
(2004) 08 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : LPA (SW) 43 of 2000

State of Jammu & Kashmir

APPELLANT

Vs

Joginder Parkash

RESPONDENT

Date of Decision : 12-08-2004

Acts Referred:

General Clauses Act, 1897 — Section 6
Jammu and Kashmir Government Servants (Prevention of Corruption) Act, 1975 —
Section 10, 17(1), 17(6), 17(7), 20

Citation : (2005) 3 JKJ 373

Hon'ble Judges : Yash Paul Nargotra, J;V.K. Jhanji, J

Bench : Division Bench

Advocate : B.S. Salathia, AAG, for the Appellant; R.P. Sharma, for the Respondent

Judgement

Y.P. Nargotra, J.—This Letters Patent Appeal No.43/2000 filed by the State, is directed against the judgment dated 31.12.1998 passed by

a learned Single Judge of this Court in SWP No.652/1983 whereby Govt. order No.8-GR of 1983 dated 24.8.1983, dismissing the respondent

writ petitioner from service, has been set aside, giving liberty to the State-appellant for holding a fresh inquiry. The respondent, writ petition has

also filed LPA No.40/1999, being aggrieved of the judgment of the learned Single Judge to the extent of giving liberty to the State for holding fresh

enquiry.

2. The respondent, writ petitioner, was a Patwari in the year 1976-77. A complaint against him for having obtained Rs.500/- as illegal gratification

from one Mohd Hussain, was entertained and proceedings were initiated by the Anti-corruption Tribunal against him u/s 4 of the Jammu &

Kashmir Government Servants Prevention of Corruption Act, 1975, (hereinafter

called the Act of 1975). The Tribunal after enquiry concluded that the charge against the writ petitioner stood established, so it made the following recommendations by its order dated 31.12.1980:-

On this finding I would recommend that the following punishment be imposed on the answering public servant Sh.Joginder Parkash the then

Patwari of Halqa Sohal,Tehsil Udhampur:-

That he be dismissed from the Govt. servant;

That the amount of Rs.500/- be recovered from him and got paid to the complainant Mohd Husaain ;

That he be disqualified for holding any public or elected office.

3. The recommendations of the Tribunal were accepted by the competent authority and punishment of dismissal from service was imposed by the

order impugned in the writ petition. The petitioner challenged the order of his dismissal inter alia on the ground that he was prejudiced in making his

defence to the show cause notice issued to him before imposition of penalty as he had not been furnished with copies of the proceedings as well as

copy of the report of the Tribunal and that even his reply to the show cause notice was not considered before passing the order of dismissal.

Learned Single Judge accepted the contentions of the writ petitioner and held that the dismissal order was bad for non-furnishing of the report of

the Inquiry Officer.

4. Learned counselor the respondent, writ petitioner, Mr.R.P Sharma, at the outset submits before us that on the date of hearing of the writ

petition his counsel was not available and therefore, the respondent himself argued the case. Though he had taken many grounds in the writ petition

to challenge the validity of the dismissal order yet being handicapped due to absence of his lawyer, he could project the sole ground of non-

furnishing of copy of the enquiry report. R.Sharma submits that the case, in the interests of justice, should be remitted back for re-hearing to the

writ court so as to enable the writ petitioner-respondent to urge all the available grounds before that court. We, however, do not think proper to

remit the case back to the Writ Court for re-hearing as in our view ends of justice would be better served if the counsel for the writ petitioner is

permitted to urge all the available grounds/pleas during the course of hearing of this appeal.

5. We have therefore, heard the learned counsel for the writ petitioner at length. We have also heard the learned counsel for the appellant-State and perused the record of the case.

6. Learned counsel for the writ petitioner firstly contends that alongwith show cause notice issued to the writ petitioner before passing of the order of dismissal copy of the report/recommendations of the erstwhile Member Anti-corruption was not served upon him, therefore, he was prejudiced in making a proper defence against the show cause notice issued before imposition of penalty by the competent authority.

