. Service of notice can be valid only if a person upon whom it is served is in a position to

understand what that notice is, meaning thereby that he should be in a fit mental stage to understand the implication of the notice. In the present

case enquiry has not been held. The question as to whether the petitioner was in fact suffering from such mental disorder has not been determined.

Mr. Salathia learned counsel for the respondents submits that simply because the petitioner has filed medical certificates obtained from a Doctor it

cannot be held that petitioner in fact suffered from Mental illness as projected by him in the writ petition during the relevant period. It is true that

this Court cannot embark upon the enquiry to find out the genuineness of the medical certificates nor this Court can go into the question as to whether petitioner in fact was suffering from the mental disorder as alleged by him being a matter of proof, yet the fact remains that had the enquiry been conducted the genuineness of the claim of the petitioner could have been gone into. It is settled principle of law that an employee against whom the order of termination is recorded, must be afforded an opportunity of being heard in a departmental enquiry as after all absence from duty is not perse misconduct. It will amount to misconduct if it is shown that absence from duty was willful. Therefore in the circumstances of this case enquiry should not have been dispensed with, therefore the order of termination which has been passed without holding an enquiry is bad in law therefore is hereby quashed with a direction to the respondents to hold a departmental enquiry by giving opportunity of being heard to the petitioner for enabling him to explain his absence from duty and in that enquiry genuineness of the medical certificates, copies of which have been filed by the petitioner may also be gone into. After such enquiry the respondents shall be free to impose any punishment permissible under law if the absence of the petitioner is found deliberate and willful.