
(2005) 05 J&K CK 0008

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1702 Of 1999, Service Writ Petition (SWP) No. 703 Of 2000, Service Writ Petition (SWP) No. 1867/99, Service Writ Petition (SWP) No. 1853/99 C/w Service Writ Petition (SWP) No. 1852/99, Service Writ Petition (SWP) No.

Riyaz-ud-Din Shah and Ors.

APPELLANT

Vs

State of J&K and Ors.

RESPONDENT

Date of Decision : 20-05-2005

Acts Referred:

Constitution of India, 1950 — Article 311

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

Citation : (2005) JKJ 571 Supp

Hon'ble Judges : Hakim Imtiyaz Hussain, J

Bench : Single Bench

Advocate : Rehana, R.A.Jan, M.Y.Bhat, M.A.Rathore, M.Abdul Qayoom, G.A.Lone, Advocates appearing for the Parties

Judgement

1. Heard.

All the above mentioned writ petitions relate to the same matter which arise out of one and the same episode, the points involved are common in all

the petitions, the order impugned is the same and even the arguments raised are almost on similar lines so these are being disposed of by this

common judgment.

2. The matter pertains to police agitation, which took place at Srinagar in the year 1993. The agitation, it appears from the record was launched in

protest against the death of a constable. Certain police personnel abstained from discharging their duties, they were joined by a good number of

other police officials who demand action against the SSP, Srinagar, revival of Police Union and reinstatement of police employee who had been

dismissed from service. The agitation continued from 22nd to 27th April 1993, during this period a procession was taken out by the agitation. As a

result of this agitation, 109 police personnel of different battalions of JKAP were dismissed from service by his Excellency the Governor of the

State under Article 126 (2)(c) of the Constitution of Jammu & Kashmir, Government Order No.9 (POL) of 1993 dated 1st May 1993, which

was issued in this behalf reads as under:

Whereas the Governor is satisfied that the conduct and activities of Police personnel as mentioned in the Annexure to this order are detrimental

and prejudicial to the security of the State and, therefore, it is necessary that said police officials should be dismissed from service in public interest

and.

Whereas, the Governor is further satisfied that in terms of Clause (C) of provision of SubSection (2) of the Section 126 of the Constitution of J&K

in the interest of the security of the state, it is not expedient to hold any enquiry against the said police officials. Now, therefore, the Governor in

accordance with provision of Section 126 of the Constitution of Jammu & Kashmir read with Article 311 of the Constitution of India hereby

dismisses the police officials as mentioned in the Annexure to this order with immediate effect.

By order of the Government of Jammu and Kashmir

3. Later the dismissed employees filed representations for review of the decision of their dismissal and prayed for their reinstatement. Their

representations were entrusted by the Government to a Committee, specially constituted for the purpose. The Committee comprised of Shri S.S.

Wazir and Shri A.M. Watali, both retired Inspector Generals of Police of the State. The Committee examined all the aspects of the case and

recommended for reinstatement of all the Police personnel. The Committee taking note of conflicting reports relied upon by the State and certain

clerical discrepancy in the Government Order observed that the orders of dismissal were passed in violation of the Constitutional provisions and in

hot haste. The Committee observed as under:

The overwhelming documentary evidence produced by the aggrieved police personnel with their representations could not be rebutted by a general

note of ADGPDIG sic (CID) J&K which has been the basis of dismissal. Even the

entries in the D.D reports and attendance register are of very important evidentiary value as these records have been maintained in the ordinary course of circumstances when the matter was not in dispute. It is, therefore, very difficult to brush aside or reject this evidence. It could be argued that the dismissed Police personnel may have been participating in the strike after making their attendance. But in that case they should have been marked absent by their respective Gazetted Officers at any stage between 21st and 27th April 1993. If a police personnel is proved to be on duty on record, he cannot be presumed to have deserted his duties without a valid documentary proof to the contrary. The documentary evidence produced by the dismissal police personnel in support of their individual representations about this being on duty is conclusive proof of their noninvolvement. Moreover no specific and definite allegations have been leveled against them which could service as a basis for dismissal. The notes submitted by the Addl. DGPCID which are copies of each other containing general and vague allegations collectively against all the dismissed employees forming the basis of dismissal orders are not going to wash off the documentary proof provided individually by the dismissed policemen to prove their innocence.

