
(1998) 12 J&K CK 0062
In the Jammu And Kashmir High Court
Case No : LPA(SW). 130 Of 1997

State of J&K and Others

APPELLANT

Vs

S.Kehar Singh

RESPONDENT

Date of Decision : 09-12-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 311(1)(b), 311(1)(c)

Constitution of Jammu and Kashmir, 1956 — Section 126(1)(b), 126(1)(c)

Citation : (1999) 1 SriLJ 77 : (1999) 1 SriLJ 73

Hon'ble Judges : M.Y.Kawoosa, J and T.S.Doabia, J

Bench : Division Bench

Advocate : Sunil Sethi, A.Kapoor , Advocates appearing for the Parties

Judgement

T.S.DoabiaJ.

1. The respondent writ petitioner was visited with an order of dismissal. This order passed under Section 126(2)(c) of the J and K Constitution was

challenged by preferring a writ petition in this court. The writ petition stands allowed. It is this verdict of a Learned Single Judge of this court which

is subject matter of challenge in this appeal preferred under clause 12 of the Letters Patent.

2. The respondent writ petitioner submitted that after joining the State Service in the year 1967 he maintained an unblemished record of service. As

per him he had several awards, recommendations and certificates to his credit. Some how or the other a retired Assistant Sub Inspector of police

by the name of Bhola Singh developed some illwill against his family members and brothers. On instigation of Bhola Singh a complaint was

manoeuvred from one Abdul Aziz. Bn Hav, Major of 7th JKAP Bn. Another complaint was also got filed in the year 1984. This was to the effect

that one Darshari and Others had given a sum of Rs. 13.400/ to the respondent writ petitioner. These matters were enquired into. Nothing was

found against him. Having failed in the aforementioned complaints, aforementioned Bhola Singh conspired with one Abdul Qayoom, SHO

R.S.Pura some cartridges were planted in the house of the petitioner. The petitioner was thus involved in a criminal case. He had applied for bail.

Bail was granted. Thereafter an order came to be passed on 16th Nov, 1989. The State Government in the exercise of power conferred under

section 126(2)(c) dismissed the writ petitioner from service with immediate effect. This order was subject matter of challenge before a Learned

Single Judge of this court. For facility of reference this order is being reproduced below:

Government of Jammu and Kashmir civil Secretariat Home Department, Government order No. Home 414 (police) of 1989 dated; 16.11.1989.

Whereas you Kehar Singh Head Constable No. 788 of JKAP III Bn(sic) not in your office at the pleasure of the governor and

Whereas you engaged yourself in activities prejudicial to the security of state; and

Whereas the Governor after considering all the facts and circumstances of your case is satisfied under Subclause (c) of the provision of clause (2)

of section 126 of the Constitution of J and K that in the interest of the Security of the state, it is not expedient to hold, in relation to your, such

enquiry as is referred to in clause (2) of the said section 126 of the Constitution of Jammu and Kashmir.

Whereas the Governor after considering all the facts, relevant material and circumstances of your case is satisfied that you are not fit to be retained

in the public service.

Now, therefore the Governor is pleased to dismiss you from the service with immediate effect".

3. As per the respondent writ petitioner above order came to be passed on account of the criminal case lodged at the instance of Abdul Qayoom.

4. The argument raised before the learned Single Judge was that there was no material available with the state Government which could enable it to

pass an order under section 126(2)(c). As the order in question was found to be not in conformity with the judicial precedents interpreting section

126. The order in question, was set aside. The findings which have been recorded by the learned Single judge are:

i) That the appellant State had not come forward with the record to defend the impugned action.

ii). That there existed no material on the basis of which a decision as to the satisfaction of the state government that it was not expedient to hold an enquiry was in the interest of the security of the state could be arrived at.

5. After recording aforementioned conclusions the writ petition was allowed. The writ petitioner was held entitled to all consequential reliefs.

6. The learned state counsel submits that a perusal of the order by which the service of the writ petitioner were brought to an end makes it crystal

clear that the Governor of the state had come to the conclusion after taking all the facts and circumstances of the case that it is not feasible to hold

an enquiry and holding of an enquiry would not be in the interest of the security of the state, it is also urged that the finding recorded by the learned

Single Judge that the parameters indicated in section 126 were not fulfilled is not correct.

7. A perusal of the record indicates that even though the writ petition petitioner was admitted on 22nd March, 1990, the respondent state had not

filed any counter affidavit. On 2nd May, 95 an order was passed directing the state to produce the record. The file does not indicate that the

records were produced. Therefore, whatever is stated in para 8 of the order under appeal has to be taken as correct. If above be the position then

can it be said that the decision arrived at by the learned Single Judge suffers from any error of law? In our Opinion there is no error of law. The

reasons for these are given hereafter.