7. We have perused the departmental record. It is manifest therefrom that a show cause notice alongwith copy of the report/recommendation of the erstwhile Member Anti-corruption Tribunal was served upon the writ petitioner through Revenue Department vide OM dated 12.5.1981. The writ petitioner in his averments made in the writ petition himself has admitted receipt of the show cause a notice and has even attached a copy of his reply allegedly submitted by him in response to the show cause notice in which he has not said anything about the non-furnishing of the report/recommendation of the Tribunal. In view of this factual position the writ petitioner cannot be allowed to urge otherwise.

8. It has next been contended by learned counsel for the writ petitioner that the proceedings as well as the report/recommendation of the Tribunal are vitiated for the reason that no cognizance upon complaint could be taken by the Tribunal and no inquiry could be conducted thereon as the complaint against him had not been made by the Vigilance Commissioner or such other officer of the investigating agency authorized by the Governor by a general or a special order nor there was any proper sanction of the appointing authority of the petitioner. He submits that Sec.10 of the Act of 1975 expressly provided that the Tribunal shall not enquire into allegations of corruption against any Government servant unless the complaint is made by the specified authority ! and without previous sanction of the appointing authority.

9. Learned counsel for the State-appellant was directed by us to produce the record of the inquiry but the same has not been produced and Mr.Salathia, learned AAG,, submits that the said record being very old could not be traced out and possibly it may have got destroyed, therefore,

the original record of the proceedings is not forthcoming for our perusal..

10. Be that as it may, the fact remains that the writ petitioner has not taken said ground of challenge in his writ petition, nor the fact of taking of

such a plea by him before the Tribunal is forthcoming from the order of the Tribunal as well. Even the reply which the writ petitioner alleges to have

submitted in response to the show cause notice does not mention any such fact or ground taken by the writ petitioner. In the absence of necessary

pleadings in this behalf in the writ petition and consequently in the counter affidavit of the State, it is not possible for us to say that the complaint had

not been filed by the Vigilance Commissioner or an officer duly authorized by the Government or that the complaint was filed without proper

sanction of the appointing authority of the writ petitioner. The writ petitioner at this stage cannot thus be allowed to urge that the complaint before

the Tribunal was incompetent and the cognizance thereupon was taken by the Tribunal illegally. The writ petitioner in our considered opinion

cannot be allowed to urge a ground not taken by him in the writ petition or in the proceedings before the Tribunal.

11. Mr.Sharma next contents that the order of punishment passed on 24.8.1983 is vitiated because of lack of inherent jurisdiction of the competent

authority. He submits that the order impugned has purportedly been passed by the Governor under sub-sec.7 of Sec.17 of the Act of 1975 when

the said Act at the time of passing of the order stood already repealed by Criminal Law Amendment Act of 1983 which came into force on

23.3.1983. According to Mr.Sharma the Amendment Act ! of 1983 did not save the power of the Governor to act under sub.sec.7 of Sec.17 of

the Act of 1975 therefore, he was not possessed of the necessary jurisdiction to pass the order of punishment on the basis of inquiry conducted

under the provisions of the repealed Act.

12. The provisions of Sec.17, which are relevant for our purpose, are reproduced as under:-

17-Report of the Tribunal(1) After the conclusion of the inquiry, the Tribunal shall record its findings on the various articles of the charges and

submit its recommendation to the Governor. In cases in which in the opinion of the Tribunal the charges are not established the Tribunal shall

record its opinion whether the charges were entirely unfounded or the accused is

entitled to the benefit of doubt. In cases where any of the charges are held to have been established against the accused the Tribunal shall recommend:-

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(6)After the Tribunal has submitted its recommendations and the Governor has after satisfying himself about the correctness or otherwise of the finding and the punishment proposed by the Tribunal arrived at a provisional conclusion in regard to the punishment to be imposed the accused shall be supplied with a Copy of the report of the inquiry and called upon to show cause by a particular date why the proposed penalty should not be imposed upon him.