4. The Committee, therefore, recommended as under:

1. Vague allegations of general nature against dismissed police men. No clear cut and definite and individual allegation. Application of mind missing.
2. None of the alleged activities of Police men came under the mischief of security of State.
3. Cabinet powers were vested in State Administrative Council during President's Rule. Approval of S.A.C. has not been obtained for dismissal.
4. Orders passed in causal and careless manner. Even names and particular of some dismissed employees have been not correctly recorded.
5. Officials similarly placed have been treated differently one group dismissed whereas another group not dismissed despite similar grounds and recommendations.
6. Many officials who have been dismissed were on duty during strike as reported by their respective officials. Recommendation of the Watali/Wazir Committee.

5. The record made available by Mr. M.A. Rathore, AAG, shows that the report of the Committee was examined by various functionaries of the

Government including A.C.S. Finance, who recommended reviewing and canceling of the decision regarding dismissal. However, the Committee

of Senior Officers came to the conclusion that in the facts and circumstances of the case, the order of dismissal should be withdrawn and in its

place an order of compulsory retirement should be made and the dismissed Police personnel should be deemed to have compulsorily retired from

the service. The matter went to the Governor who accorded his approval to the proposal. Consequently it was ordered that the Police personnel

dismissed from service be deemed to have been compulsorily retired from service from the date of issue of the order. Government Order No.

Home278(ISA) of 1998 dated 17th July, 1998 issued in this behalf by the Government provides as under:

It is hereby ordered that 109 Police personnel dismissed from service, vide the following Govt. Order Nos. would be deemed to have been

compulsorily retired from service with effect from the date of issue of the respective orders.

(The order contains the names of the Police personnel deemed to have been compulsorily retired from service. The names of all the petitioners

before us appear in the list.)

6. Meanwhile some of the dismissed police officials had filed writ petitions before this Court against the order of their dismissal. All these writ

petitions were withdrawn on the ground that the Chief Minister had given them assurance that their grievance would be met outside the Court.

7. From the record, it also appears that the Government while taking the decision of converting the order of dismissal into that of compulsory

retirement also came to the conclusion that the dismissed Police personnel should be taken back in the Government service but it was felt that it will

not be just and proper to allow them to continue in the Police service. Accordingly it was decided to absorb them in the Fire Service Department

by transferring their posts from the Police Department to the Fire service department. But since most of the posts which fell vacant due to the

dismissal of the police personal in the police department had been filled up by the time the Government arrived at such a decision, the Government

decided to create new posts in the Fire Service Department and appoint the effected Police personnel against those posts. Government order No.

Home 132(ISA) of 1999 dated 22031999, was, therefore, passed which accorded sanction in relaxation of rules to:

- a. creation of 108 posts in Fire Service department
- b. appointment of 108 persons, shown in AnnexureB to the said order against the said posts.

The order further directed that the appointees shall be on probation for a period of two years during which they will be imparted necessary onjob

orientation training. The petitioners also figured in the list of appointees and in compliance to the appointment order, they joined the new assignment.

8. Though the petitioners have joined in the Fire Service Department but they are aggrieved of the manner in which they were compulsorily retired

from the Police Department and their past service was almost ignored. Their appointment in the Fire Service Department has been treated as a

fresh service and they have been kept on probation for two years, thus they are not entitled to any of the benefits which accrue to them under the

past service in the Police department. They have been means of these writ petitions, filed under Article 226 of the Indian Constitution read with

Section 103 of Constitution of Jammu & Kashmir, prayed for a writ of certiorari for the quashment of Government Order No. 9 (POL) of 1993

dated 1st May 1993 in so far it relates to the termination or the petitioners. They have also prayed for quashment of Government order No.

Home278(ISA) of 1998 dated 17th July 1998 in so far as it relates to them and have prayed that the respondents be directed to reinstate them in

the Police Department against the post they were holding as on 1st of March, 1993 with all consequential benefits including seniority, increment

and other service benefits etc.

