
(2007) 05 J&K CK 0013
In the Jammu And Kashmir High Court

Shakeel Ahmad Shal

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 25-05-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 311

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3, 4

Citation : (2008) 1 JKJ 104

Hon'ble Judges : Nirmal Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Nirmal Singh, J.—Petitioner was serving as Constable in the Jammu and Kashmir Armed Police. Vide impugned order No. Home-91 (ISA)

of 1995 dt. 20th of March'95, he has been dismissed from service by invoking the provisions of Section 126 Sub-section 2 Clause (c) of the

Constitution of Jammu and Kashmir read with Article 311 of the Constitution of India.

2. The grievance of the petitioner is that he has been terminated from service without holding an enquiry against him. It is contended that even the impugned order has not been served upon the petitioner.

3. Learned Counsel for the petitioner contended that before invoking the aforesaid provisions the competent authority has to apply its mind and to

hold that it is not in the interest of public or in the State to hold an enquiry nor it is possible due to threat to the security of the State. He further

contended that the impugned order has been passed in violation of the Constitutional provisions. In support of his submission he has relied upon the

judgment passed in SWP 1012/1990 decided on 07-04-1998 titled Maqbool

Hussain Shah v. State of Jammu and Kashmir. It is submitted that the case of the petitioner is fully covered by the aforesaid judgment and the petitioner is entitled to the same relief.

Mr. B.S. Salathia, learned AAG appearing for the respondents submitted that this petition is to be dismissed on the ground of delay and latches.

He pointed out that the impugned order was passed on 20-03-1995, whereas the present writ petition was filed after more than six years, i.e., in

the year 2001. Delay in this case remains un-explained. He contended that it was inexpedient and also not in the interest of the security of the State

to hold an enquiry against the petitioner and before dispensing with the enquiry the competent authority was fully satisfied in view of the merits and

evidence available with it for terminating the services of the petitioner. He contended that when the competent authority has invoked the provisions

of Section 126(2)(c) of the Constitution of Jammu and Kashmir read with Article 311 of the Constitution of India, the scope of review is very

limited.

4. Mr. Qureshi, learned Counsel appearing for the petitioner submitted that there is no delay in filing the petition and the delay stands fully

explained. He contended that as the impugned order was never served upon the petitioner and the petitioner was allowed by the respondents to

participate in the Volley Ball game and even the petitioner participated in the Volley Ball tournament(s) out side the State on behalf of the JAKP.

On the other hand, Mr. B.S. Salathia, AAG has disputed this fact that the petitioner has ever participated.

5. I have given my thoughtful consideration to the submissions made by the learned Counsel for the petitioner and perused the record.

6. This Court may entertain the petition for adjudication and grant a relief to a party when there is a satisfactory explanation for delay and latches,

but the Court may refuse to exercise the extraordinary powers granted u/s 103 of the Constitution of Jammu and Kashmir read with Article 226 of

the Constitution of India where the petitioner is guilty of latches or undue delay for which there is no satisfactory explanation.

7. In State of Maharashtra Vs. Digambar, , the Hon'ble Apex Court has held as under:

Thus, when the writ petitioner (respondent here) was guilty of latches or undue

delay in approaching the High Court, the principle of laches or undue delay adverted to above, disentitled the writ petitioner (respondent here) for discretionary relief under Article 226 of the Constitution from the High Court, particularly, when virtually no attempt had been made by the writ petitioner to explain his blameworthy conduct of undue delay or laches.

8. In *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, , the Apex Court has held as under:

Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the

High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is

inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to

intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors.

The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause

confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is

exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice

on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the

meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction....

9. In *Ashok Kumar Mishra and Others Vs. Collector, Raipur and Others*, , it is held as under:

The power of the High Court under Article 226 to issue an appropriate writ is discretionary and if the High Court finds that there is no satisfactory

explanation for the inordinate delay, it may reject the petitioner if it is in' that the issue of writ will lead to public inconvenience and interference with

rights of others.