8. Section 126 of the J and K Constitution is in parameteria with Article 311 of the Constitution of India. It is settled proposition of law that if an

order passed under the aforementioned proviso is assailed before a court of law on the ground that the decision of the competent authority 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 of the state is based. If the court finds that the said circumstances have no bearing whatsoever on the security of the

state, the court can hold that the satisfaction of the President or the Governor of

the state which is required for passing such an order has been vitiated by taking note of wholly extraneous or irrelevant considerations.

9. In the light of the above broad proposition of law order of dismissal which has been reproduced above is being examined.

10. As indicated above the proviso of a section 126 are similar to the proviso contained in Article 311 of the constitution of India. Some of the judicial pronouncement in this regard be noticed. Before doing so the provisions of section 126 be also noticed. These are as under

Dismissal, reduction or removal of persons employed in civil capacities under the State :

1. No person who is a member of a civil service of the state or holds a civil post under the state shall be dismissed or removed by an authority

subordinate to that by which he was appointed.

2. No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the

charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed after such enquiry to

impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed but only on

the basis of the evidence during such inquiry.

Provided that this SubSection shall not apply:

a). Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge, or

b). Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that

authority in writing it is not reasonably practicable to hold such enquiry, or

c). Where the Governor"" is satisfied that in the interest of the security of the state, it is not expedient to hold such enquiry.

3. If, in respect of any such person as aforesaid a question arises, whether it is reasonable to hold such enquiry as is referred to in subsection(2),

the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

11. A Constitution Bench of the Supreme Court in Arjun Chaubey Vs. Union of India, AIR 1984 Supreme Court 1356 quashed the order passed

by the employer who exercised power under proviso {b) to Article 311 of the Constitution of India on the ground that no material was available

with the said authority for satisfying itself that it was not reasonably practicable to hold inquiry,

12. The scope of Article 311 (2) of the

Constitution was again considered by the Supreme Court of India in Union of India Vs. Tulsiram Patel, AIR 1985 Supreme Court 1416. It was

observed that a disciplinary authority is not expected to dispense with the disciplinary inquiry lightly or arbitrarily or out of ulterior motives or

merely in order to avoid the holding of an inquiry because the Department's case against the Government servant is weak and must fail, it was

further observed that the finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the Court so far as its

power of judicial review is concerned and in such a case the court will strike down the order dispensing with the enquiry as also the order imposing

penalty.

13. In Sardari Lal (Dead) through L.Rs. Vs. Union of India. 1987(4) SCC 114, in a challenge to orders of dismissal passed under clause (c) of the

second proviso of Article 311(2), after referring to the decision in Tulsiram Patel (Supra), the Supreme Court of India observed:

The record of the case produced before us clearly indicates that the reason has been recorded though not communicated. That would satisfy the

requirements of the law as indicated in Tulsiram Patel's case. The plea of malafides as had been contended before the High Court and casually

reiterated before us arise out of the fact that typed orders dated June 3, 1971, were already on record in the file when the papers were placed

before the president, such a contention is without any substance.

14. The provision of Article 311 were again considered by the Supreme Court of India in the case reported as ""Jaswant Singh Vs. State of

Punjab"". AIR 1991 SC 385: 1991(1) SCT 125. What was observed by the Supreme Court of India is relevant and is being quoted:

Thus the English doctrine incorporated in Article 310 which is qualified by the opening words ""except as expressly provided by this Constitution"" is

subject to Article 311 (1) and (2) which contains a safe guards against termination from service. However, the second proviso to Article 311(2) is

