
(2014) 12 J&K CK 0006

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 786 Of 2009

Tanveer Saleem Dar

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Citation : (2014) 4 JKJ 177

Hon'ble Judges : Mohammad Yaqoob Mir, J

Bench : Single Bench

Advocate : M.A. Qayoom, Advocates for the Appellant; R.A. Khan, AAG, Advocates for the Respondent

Judgement

Mohammad Yaqoob Mir, J.—Petitioner-Tanveer Saleem Dar, Constable No. 1134 of 1st Bn. Auxiliary Police, Srinagar, is allegedly

involved in subversive activities detrimental and prejudicial to the security of the State. Number of cases are registered against him for commission

of various offences. Noticing the activities of the petitioner highly prejudicial to the security of the State, has been dismissed from service vide order

No. 279 of 2004 dated 28.06.2004 passed by the Commandant Auxiliary Police 1st Bn. Srinagar, which is impugned in this writ petition. Learned

counsel for the petitioner, while projecting the case of the petitioner contended that the order impugned providing for dismissal of the petitioner has

been passed without authority of law. Buttressing his submission highlighted that the Commandant who has passed the order impugned has

exercised the powers under Section 126 of the Constitution of Jammu & Kashmir read with Article 311 of the Constitution of India, by mentioning

therein that he is satisfied so in the interest of security of the State it shall not be expedient to hold enquiry, when such power can be exercised only

by the Governor.

2. Confronted with the legal position, Mr. Khan, learned AAG, would submit that even if the order is quashed, respondent authority may be left

free to initiate departmental enquiry and to have resort to other measures.

3. While considering the rival submissions, what would emerge is that the Commandant who is competent to dismiss or remove a person when

satisfied for reasons to be recorded that it is not reasonably practicable to hold the enquiry; he can pass the order of dismissal, which is covered

under Clause-b to proviso to Sub Section 2 of Section 126 of the Constitution of J&K but the Commandant in effect has passed the order under

Clause-c to proviso, as he has recorded that in the interest of security of the State it is not expedient to hold enquiry against the petitioner.

4. When a person is to be removed from service without enquiry in the interest of security of the State then such power is exercisable by the

Governor under Clause-c to proviso to Sub Section 2 of Section 126 of the Constitution of J&K, as in terms of the Sub Section 2 of Section 126,

dismissal or removal or reduction in rank is permissible only after holding enquiry and after proper opportunity of hearing is given regarding the

charges, then after enquiry, if it is proposed to impose penalty, again a person is to be given opportunity to make representation on the penalty so

proposed. In case Commandant would have exercised the power under Clause-b to proviso of Sub Section 2, as he has referred to in the order

impugned, then position could be somewhat different. No-doubt he has referred to Clause-b but then he has recorded that in the interest of

security of State, it shall not be expedient to hold enquiry.

5. Wording so employed and the ground recorded for exercise of power fall within the scope of Clause-c to proviso. Once it falls under Clause-c

then it is only the Governor to pass such order.

6. For facility of reference the order impugned is reproduced herein below:--

Whereas the department is satisfied that the conduct and activities of Tanvir Saleem Dar constable No. 1134 of 1st Bn Auxiliary Police Srinagar

S/o. Ghulam Rasool Dar R/o Solina Tehsil and Distt. Srinagar involved in subversive activities are detrimental and prejudicial to the security of the

State and therefore said Constable deserves dismissal in the interest of security of the State, and

Whereas, the department is further satisfied that in terms of clause(b) of the provisions 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, I, Commandant Auxiliary Police 1st Bn. Srinagar in exercise of powers conferred on me under the provisions of Section 126 of

the Constitution of Jammu & Kashmir read with article 311 of the Constitution of India, hereby dismiss Tanvir Saleem Dar Constable No. 1134 of

1st Bn. Auxiliary Police, Srinagar S/o. Ghulam Rasool Dar R/o Solina, Tehsil & District Srinagar from services with immediate effect.

7. It shall be quite apt to quote Section 126 of the Constitution of Jammu & Kashmir.

126. 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 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 and where it is proposed after such inquiry, 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 adduced during such inquiry:

Provided that this sub-section 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;

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reasons, 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 inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonable to hold such inquiry as is referred in sub section (2), the

decision thereon of the authority empowered to dismiss or remove such person

or to reduce him in rank shall be final.

8. Section 126 of the Constitution of J&K almost is pari materia to Section 311 of the Constitution of India. In terms of Clause-c Proviso 2 to Sub

Section 2 of Article 311 of the Constitution of India, in case order of dismissal in the interest of security of the State and it may not be expedient to

hold enquiry then President or Governor has to be satisfied for passing orders without enquiry.

9. The order impugned passed by the Commandant, in view of the settled legal position, is not in accordance with law, therefore, has to be

quashed, as such, is quashed, leaving it open to the respondent-authority to proceed against the petitioner, if they so choose, in accordance with

the law and then to pass appropriate orders, as shall be warranted. Petition succeeds, as such, shall stand disposed of.