10. In *Life Insurance Corporation of India and Others Vs. Jyotish Chandra Biswas*, it has been held as under:

The order terminating the services of the respondent was passed on 28-1-1969. The writ petition was filed challenging the said order on 25-3-

1975, almost after a period of six years. There was no explanation in the writ petition whatsoever for this inordinate delay. The respondent sought

for his re-employment in the Corporation by his letter dated 9-1-1974 almost after a period of five years from the date of termination of his

services. It only indicated that he accepted the order of termination of his services, if not expressly but impliedly. In the writ petition no ground was

raised as to deprivation of a right of appeal to the respondent against the order of the termination of his services. It is not the case of the

respondent that he was denied, opportunity offending principles of natural justice. An inquiry was held pursuant to the charge-sheet; witnesses

were examined; and even the respondent examined three witnesses on his behalf. The enquiry officer looking to the evidence brought on record

found the respondent guilty of the charges. It was also not shown that any prejudice was caused to him in the inquiry. The disciplinary authority

concurring with the findings recorded by the enquiry officer, after giving further opportunity to the respondent, passed the order terminating the

services of the respondent. These being the facts and circumstances of the case, in our opinion the learned Single Judge was right in dismissing the

writ petition. We find that the order of the learned Single Judge is a detailed and considered one. We find it difficult to accept the observations

made by the Division Bench of the High Court extracted above that the order passed by the learned Single Judge was laconic when there was no

explanation whatsoever given by the respondent in the writ petition for delay of about six years, the learned Single Judge was right in saying so and

dismissing it. When the ground that the respondent was deprived of a right to appeal was not taken before the learned Single Judge either in the

writ petition or in arguments, the Division Bench was not right and justified in saying that the learned Single judge did not assign any reason

whatsoever in support of his judgment in tills regard. We fail to understand how such a non-existing ground could be considered by the learned

Single Judge.

11. In the instant case the impugned order has been passed on 20-03-1995, whereas the present petition was filed on 09-04-2001 and the

learned Counsel for the petitioner has tried to explain the delay by pleading that the impugned order was never communicated to him and also the

petitioner was allowed to participate in Volley Ball game. Learned Counsel for the petitioner has placed reliance on various certificates issued by

the authorities in regard to the participation in the Volley Ball game(s).

12. At the hearing when it was pointed out to the learned, counsel for the petitioner whether the petitioner was drawing his salary for the period

from 1995 to 2001, he very fairly conceded that the petitioner has not received any salary for the above said period.

13. If an employee is not getting a salary it is implied that his services have been terminated or his salary has been withheld. The petitioner has not

placed on record any document to show that he has made a representation to the competent authority for release of the salary nor it has been

pleaded that where the petitioner was posted or working during the above said period. Much "stress has been laid by (hi petitioner on participation

in Volley Ball game on behalf of TKAP. This fact has been denied by the respondents. Even it is taken that the petitioner has participated in the

Volley Ball game even then it cannot be said that with certainty that the petitioner is in service as he was not drawing his salary during the above

said period. Therefore, delay is fatal to the case of the petitioner, so on this ground the petition fails. Even on merits the petitioner has no case.

14. The issue which is to be determined on merits in this nisi is whether the competent authority was justified in exercising the powers in terms of

Section 126(2)(c) of the Constitution Jammu and Kashmir read with Article 311 of the Constitution of India.

15. Before proceeding further it will be appropriate to see the impugned order which is reproduced below:

GOVERNMENT OF JAMMU AND KASHMIR

HOME DEPARTMENT

SUBJECT: Termination of Service of a Government Employees-

Government Order No. Home 91 (PSA)

Dated: 20-3-1995

Whereas the Government is satisfied that the conduct and activities of Shri Shakeel Ahmad Shawal Constable No. 210 TT of JKAP 6th Dn S/0

Ab. Aziz A/0 Thana Mandi, Distt. Rajouri are detrimental and prejudicial to the security of the State and therefore, it is necessary that the said

police official should be dismissed from service in public interest and,

Where, the Governor is further satisfied that in terms of Clause (C) of the proviso of Sub Section (2) of the section (126) of the constitution of

Jammu and Kashmir in the interest of Security of the State, it is not expedient to hold an enquiry against the said police official.

Now, therefore, the Governor in accordance with the provision of Section 126 of the Constitution of the Jammu and Kashmir read with article 311

constitution of India, hereby dismisses Shri Shakeel Ahmed Shawl Constable No. 201 (TT) of JKAP 6th BN with immediate effect.

By order of the Governor of Jammu & Kashmir.

Secretary to Government Home Department No.