again in the nature of an exception and lays down that in cases catalogued in clauses (a), (b) and (c) there of the requirement of an inquiry can be dispensed with. The scope of Articles 310 and 311 of the Constitution was examined by this court in *Tulsiram Patel (Supra)*, wherein by majority this court held that once the requirements of the relevant clause of the second proviso are satisfied, the services of a civil servant can be terminated without following the *audi alteram partem* rule. It was held that since the requirement of Article 311(2) was expressly excluded by the second proviso there was no question of introducing the same by the back door. On this line of reasoning, the majority held that *Chalapan's case, 1976(1) SCR 783*, was not correctly decided. It, therefore, took the view that it is not necessary to offer a hearing to the civil servant even on the limited question of punishment. In so far as clause (b) is concerned, this court pointed out that two conditions must be satisfied to sustain any action taken thereunder. These are (i) there must exist a situation which renders holding of any inquiry ""not reasonably practicable"", and (ii) the disciplinary authority must record in writing its reasons in support of its satisfaction. Of course the question of practicability would depend on the existing factsituation and other surrounding circumstances, that is to say, that the question of reasonable practicability must be judged in the light of the circumstances prevailing at the date of the passing of the order. Although clause (3) of that Article makes the decision of the disciplinary authority in this behalf final such finality can certainly be tested in a court of law and interfered with if the action is found to arbitrary or malafide or motivated by extraneous considerations or merely a ruse to dispense with enquiry. Also see *Satyavir Vs; Union of India, 1985 (4) SCC 252. AIR 1986 SC 555, Shiviji Atamji Sawant Vs. State of Maharashtra, 1986(2) SCC 112: AIR 1986 SC 617 and Ikramuddin Ahmad Borah Vs. Superintendent of police, Darrang, 1988 (Supp. 1} SCC 663: AIR 1988 SC 2245.*

It was further observed:

It was incumbent on the respondents to disclose to the court of the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent No.3 in the impugned order. Clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed before

him that it is not reasonable practicable to hold a departmental enquiry.

It was concluded:

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer.

In Chief Security Officer and Others Vs. Singisan Rabi Das, 1992(1) SCT 595 (SC) 140, the Supreme court of India was of the view that there is

no justification to dispense with the enquiry merely because the disciplinary authority thought that it was not feasible or desirable to procure

witnesses of the security/other railway employees since that will expose these witnesses and make them ineffective in future and if these witnesses

were asked to appear at a confronted enquiry they were likely to suffer personal humiliation an insults and even their family members may also

become targets of violence. A.K. Koul Vs. Union of India, 1995(3) SCT 15, is another decision wherein it was observed that in a case where the

validity of an order passed under clause (c) of the second proviso to Article 311(2) is assailed before a court or a Tribunal it is open to the court

or the Tribunal to examine whether the satisfaction of the president or the governor is vitiated by malafides or is based on wholly extraneous or

irrelevant grounds. In Union of India Vs. Subramanian, 1985 (1) SLR 238, the action to dispense with the enquiry by declaring it to be reasonably

impracticable to hold, was declared to be invalid. The court held that the constitutional requirement of Article 311(2) cannot be converted into a

dead letter merely because employees have developed class or group feelings.

15. A learned Single Bench of the Kerala High court quashed the dismissal of an employee from service which was brought about by invoking

proviso (c) to Article 311 (2) of the constitution of India on the ground that the petitioner believed in the philosophy of violence and was also an

accused in a murder case and the commission of murders was a part of his philosophy, it was held that there was nothing to show that holding of

an inquiry into the conduct of the petitioner was reasonably linked with the

interest of security of the State. This Judgement of the learned Single Judge which is reported as (1984)2 SLR 669 was upheld in President of India Vs. Kunjappan, 1985(1) SLR 494, by a Division Bench. It was observed:

The High Court has the power to ascertain whether the opinion formed by the authority has any factual basis and the conditions precedent to its formation were there. In this case the president of India has no doubt powers under Clause (c) if the 2nd proviso to Article 311 (2) of the Constitution to dismiss a member of the civil service of the Union without an enquiry if and only if he is satisfied that in the interest of the security of the state it is not expedient to hold an enquiry into the charges against him. So, two conditions must exist, namely, (i) the security of the State is involved, and (ii) in view of that it is inexpedient to conduct enquiry.

16. In Kadarnath Singh Vs. Union of India and others, 1984(2) SLR 347, a Division Bench of the Allahabad High Court while interpreting Rule 47 of the Railway Protection Forces Rules, 1959 which is in pari materia with proviso (b) to Article 311(2) rejected the contention of the Union of India, but the enquiry was not reasonably practicable because the only eyewitness to the alleged incident was not willing to come forward and give testimony against the delinquent. It was held:

Practicability is not to be confused with the expediency or the chances of success of the enquiry contemplated against the delinquent member of the Force. Rule 44 embodies a sound principle of natural justice providing for a full and fair opportunity to the employee against whom it is proposed to award a major penalty which includes dismissal or removal from services. Rule 47(b) has, therefore, to be construed strictly as it enables the disciplinary authority to give a complete go-by to the aforesaid principles of natural justice embodied in Rule 44 and straightway, on the material collected ex parte and behind the back of the delinquent member, to remove or dismiss him. In view of what has been stated above we are clearly of the view that Rule 47(b) was illegally applied in the case of the petitioner. The grounds disclosed by the Assistant Security Officer were not germane to the consideration on account of which enquiry under Rule 44 could be dispensed with.