(7) After the reply of the accused to the show cause notice issued under sub-section(6) has been received, the Governor may impose upon the accused such penalty as he may deem fit and shall also pass orders regarding the treatment of the period of suspension and the recovery of the amount referred to in sub-section(5) of this section.

13. In the present case undisputedly the proceedings initiated against the writ petitioner concluded and culminated into an order dated 31.12.1980 of the Tribunal. From the date of initiation of the inquiry u/s 4 and culmination of the proceedings u/s 17(1) i.e. 31.12.1980 Act of 1975 was in force. After receipt of recommendations of the Tribunal show cause notice was issued in terms of sub-sec.(6) of Sec.17 to the petitioner in the year 1981. At that time also Act of 1975 was in force. The Act of 1975 however, came to be repealed by passing of Jammu & Kashmir Criminal Law Amendment Act of 1983 by the State legislature. This Act came into force w.e.f. 23.3.1983. The repealing provision of Amendment Act of 1983 provided as follows:-

20-Repeal of Act XXV of 1975(1) The Jammu and Kashmir Government Servants Prevention of Corruption Act,1975 (XXV of 1975)

(hereinafter in this section referred to as the 'said Act') is hereby repealed.

14. Notwithstanding such repeal all cases pending before the Anti-corruption Tribunal are investigated by the investigating agency under the said Act shall stand transferred to the Government and the inquiry in every such case shall be continued by the Inquiry Officer, appointed by the

Government, from the stage left over by the said Tribunal in accordance with the rules regulating the departmental inquiries of public servants;

if any case transferred to the Government said Tribunal has recorded evidence in whole or in part prior to the commencement of the Jammu and

Kashmir Prevention of Corruption Laws(Amendment)Ordinance,1983 the Inquiry Officer appointed under this section shall act on the evidence so

recorded by the said Tribunal or on the evidence partly recorded by the said Tribunal and partly recorded by the Inquiry Officer.

21-Provision regarding Chairman and other members of the Tribunal-All persons who immediately before the commencement of the Jammu &

Kashmir Prevention of Corruption Laws (Amendment) Ordinance 1983 (II of 1983) were appointed as the Chairman or a member of the Tribunal

under the Jammu & Kashmir Government Servants Prevention of Corruption Act, 1975 shall cease to hold such posts or to discharge such duties

and all such appointments made whether by extension in service or otherwise under the said Act shall stand terminated from the commencement of

the said Ordinance.

15. From the bare perusal of sections 20 & 21 of the repealing Act it is revealed that with regard to pending cases and pending investigations a

provision was made for continuing the investigation instead of by the Tribunal by an Inquiry Officer appointed by the Government to which these

cases were to be transferred. So far as other cases not covered under clauses (a&b) of sub-sec.2 of sec.20 are concerned, clause (e) of sub-

sec.2 provided that those shall be governed by the provisions of Sec.6 of the General Clauses Act. The present case being one not covered by

clauses (a&b) of sub-sec.2 was made to be governed by sec.6 of the General Clauses Act under clause(e) of sub-sec.(2) of sec.20 of the

Repealing Act. Section 6 of the General Clauses Act is thus required to be seen for deciding the objection of learned counsel for the writ

petitioner. It reads as under:-

6-Effect of repealWhere this Act or any Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be

made, then, unless a different intention appears, the repeal shall not revive anything not in force or existing at the time at which the repeal takes

effect; or

affect the previous operation of any enactment so repealed or anything duly done or suffered hereunder; or

affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed, or;

affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as

aforesaid.; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or

punishment may be imposed as if the repealing Act had not been passed.

16. Thus under sec.6 of the General Clauses Act repeal of Act of 1975 by the Amendment Act of 1983 did not and could not affect any liability

acquired, accrued or incurred under the Act of 1975 and the legal proceedings could be instituted, continued or enforced and any such penalty of

forfeiture or punishment provided under the Act of 1975 could be imposed by deeming that the repealing Act had not been passed. In this view of

the legal position there is no merit in the contention of learned counsel for the writ petitioner.

