
(2014) 12 J&K CK 0029

In the Jammu And Kashmir High Court

Case No : SWP No. 414/09 and CMP No. 674/09

Tariq Ahmad Sofi

APPELLANT

Vs

State of JandK and Others

RESPONDENT

Date of Decision : 31-12-2014

Acts Referred:

Citation : (2015) 2 JKJ 287

Hon'ble Judges : Hasnain Massodi, J.

Bench : Single Bench

Advocate : Bhat Fayaz, Advocate, for the Appellant; T.A. Lone, Dy. AG vice R.A. Khan, AAG, for the Respondent

Final Decision : Allowed

Judgement

Hasnain Massodi, J.â?"Petitioner, aggrieved with order No. 201 of 2005 dated 25.10.2005 whereby he has been removed from service and the

order No. 87 of 2008 dated 22.02.2008, dismissing appeal against order dated 25.10.2005, has come up with present petition. He on the

strength of averments made in the petition seeks quashment of both the orders appended as Annexure ""D"" and ""E"" to the petition and also a writ of

mandamus directing respondents to reinstate him and allow him to perform his duties. Petitioner, admittedly was appointed as constable in the

Jammu & Kashmir Police Department vide order No. 608 of 1990 dated 29.06.1990 and allotted Belt No. 1939/S. He vide order of ZPHQ No.

200 of 2004 dated 03.07.04 was transferred from Police District, Kulgam, and adjusted in District Kargil vide order No. KPO order No. 325 of

2004 dated 11.09.2004. He joined his duties on 11.10.2004 and was posted on guard duty at Dak Banglow Ist Kargil. He proceeded on 12

day's casual leave w.e.f. 15.10.2004 and was required to report back on 27.10.2004. He failed to resume his duty on the said date and

unauthorisedly absented himself from duty and was ultimately removed from service vide order impugned in the petition.

2. Petitioner's case is that after proceeding on casual leave, he fell ill and was hospitalized in SKIMS, Soura, Srinagar. He insists that as he was

seriously indisposed and was not able to move without support, he could not resume his duty on due date.

3. Petitioner questions order of removal and the order, whereby, his appeal has been dismissed on the ground that order has been passed by an

incompetent officer, in as much as, in terms of Rules only Deputy Inspector General Police (DIG), is competent to pass such order. It is next

pleaded that as no enquiry has been made by the respondents affording petitioner opportunity to put forth his stand, the impugned order cannot

stand legal scrutiny. Petitioner claims to have responded to show cause notice No. Estt/Notice-38/KL/2005-7054-61 dated 26.08.2005 and

submitted detailed reply substantiated by copies of medical prescriptions. According to petitioner the Senior Superintendent of Police, District

Kargil, did not allow him to resume his duty.

4. Petitioner insists that the Appellate Authority has dealt with his appeal in an arbitrary and mechanical manner and the order is, therefore, liable to

be set aside.

5. Respondents in their reply have admitted factual aspects of the case. They, however, oppose writ petition on the ground that petitioner did not

respond to the written message/signal dated 24.08.2005 served through Police Station, Bandipora, and show cause notice published in daily

Aftab"" on 25.09.2005, leaving no option with the respondents but to fall back upon Section 126(2)(b) read with Rule 359(11)(2)(b) of Jammu &

Kashmir Police Rules 1960.

6. Petition is also resisted on the ground that as petitioner failed to avail efficacious/alternate remedy, he has no right to invoke writ jurisdiction. It is

denied that petitioner applied for extension of leave or responded to show cause notice dated 26.08.2005, 20.09.2009 or he even approached

respondent No. 4 with the request to permit him to resume his duty. Appeal preferred by the petitioner is stated to have been rightly dismissed as

time barred as the petitioner did not approach appellate authority within prescribed time.

7. I have gone through pleadings and record available on the file. Respondents though given repeated opportunities to produce record, have not made record available.

8. Petitioner, on the date impugned order had 15 years on service to his credit. He proceeded on 12 day's casual leave, after it was duly sanctioned by competent authority in his favour. He had to report back on 24.10.2004. He, however, remained un-authorisedly absent from duty from the said date. It was therefore, case of "unauthorised absence" from duty. Respondents in terms of Jammu & Kashmir Police Rules 1960

(hereinafter called as Police Rules) had to initiate enquiry against the petitioner in accordance with procedure laid down in Rule 359 of Police Rules and thereafter proceed in the manner as delineated in Police Rules.