The scope of these provisions was considered by Justice Syed Saghir Ahmad

former Chief Justice of this court and now judge of Supreme Court

of India in Ghulam Mohiuddin Vs. States of J and K, 1995 SLJ 212. Paras 6,8,9 and 10 deal with the same situation as are there in this case.

These paras read as under:

The proviso to section 126(1) of the Jammu and Kashmir constitution contemplates a departure from the normal rule holding an enquiry into the charges against the government servant

The constitutional provisions referred to above require that an enquiry shall be held against a government servant into charges of misconduct for

which he is sought to be removed from service and that in that enquiry he shall be afforded an opportunity of hearing which necessarily includes

inter alia the right to file a reply to the charges and to lead evidence in support of the reply and also the right to cross-examine the witnesses if any

produced against him in that enquiry.

The quantum of enquiry required in a given case of the procedure which has to be followed in the enquiry is not under my consideration as the

enquiry itself in this case was dispensed with and therefore, the question whether the enquiry was properly, dispensed with is one of the questions

on which the fate of this petition hinges.

As pointed out earlier, a government servant is entitled to the protection contemplated by Article 311 (2) and therefore he cannot be dismissed

from service unless he has been given an opportunity of hearing. The rule of exception is contained in the proviso to Article 311(2) which is akin to

proviso section 126(2) of the Jammu and Kashmir Constitution.

17. This aspect of the matter has also been considered in SWP 667 of 1994 Syeed Mohd. Vs. Sr. Superintendent of Police, Udhampur and

others decided on 27.5.1986 and SWP 828 of 1995 Janmaz Singh Vs. State of Jammu and Kashmir and others, decided on 27.11.1996. The

opinion expressed was that it is incumbent on those who support the order to show that satisfaction is based on certain objective facts and is not

out of the whim and caprice of the concerned officer.

18. See also the view has been expressed by M.Y.Kawoosa J in case reported as Mehrajuddin Auli Vs. Chief Engineer, Electric Maintenance

and Re Department Srinagar and others, KLJ Feb. 1998 page 99.

19. In all the above cases, the courts have recorded the findings that order passed by the competent authorities are not in accordance with the relevant statutory and constitutional provisions.

20. It would be apt to notice some of the cases where the power was to be rightly exercised under Article 311(2), second proviso be also noticed.

21. A Head Constable was found to have links with subversive elements. Allegation was that he was making preparation to murder some senior

police officers. There was reasonable apprehension that witnesses would not come forward to depose against him. On the basis of the material

which was placed before the High court has been rightly exercised This decision given by the supreme court of India in Kuldeep Singh Vs. State of

Punjab, 1996(10) SCC 659: 1996(4) SCT 595. Similar opinion has been expressed in the case reported as Union Territory of Chandigarh Vs.

Mohinder Singh, 1997 (3) SCC 68: 1997 (2) SCT 39. in this regard reference may also be made to a recent decision of Supreme Court of India

reported as Union of India Vs. Balbir Singh, AIR 1998 SC 2043. After taking note of the material gathered by the intelligence Bureau, which

matter was considered by a Committee of advisors, the respondent Balbir Singh was dismissed from service. It was observed that the order in

question was rightly passed. It was also that holding of enquiry would not be in the interest of the state.

22. A scrutiny of the relevant provisions and judicial precedents noted above lead to the coming to the following conclusions.

i). That enquiry can be dispensed with when a finding is recorded that in the facts and circumstances of the case, it is not possible to hold an enquiry.

ii). that in the interest of the security of the state it is not expedient to hold an enquiry,

iii). the decision (to not to hold enquiry is not final, this decision is open to judicial review. The exercise of power under this provision would be bad:

a). Where the authority whose satisfaction is in question has totally failed to apply its mind to relevant considerations.

b). Where the satisfaction is based on extraneous or irrelevant considerations,

c). Where the satisfaction is arrived at by the application of a wrong test,

d). Where the satisfaction is based on materials which are of no rationality

probative value.

e). What is required to be seen is that there should be some independent material apart from the allegations which are being looked into to record

the finding that it is not possible to hold an enquiry and that the holding of enquiry would not be in the interest of the state.

23. In the present case, the appellant state did not file a counter affidavit. It did not produce any record before the learned Single Judge. The

records were not produced even before this court when this appeal was heard. In view of the above we do not find any merit in this appeal, the

same is dismissed, there would be no order as to costs.