17. Mr.Sharma however, relies upon a judgment rendered by a constitution Bench of the Supreme Court in case titled Kohlapur Canesugar works

vs Union of India, reported in AIR 12000 SC 811.He relies upon the following observations of their lordships made in the said judgment in

support of his argument that Sec.6 of General Clauses Act cannot be pressed into service for exercise of jurisdiction for imposition of penalty

under sub-sec.7 of Sec.17 of the repealed Act of 1975:-

18. At common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had

never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of

sections 6(1).If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop

where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings

of the nature contained in section 6 or in special Acts may modify the position.

Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision.

19. Their lordships have further observed:-

It is not correct to say that in considering the question of maintainability of pending proceedings initiated under particular provision of the rule after the said provision was omitted the court is not to look for a provision in the newly added rule for continuing the pending proceedings. It is also not correct to say that the test is whether there is any provision in the rules to the effect that pending proceedings will lapse on omission of the rule under which the notice was issued. In such a case the court is to look to the provisions in the rule, which has been introduced after omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such a proceeding will continue. If the case is covered by section 6 of the General Clauses Act or there is a pari-material provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the rule. In the absence of any such provision in the statute or in the rule the pending proceedings would lapse on the rule under which the notice was issued or proceeding was initiated being deleted/omitted.

20. Reliance placed by learned counsel for the writ petitioner is clearly misplaced. In the present case clause (e) of sub-sec., 2 of sec. 20 of the repealing Act of 1983 clearly provided that all other matters not provided for in this section shall be governed by Sec. 6 of the General Clauses Act. Thus there is a clear provision in the repealing Act that the pending proceedings shall not lapse and would be governed by Sec. 6 of the General Clauses Act and as already noticed sec. 6 of the said Act provides for continuation of the proceedings and even imposition of penalty in

respect of cases where liability has been incurred under the repealing enactment.! Therefore, the contention of learned counsel for the writ petitioner that after the repealing Act of 1975 the Governor possessed no power under sub-sec.7 of Sec.17 of the repealing Act of 1975 cannot prevail.

21. It has next been argued by learned counsel for the writ petitioner that while imposing the order of penalty the competent authority did not take into consideration the reply/objections filed in response to show cause notice issued to him under sub-sec.6 of Sec.17. This plea also is without any basis. The writ petitioner in para 11 of his petition has stated that he had engaged the services of Sh.B.K.Bhasin advocate at Jammu for submitting the reply and handed over the documents to the learned counsel. In the month of July 1983 he met his counsel and came to know that reply had not been sent as Shri Bhasin had misplaced the papers. Thereafter he submitted a reply addressed to respondent No.2 (Dy.Secretary to Government Home Department Vigilance), through proper channel i.e. through Tehsildar Reasi against office receipt dated 25.7.1983.

22. We have perused the official record of the Home Department. It is revealed therefrom that explanation of the writ petitioner was received more than two years after the issuance of show cause notice when the penalty on that date already stood confirmed. As already stated the show cause notice was served on the writ petitioner on 12.5.1981. The petitioner himself states that he had submitted the reply to Tehsildar Reasi for onward transmission through proper channel on 25.7.1983. The stand of the State-appellant that reply had not been received before passing of the order of punishment is found to be correct based on official record. Therefore the objection to the imposition of penalty on the ground of not considering the reply of the writ petitioner before passing the order of imposition of penalty does not have any merit.

23. No further point was urged by learned counsel for the writ petitioner.

24. For the aforesaid reasons LPA No.43/2000 filed by the State-appellant is allowed and order of the learned Single Judge dated 31.12.1998 is set aside and writ petition SWP No.652/1983 is dismissed. Consequently LPA No.40/99 filed by the writ petitioner shall also stand dismissed.