9. The petitioners were dismissed from service vide Government Order No. 9 (POL) of 1993 dated 1st May 1993 by the Governor in exercise of

the powers vested under Section 126(2) (c) of the State Constitution by dispensing with the enquiry against them on the ground that their conduct

and activities were detrimental and prejudicial to the security of the state and that in the interests of security of the state, it was not expedient to

hold an enquiry against them.

10. The jurisdiction and limits of the courts to review an order passed by the Governor in exercise of its powers under Section 126(2)(c) of the

State Constitution [corresponding to Article 311 (2) (c) of the Constitution of India], is well defined now. The courts, though cannot go to the

correctness of the satisfaction of the Governor in arriving at the conclusion but the courts can definitely look into the fact as to whether there was

any material on the basis of which the Governor arrived at such a satisfaction.

11. In *A.K. Kaul v. Union of India*, AIR 1995 SC1403 the Supreme Court held that (the president or) the Governor has to satisfy himself about

the expediency in the interest of the security of the State to hold an enquiry as prescribed under Article 311(2) and that the satisfaction would be

vitiating if it is based on circumstances having no bearing on the security of the State. The Court said (at para 24)

24. Under Clause (c) of the second proviso to Article 311(2) the President or the Governor has to satisfy himself about the expediency in the

interest of the security of the State to hold an enquiry as prescribed under Article 311(2). Are the 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 the matters from the

field of justifiability? We do not think so. Article 19(2) of the Constitution permits the State to impose, by law, reasonable restrictions in the

interests of the security of the State on the exercise of the right to freedom of speech and expression conferred by subclause (a) of Clause (1) of

Article 19. The validity of the law imposing such restrictions under Article 19(2) is open to judicial review on the ground that their restrictions are

not reasonable or they are not in the interests of the security of the State. The Court is required to adjudicate on the question whether a particular

restriction on the right to freedom of speech and expression is reasonable in the interest of the security of the State and for that purpose the Court

takes into consideration the interests of the security of the State and the need of the restrictions for protecting those interests. If the Courts are

competent to adjudicate on 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) 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) is based on considerations having a bearing on the interests of the security of the State. While examining the validity of a law imposing restrictions on the right to freedom of speech and expression this Court has emphasized the distinction between security of the State and maintenance of public order and has observed that only serious and aggravated forms of public order which are calculated to endanger the security of the State would fall within the ambit of Clause (2) of Article 19.

(See: *Romesh Thappar v. The State of Madras*, 1950 SCR 594, at p.601) (AIR 1950 SC 124 at p. 128). So also in *Tulsiram Patel* (AIR 1985 SC 1416) (supra), the Court has pointed out the distinction between the expression 'security of State', 'public order' and 'law and order' and has stated that situations which affect public order are graver than those which affect law and order and situations which affect security of the State are graver than those which affect public order. The President or the Governor while exercising the power under Article 311 (2)(c) has to bear in mind this distinction between situations which affect the security of the State and the situations which affect public order or law and order and for the purpose of arriving at his satisfaction for the purpose of passing an order under Article 311(2)(c) the President or the Governor can take into consideration only those circumstances which have a bearing on the interests of the security of the State and not on situations having a bearing on law and order or public order. The satisfaction of the President or the Governor would be vitiated if it is based on circumstances having no bearing on the security of the State. 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 or the Governor is not based on circumstances which have a bearing on the security of the State the Court can examine the circumstances on which the satisfaction of the President or the Governor is based and if it finds that the said circumstances have no bearing on the security of the State the Court can hold that the satisfaction of the President or the Governor which is required for passing such an order has been vitiated by wholly extraneous or irrelevant considerations".

(emphasis supplied).

