

(2009) 03 J&K CK 0024
In the Jammu And Kashmir High Court

Shabir Ahmad Bhat

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 12-03-2009

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2009) 03 J&K CK 0024

Hon'ble Judges : Mohammad Yaqoob Mir, J

Bench : Single Bench

Judgement

Mohammad Yaqoob Mir, J.—Petitioner vide order No. 558/13/6/2000 has been appointed as constable by SSP Srinagar. Within the

probationary period of three years was nominated, and deputed for undergoing Basic Recruitment Training Course (BRTC). In the month of

January 2001, petitioner reported there at STC Talwara but allegedly remained absent with effect from 12/3/2001, resultantly respondent No. 4

vide his order No. 53/2001 dated 31.3.2001 reverted him back, thereafter, SSP vide his order No. 334/01 dated 27.4.2001 while exercising

powers under Article 126(B) of J&K CSR read with Article 187 of J&K Police Manual, discharged the petitioner from the service w.e.f.

12/3/2001 i.e, the day the petitioner absented himself from STC Talwara. In the order it is added that the petitioner (constable) has not himself

proved a good police official and has also recorded that absence of the constable clearly depicts that he is not likely to become a good police

official.

2. It is no more res integra that discharge simpliciter does not warrant enquiry before discharge but when the discharge is stigmatic then order of

discharge cannot be passed unless adequate opportunity of being heard to the concerned employee is given same being in keeping with Article 311

of Constitution of India, Section 126 of J&K Constitution and Rule 359 of Police Rules.

3. Admittedly in the instant case, petitioner has been appointed as constable, was on probation, within the period of probation has absented from the STC Talwara w.e.f 12/3/2001.

4. Petitioner admits his absence but contended that he had left with the permission of respondent No. 4. Further adds that earlier he had completed three months training course in Police Training Centre Zewan, thereafter was deputed for undergoing training at PTS Talwara where he remained

for six months with satisfactory performance but unfortunately his younger sister fell ill, was taken to All India Institute of Medical Sciences New

Delhi, who was suffering from serious disease viz Bone Tumor (Cancer). There was no one to look after, bringing the said fact to the notice of

respondent No. 4 was permitted to attend his sister but on return found order of discharge passed against him, thereafter moved a detailed

representation before SSP, copy of which is on the file, same is admitted to have been made but rejected by the SSP vide his order No.

1262/2003 dated 29.10.2003.

5. It is admitted position that enquiry at all has not been conducted nor petitioner has been given opportunity of being heard before passing of

order impugned. Same position is admitted in the counter affidavit wherein it is recorded that the question of conducting or holding of enquiry in the

matter of a constable who was still on probation did not arise. In the order of discharge impugned it is recorded that the petitioner is not likely to

become a good police official and is also recorded that the petitioner has not himself proved a good police official which on the face of it is

stigmatic so as to prejudice the future prospectus of getting employment when without conducting enquiry such order is passed same cannot sustain

in the eye of law as the same violates the guaranteed rights.

6. The question of holding enquiry before discharge that too of a probationer without enquiry has been catching attention but finally has been set at

rest by this Court. In this connection it is quite relevant to quote para 12 of the judgment reported in 2005(1) SLJ 375, which reads as under:

The question as to whether any enquiry is required to be conducted before discharging a probationer police official under Rule 187 J&K Police

Manual is not res intergra. It is settled now by this Court that before invoking Rule 187, it is incumbent and obligatory upon the appointing authority

to hold an enquiry into the matter to afford adequate opportunity of being heard to the concerned employee.

In Chaman Lal v. State of J&K SWP No. 1009/88 decided on 23.8.1989 Sethi J (as his lordship then was) discussed the scope and ambit of

Rule 187 and the consequences of not observing the rule. It was held:

A perusal of the rule would make it clear that before discharging a constable the Superintendent concerned has to ascertain that such constable

was unlikely to prove an efficient officer. The word 'found used in the Rule is significant and categorical in terms. It is not possible to 'find a person

unlikely to prove an efficient officer', without holding some sort of inquiry after giving such constable an opportunity of being heard and basing the

finding of such conclusion on the basis of material placed before the Superintendent of police. It is not the mere subjective satisfaction of the police

officer which is relevant for the purposes of deciding as to whether he has rightly held a constable to be unlikely to prove an efficient police official.

To find the concerned as inefficient the authority has to decide on the basis of the record the likelihood of the retention of a police officer as

otherwise. The finding must be based upon a conscious decision arrived at after proper application of mind hypothetically or more upon conjectures

or suspicion. According to Webster's English Dictionary the word 'find' means, amongst other things, ' to arrive at a conclusion, come to a finding,

determine and declare as a verdict in a judicial proceedings, agree or settle upon or deliver the finding regarding innocence or guilt of a person.