Dated: 28-3-1995

No. Home -2/95-15A

16. Before passing the impugned order the competent authority has to examine the record and also record reasons for its satisfaction that it is not

practicable to hold an enquiry. For facility of reference, Section 126(2)(c) reads as under:

Section 126(2)(c). Where the Governor is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.

17. In Union of India and Another Vs. Tulsiram Patel and Others, their lordships have held as under:

The first safeguard (which is given by Clause (1) of Article 311) is that such person cannot be dismissed or removed by an authority subordinate to

that by which he was appointed. The second safeguard (which is given by Clause (2) of Article 311) is that he cannot be dismissed, removed or

reducing 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. The second safeguard is, however, not available to him when he is dismissed, removed or reduced in rank in any of the

three cases mentioned in the second proviso to Article 311(2). These cases are set out in Clauses (a) to (c) of the second proviso. Under Clause

(a) such person can be dismissed, removed or reduced in the rank without any inquiry on the ground of conduct which has led to his conviction on

a criminal charge. Under Clause (b) any of these three penalties can be imposed upon him where the authority empowered to impose any of these

penalties is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry. Under

Clause (c) any of the above penalties can be imposed upon him where the President or the Governor of a State, as the case may be, is satisfied

that in the interest of the security of the State it is not expedient to hold inquiry.

18. In A.K. Kaul and another Vs. Union of India and another, the Hon'ble Apex Court held as under:

...that Clause (2) of Article 311 gives a constitutional mandate to the principles of natural justice and audi alteram partem rule by providing that a

person employed in a civil capacity under the Union or a State shall not be dismissed or removed from service or reduced in rank until after an

inquiry in which he has been informed of the charges against him and has been given a reasonable opportunity of being heard in respect of those

charges and that this safeguard provided to, government servant by Clause (2) of Article 311(2), is however, taken away when the second proviso

to the cause becomes applicable. (Page 202) (of SCR) : (at p. 1444 of AIR). The Court has also pointed out that the paramount thing to bear in

mind is that the second proviso will apply only where the conduct of a government servant is such as he deserves the punishment of dismissal,

removal or reduction in rank and that before denying a government servant his constitutional right to an inquiry, the first consideration would be

whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank and once that

conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the

government servant is not entitled to an inquiry (page 204-205) (of SCR) at the second proviso to Article 311(2) it has been stated:

The question under Clause (C), however, 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 by actual acts or even the likelihood of such acts

taking place. Further, what is required under Clause (c) is not the satisfaction of the President or the Governor, as the case may be, that the interest

of the security of the State is or will be affected but his satisfaction that in the interest of the security of the State, it is not expedient to hold an

inquiry as contemplated by Article 311(2). The satisfaction of the President or Governor must, therefore, be with respect to the expediency or

inexpediency of holding an inquiry in the interest of the security of the State"" (p. 277) (of SCR) : (at p. 1483 of AIR):

The satisfaction so reached by the President or the Governor must necessarily be a subjective satisfaction"" Expediency involves matters of policy.

Satisfaction lit arrived at as a result of secret information received by the Government about the brewing danger to the interest of the security of the

State and like matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite

satisfaction whether holding an inquiry would be expedient or not. If the requisite satisfaction has been reached as a result of secret information

received by the Government, making known such information may very often result in disclosure of the source of such information. Once known,

the particular source from which the information was received would no more be available to the Government. The reasons for the satisfaction

reached by the President or the Governor under Clause (c) cannot, therefore, be required to be recorded in the order of dismissal, removal or

reduction in rank nor can they be made public.

19. Before invoking the provisions of Section 126(2)(c) of the Constitution of Jammu and Kashmir read with Article 311 of the Constitution of

India the competent authority sought a report of Criminal Investigation Department. The said report reveals that the petitioner was arrested by the

local police on March 26, 1994 in FIR No. 432/1993 u/s 3/4 TADA, 307 RPC, Police Station Pacca Danga. This report also reveals that the

petitioner joined the militant out fits and he motivated the youths for arms training. On the basis of this report the competent authority satisfied

himself and passed the impugned order. The petitioner has not alleged any malafied, biased or the said order has been passed on extraneous or

irrelevant consideration.

20. When the impugned order has been passed after taking into consideration material placed before the competent authority and the competent

authority was satisfied for dispensing with an inquiry, therefore, there is no scope

to interfere in the impugned order.

21. For the reasons mentioned above, the petition shall stand dismissed. No order as to costs.