12. The Court further held that the Court, however, cannot sit in appeal over the order, or substitute its own satisfaction for the satisfaction of the

President. So long as there is material before the President which is relevant for arriving at his satisfaction as to action being taken under Clause (c)

to the second proviso to Article 311 (2), the Court would be bound by the order so passed. The Court has enumerating the scope of judicial

review of the President's satisfaction for passing an order under Clause (c) of the second proviso to Article 311 (2) observed

i. that the order would be open to challenge on the ground of malafides or being based wholly on extraneous and/or irrelevant grounds;

ii. even if some of the material on which the action is taken is found to be irrelevant the Court would still not interfere so long as there is some

relevant material sustaining the action;

iii. the truth or correctness of the material cannot be questioned by the Court nor will it go into the adequacy of the material and it will also not

substitute its opinion for that of the President;

iv. the ground of malafides takes in, inter alia, situations where the proclamation is found to be a clear case of abuse of power or what is sometimes

called fraud on power;

v. the Court will not lightly presume abuse or misuse of power and will make allowance for the fact that the President and the Council of Ministers

are the best judge of the situation and that they are also in possession of information and material and Constitution has trusted their judgment in the

matter;

vi. this does not mean that the President and the Council of Ministers are the final arbiters in the matter or that their opinion is conclusive.

13. Following the decision in Mohd Afzal's case Full Bench of this court in State of J & K v. Mohammad Shafi Bhat 2004 (I) SLJ127 held: (at

para 13)

In light of the above settled position of law, apart from what has been expressly and explicitly held by the Supreme Court from time to time, it is

clear that it is not open to the court to dissect, i.e. to analyze and interpret minutely the material on the basis of which the Governor has arrived at

his satisfaction under Article 311 (2)(c) of the Constitution. The Governor is also not required to record any reasons to justify the satisfaction. The

Court is also debarred from going into the question of adequacy or inadequacy of the material on the basis of which the Governor arrives at the requisite satisfaction. When there is some sort of material having bearing on such satisfaction, it cannot be said that there has been nonapplication of mind on the part of the Governor, Registration, pendency or determination of a criminal case, or even a departmental enquiry, is no bar to the exercise of such power by the Governor.".....

14. The State has made available the whole record relating to the present case but on going through the same, I could not find as what was the material before the Governor at the time the order impugned was passed to arrive at the conclusion that in the interest of the security of state it was not expedient to hold an enquiry into the matter. It is interesting to note that even in the official record there is clear observation that subclause 2 of S.126 of the Constitution is not attracted as 'none of the activities of skilling policemen as disclosed by the ADGP, CID in his note are prejudicial to the security of the state as the demands of the Police personnel did not come within that mischief.' Perhaps this was one of the reasons, which persuaded the Government to appoint a committee of senior police officers to review the cases. The Committee, as observed above, has come to the conclusion that no case was made out against the concerned police personnel justifying their dismissal. The Committee has pointed out to certain glaring contradictions which itself is proof of the fact that the order of dismissal was passed by the Governor on extraneous material. Report of the committee, therefore, shows that the order was not on the ground permitted by Section 126 (2)(c).

15. All these points came to the notice of the Government and it was felt and decided that the order of dismissal needs to be recalled. This undoubtedly was the right decision but while rectifying this wrong, the Government proceeded to commit another wrong, which in the facts and circumstances of the case was not justified at all.

16. From the official noting it appears that Additional Chief Secretary, Finance, had rightly recommended for recalling of the order of dismissal and had suggested that the dismissed police personnel be adjusted in the Police Department by treating their period of absence as 'Diesnon' but this view did not find favour with the Government and it was decided to treat the

order of dismissal as of compulsory retirement. Once the Government came to the conclusion that the order of dismissal had not been passed in accordance with the provisions of law, the order should have been withdrawn immediately but instead of recalling it, the same was converted into that of compulsory retirement, forgetting that the Governor could have in exercise of the powers under Section 126 (2)(c) dispensed with the enquiry only with regard to penalties of dismissal, removal and reduction in rank. Penalty of compulsory retirement is not mentioned in Section 126 (2)(c) of the Constitution, so enquiry in respect of this penalty cannot be dispensed with under the section.

17. No doubt the Government has got powers to compulsory retire a Government servant but one of the essential requirements is that it should be in public interest. The order of compulsory retirement does not need to contain the words that order was passed in public interest but the record should speak that the Government was making an order in public interest. On going through the record, I again find that there is absolutely no material to show that at any stage the Government found it in public interest to convert the order of dismissal into order of compulsory retirement.