Such a finding arrived at by the concerned authority may not be open to challenge in the court of law, but if the record shows that the finding was

based upon no material that the same was arrived at mechanically or that the aggrieved were not offered reasonable opportunity of being heard

before passing the order impugned, this Court would immediately come to the rescue of such civil servant and grant him appropriate relief.

Para 6 of the judgment delivered by this Court in 2002 (1) SLJ 210 are quoted herein below:

Reading of the Rule shows that during the period of probation of three years if on the performance of the Constable, the Superintendent forms an opinion that he/ she would not prove to be an efficient police officer, then he/ she may be discharged from service. The law in regard to probationer is well settled. The probationer has no right to the post held by him and under the terms of his appointment, he is required to be discharged at any time during the period of his probation under the rules governing such cases. Probationers are discharged generally because they are not found to be competent or suitable for the post they held. In other words, if the temporary servant or a probationer is found to be satisfactory in his work, efficient or otherwise, eligible, it is unlikely that his service would be terminated and so before discharging such employee the authority may have to examine the question about the suitability of the said servant to be continued and take action bonafide in that behalf. The authority may also give(sic) employee to explain, if any complaints are made against him or his competence or suitability is disputed on some grounds arising from the discharge of his work, then such an enquiry should be held only for the purpose of deciding whether he should be continued or not there is no element of punitive proceedings in such an enquiry and if the authority comes to the conclusion that the incumbent is not suitable to be continued, it may simply pass the order of discharge by virtue of the powers conferred upon it by the contract or by the relevant rules and it would not be open to the concerned employee to invoke Article 311 of the Constitution of India or Section 126 of the Jammu and Kashmir Constitution, for the simple reason that the enquiry ultimately led to his discharge was held only for the purpose of deciding whether the power should be exercised in terms of the rules. But if a probationer is discharged on the ground of misconduct or inefficiency without a proper enquiry and without giving a reasonable opportunity of showing cause against the discharge in a given case it may amount to removal from service within the meaning of Article 311 of the Constitution of India and Section 126 of the Jammu and Kashmsir Constitution.

Para 3 of the judgment reported in State of Haryana and another Vs. Jagdish Chander, is quoted hereunder:

It would thus be clear from the order of discharge that it is not an order of discharge simpliciter. On the other hand, the S.P considered the record

and found him to be habitual absentee, negligent to his duty and indisciplined. The findings of habitual absence and indiscipline necessarily cast

stigma on his career and they would be an impediment for any of future employment elsewhere. Under those circumstances, the principles of

natural justice do require that he should be given an opportunity to explain the grounds on which the S.P proposes to pass an order of discharge

and then to consider the explanation submitted by the Police Officer. Then the S.P is competent to pass appropriate orders according to the rules.

Since this part of the procedure had not been adopted, the order of discharge is vitiated by manifest error of law.

7. It shall be quite relevant to quote under as to what has been held in the judgment captioned Kulbir Singh Sanina v. State of J&K and Anr.

reported in SLJ 1989 J&K 43:

Rule 187 of the Police Rules does not give an arbitrary power to the appointing authority to remove any employee of the police without observing

the principles of natural justice, which is the minimal requirement to hold an employee liable for removal from service, who has been appointed on a

clear vacancy and has been put on probation of three years from the date of appointment.

8. The ratio laid down in the above referred judgments is that when the order of discharge is stigmatic then without enquiry order of discharge

cannot be passed even against the probationer by invoking powers u/s 187 of J&K Police Rules.

9. It is true that there has been some laxity/ lethargy on the part of the petitioner in pursuing the matter but the situation in which petitioner was

caught i.e, his sister was suffering from cancer, therefore, laches shall not stand in his way.

10. The cumulative effect of the aforesaid fact and law is that the order of discharge impugned bearing No. 334/2001 dated 27.4.2001 is not

sustainable, as such is set aside. As a necessary corollary it shall be incumbent for the respondents to reinstate the petitioner in service. Thereafter,

it shall be open for them to place him under suspension and initiate enquiry about his un-authorized absence and also enquiry regarding likelihood

of his not becoming a good police official and then to pass appropriate orders under rules. For the intervening period i.e. till petitioner is reinstated.

Petitioner shall not be entitled to any emoluments except for subsistence allowance as shall be permissible.

11. Petition accordingly succeeds and disposed of as such.