9. Respondents as already stated while holding enquiry against the petitioner were required to adhere to the procedure laid down in Rule 359 of

Police Rules. The procedure provides right of hearing to petitioner at different stages as the enquiry proceeds. This court mapped out procedure to

be followed in such case in Abdul Satar Lone v. State of J&K & others 2011 (4) JKJ 587 [HC]. It would be advantageous to extract relevant

part of the judgment:-

(a) Whenever a definite complaint of misconduct is received against Police Office, the officer receiving the complaint is to immediately record

statements, if any, in support of the complaint and throw usual channels forward the complaint with the statements, if any, to the Superintendent of

Police or other Gazetted Officer under whose immediate control the officer receiving the complaint, is serving. The police or other officer, if

satisfied, that a prima facie case for enquiry is made out is to entrust the enquiry as far as possible to a Gazetted Officer empowered to inflict a

major punishment upon the delinquent officer.

(b) The officer conducting the enquiry is to summon the delinquent police officer, read out to him the statements summarizing the alleged

misconduct so as to give notice to such police officer of the circumstances in regard to which evidence is to be recorded in case the delinquent

Police Officer admits the misconduct alleged against him. The Officer conducting

enquiry may then and there record a final order if it is within his

power to do so or forward the matter to an officer empowered to pass a final order.

(c) If the delinquent Police Officer does not admit the alleged misconduct, the enquiry officer is required to record such evidence oral and

documentary in proof a accusation as is available and necessary to support the charge. Whenever possible, witnesses are to be examined in

presence of the delinquent Police Officer and such Officer given opportunity to examine the witness unless he is of the opinion that the presence of

the witness cannot be secured without undue delay and expense or inconvenience. In latter case the statement of the witness recorded and attested

by Magistrate, may be considered though not recorded in presence of the delinquent officer and without opportunity to cross examine the witness

to such officer.

(d) When the evidence is recorded and it is found not to substantiate the accusation, the officer is to recommend his discharge to the

Superintendent of Police or other officer so empowered. However, if the evidence collected substantiates the accusation of misconduct, the officer

is to frame a formal charge/charges in writing, explain the charges to the delinquent police officer and call upon him to answer the charge.

(e) The Enquiry Officer after the charge/charges are framed in writing is to explain it to the delinquent officer, and ask the delinquent Police Officer

to furnish list of the defence witnesses whom he wishes to call alongwith summary of the facts as to which such witnesses are to testify. The enquiry

officer thereafter has to record the statement of the defence witnesses whom he decides to admit, in presence of the delinquent Police Officer, who

is also to be allowed address/put questions to the witnesses as he may deem fit. The delinquent Police Officer is also to be given opportunity to file

documentary evidence and in this regard to have access to official files and papers except such as form part of the confidential record.

(f) The inquiry officer, after the defence is concluded, is to allow the delinquent Police Officer to make a statement in reply to the charge and if he

so chooses to file his written statement. The inquiry Officer independent of the option, exercised by the delinquent Police official to file a written

statement, would be competent to put all such questions to him which he may

see fit to be put arising out of the charge.

(g) The inquiry officer after the delinquent officer closes his case files his written statement and answers questions, if any, put to him, is to pass

order as may be warranted under facts and circumstances of the case or forward the case with his recommendations to an officer empowered to

pass such order. However, no officer is to be dismissed or removed by an authority subordinate to that by which he was appointed.

(h) The punishment of dismissal, removal or reduction in rank is not to be imposed unless delinquent police officer is given a reasonable opportunity

of showing cause orally and also in writing against the action proposed to be taken against him. However, such right may be denied if the

delinquent officer is dismissed, removed or reduced in rank on his conviction on a criminal charge or the authority is of the opinion that it is not

reasonably practicable to give the delinquent police officer an opportunity of showing cause or where the Governor is satisfied that in the interest of

the Security of the State it is not expedient to give that officer such an opportunity.