18. Compulsory retirement (i.e. premature retirement) brings about termination of service. Service rules provide two contingencies in which compulsory retirement may be ordered. A public servant may, under Article 226(2) of the J&K Civil Service Regulations be directed to take premature retirement in public interest subject to the fulfillment of the conditions provided in the said rule. In such a case it is imposed not by way of punishment so it neither amounts to dismissal nor removal. Another type of compulsory retirement amounts to punishment. It is provided by Rule 30 (vi) of the Jammu and Kashmir Civil Service (Classification, Control and Appeal) Rules, 1956. When it is inflicted as a major punishment it is a species of removal.

19. In the present case the compulsory retirement ordered was not under Article 226(2) of J&K CSR but under Rule 30 (vi) or J&K CS (CC&A) Rules, as the order of dismissal was substituted with that of compulsory retirement, so it required a departmental enquiry under the rules as the Governor could not have dispensed with the enquiry under Section 126(2) (c). No enquiry has been conducted in the matter.

20. If the order is treated as under Article 226(2) of J&K CSR, the same is not in order as while passing the order of compulsory retirement,

certain formalities are to be observed, which I find lacking in the present case.

21. Compulsory retirement empowers the Government to weed out deadwood. The Government can remove a person from service by means of

compulsory retirement, if it finds that his service is no more required in public interest. If the Government came to the conclusion that the services of

the petitioners (as we are concerned with the petitioners in the present petitions only), were not required in public interest, then how and why they

were reemployed in Fire Service Department. If a person is unfit for the Government job and is retired compulsorily, how can he be taken back in

public employment in other service.

In *P. Radhakrishna Naidu v. Government of A.P* AIR 1977 SC 854, the Supreme Court observed that it will be an exercise in futility if

Government servants who are compulsorily retired are again employed in Government service.

22. True, the Government may have compulsions, the authorities may come to the conclusion that a particular public servant is not fit for a

particular service, in such a case the Government is not powerless to shift him from that field to some other suitable place where his services can be

utilized properly. If the Government in the present case found the petitioners not suitable for the Police Department which definitely calls for strict

discipline, obedience to the higher authorities and compliance to the rules, the petitioners could have been, by means of transfer, shifted to the Fire

Service Department in which they were ultimately appointed.

23. In the circumstances of the case, I, therefore, find that both the orders, Order of dismissal No. 9 (POL) of 1993 dated 1st May 1993 and

order of compulsory retirement No. Home278 (ISA) of 1998 dated 17th July 1998, were not in accordance with the rules and, therefore, cannot

stand.

24. But the circumstances of the case, with the passage of time have reached at a stage, which does not warrant restoring the services of the

petitioners in the Police Department. The petitioners have in compliance to Order No. Home132(ISA) of 1999 dated 22.03.1999, voluntarily

accepted their appointment in the Fire Service Department and are holding the

substantive position in the Department. Once they joined the Department, even though an apparent compelling situation, they cannot ask for the restoration of their posting in the Police Department. Under these circumstances, they cannot be now reverted back to the Police Department. They cannot also claim counting of their past services for the purpose of seniority in the Fire Service Department on the ground that they with their free consent accepted the position which was granted to them at the time of passing of their fresh appointment Order No. Home132(ISA) of 199 dated 22.03.1999 in the Fire Service Department but since their removal from Police Department has been done in contravention of rules, they are certainly entitled to ask for counting their services which they rendered in the Police Department for the purpose of their pension and leave benefits.

25. Under these circumstances, I, therefore, allow these writ petitions with the following directions:

1. Dismissal order No, 9 (POL) of 1993 dated 1st May 1993 and compulsory retirement Order No. Home278 (ISA) of 1998 dated 17th July

1998 in respect of the petitioners, which is impugned in the petitions, are hereby quashed in so far as they relate to the petitioners.

2. Their period of absence in the Police Department from the date they were dismissed from service to their reappointment in the Fire Service

Department be settled in accordance with the rules. The period shall count for the purpose of their pensionary benefits and leave and other

monetary benefits due to them under rules, in view of quashment of the order of dismissal and compulsory retirement etc.

26. Writs allowed as indicated.

27. Registry is directed to place a photostat copy of this judgment on each file.