(i) The authority competent to order dismissal, removal or reduction in rank, is not merely to give an opportunity to the delinquent police officer to

show cause against the proposed action but provide the officer copy of the enquiry report and the record, so as to enable the delinquent police

officer to exercise his right to show cause against the proposed action in a meaningful manner.

10. Respondents admittedly have not followed the procedure laid down in Rule 359 Sub-Rule 1 to 10. They have fallen back on Rule 359(11)(2)

(b) which maybe noticed:-

(2) No police officer shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause orally

and also in writing against the action proposed to be taken in regard to him, provided that this clause shall not apply:-

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

(b) where an authority empowered to dismiss or remove an officer 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 give to that person an

opportunity of showing cause;

11. A bare look on the Rule would reveal that the Rule extends two guarantees to an Officer governed by Police Rules of 1960. It provides a

statutory guarantee that such an officer shall not be dismissed or removed from service by an authority subordinate to that by which he was

appointed. It next guarantees that an officer shall not be dismissed or removed or reduced in rank unless he is given reasonable opportunity of

showing cause orally and in writing against the action proposed to be taken against him.

12. Rule 359(11)(2) clause (a)(b)(c) carve out three exceptions to the second statutory guarantee provided under the Rule embodied in 359(11)

(2)(b). In order to dismiss, remove or reduce in rank an officer without affording him reasonable opportunity against the proposed action against

him, the authority empowered to dismiss, remove or reduce in rank must be satisfied that for some reason, it is not practicable to give to the officer

an opportunity of showing cause. The authority has not only to be satisfied that it is not practicable to give an officer opportunity of showing cause

but also is required to record its reasons in writing to arrive at such a conclusion.

13. As already pointed out, respondents have not made record available to enable the court to find out whether the requirement of Rule 359(11)

(2)(b) were followed in letter and spirit. The court, therefore, is left with no option but to rely on the record whatever available on the file.

14. It hardly needs any emphasis that right guaranteed to an officer under Rule 359(11)(1) & (2) in particular Sub-Rule (2) is a precious right and

is not to be dealt with in casual or mechanical manner. Rule 359(11)(2)(b) does not empower competent authority to dispense with enquiry, if it is

satisfied that holding enquiry would be impracticable. It prefixes word ""practicable"" by ""reasonably"" implying that competent authority has to

examine the issue in objective manner at the touchstone of reasonableness. It is, therefore, more than evident that the authority empowered to

dismiss or remove an officer or to reduce him in rank while dispensing with enquiry contemplated in Rule 359(11)(1) must not only be satisfied

with that it is not practicable to afford an officer the opportunity of showing cause against proposed action.

15. In the present case, order dated 25.10.2005 whereby petitioner has been

removed from service, does not show that respondent No. 4

recorded reasons to conclude that it was not ""reasonably practicable"" to give petitioner an opportunity of showing cause against the proposed

action. There is no record on the file to conclude that such satisfaction was recorded at any stage after petitioner unauthorisedly absented himself

from duty. True that the show cause notice was issued by respondent No. 4 on 26.04.2005 with copy endorsed to Police Station, Bandipora, for

service on petitioner. Record does not reveal that such notice was actually served on the petitioner. Show cause notice dated 20.09.2005 even if

assumed to have been brought to the notice of the petitioner, it did not inform petitioner that enquiry was proposed to be initiated against him. It is

highly doubtful whether petitioner because of his serious indisposition and hospitalization had ever gained knowledge about the notices dated

26.04.2005 and as also the proposed action.

16. In the circumstances, there was no sufficient material before respondent No. 4 to dispense with the enquiry under Rule 359(11)(2) to remove

petitioner with fifteen years service at his back, from services without affording him opportunity to explain and justify his unauthorised absence and

show cause against the proposed removal.

17. For the reasons discussed above, writ petition is allowed and the order impugned bearing No. 201 of 2005 dated 25.10.2005 are set aside.

Resultantly, respondents are directed to allow the petitioner to resume his duty. Respondents would be free to initiate enquiry against petitioner as

regards his unauthorised absence, afford opportunity to the petitioner to show cause against the proposed action and deal with the matter in

accordance with law. The period of absence with effect from the date of his absence till petitioner actually resumes duty, shall be dealt with in light

of outcome of the enquiry initiated against the petitioner. Disposed of.