

(2011) 09 J&K CK 0018
In the Jammu And Kashmir High Court
Case No : LPA No. 83 of 2008

Union of India

APPELLANT

Vs

Mohammad Ashraf Khan and Others

RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

Indo-Tibetan Border Police Force Rules, 1994 — Rule 25, 25(2)

Citation : (2011) 3 JKJ 71

Hon'ble Judges : Virender Singh, J; Mohammad Yaqoob Mir, J

Bench : Division Bench

Judgement

Hon'ble Per M. Justice Yaqoob, J.—Impugned is the judgment dated 09.08.2007 rendered in SWP No. 837/2006, where under order of

dismissal from service dated 24.05.2006 has been quashed and the appellant stand directed to allow the writ petitioner to resume his duties.

2. Writ petitioner has been appointed as Constable in Indo-Tibetan Border Police Force (ITBP) on 02.05.1995 under No. 950050214

Constable/GD. During the subsistence of first marriage he has contracted 2nd marriage with Jubeena Khan on 24.02.2006. The first wife Haseena

Begum complained, as a result thereof appellant issued memorandum on 15.04.2006 mentioning therein that the writ petitioner has ignored his first

wife alongwith two children as such, is living with his 2nd wife. On enquiry same was found to be correct and truth of 2nd marriage was also

accepted by the writ petitioner. It is further mentioned therein that in contravention to the Rule 10(2) of Indo-Tibetan Border Police Force Rules,

1994 (hereinafter referred to as the Rules) and Rule 21 of CCS (Conduct Rule), writ petitioner contracted 2nd marriage. The said act amounts to

indiscipline as such, writ petitioner was directed to submit his clarification/

defence within 15 days. In response thereto writ petitioner had sought three months time to reply. In said request dated 4.5.2006 it is admitted by the writ petitioner that he has contracted 2nd marriage without permission from the Competent Authority and he has discussed the matter with the family of 2nd wife and also informed them about danger to his service. That the family of the 2nd wife agreed to the dissolution of marriage and it is in that backdrop three months time has been sought.

3. The appellant refused to accept the request for grant of extension of time so issued the order dated 24.5.2006 where under the admission of the 2nd marriage was noticed. Based on which it was concluded that in terms of Rule 10(2) of the Rules, the writ petitioner has rendered himself

ineligible for further retention in service. Finally it is recorded that in exercise of powers conferred under Rule 17 and Rule 20 (3) of the Rules, No.

950050214 Const (GD) Mohd. Ashraf Khan of Administration Wing, SPT BN, ITBP Force is removed from service with immediate effect and

stuck off from the strength of SPT BN, ITBP Force from the date of removal i.e, 24.5.2006 (AN) and also stopped to draw pay and allowances from the date of removal.

4. Aggrieved by the order of removal, writ jurisdiction was invoked and by means of the impugned judgment, it has been held that on records there

is nothing to show that formal charge was framed against the petitioner and no enquiry under rules has been conducted nor any opportunity of

being heard has been given to the petitioner. On such basis the said order was quashed.

5. Learned counsel for the appellant would contend that the judgment impugned is contrary to the records because the respondent admitted the

position of his 2nd marriage. His statement has been recorded. Additionally notice has been issued to him on 15.04.2006 to submit his clarification

which he has failed to do. When the position was admitted, operation of Rule 10(2) of the Rules was inevitable, so the appellant has rightly

exercised powers as conferred under Rule 17 and 20(3) of the said Rules, therefore, impugned judgment is liable to be set aside.

6. In opposition learned counsel for the respondents contended that the order dated 24.05.2006 issued by the appellant smacks off application of

mind. Non-rigidity of the Rule 10(2) has not been correctly considered. The

power under Rule 20(3) has been invoked when the said Rule is not applicable.

7. While considering rival submissions what emerges is that the petitioner admittedly during subsistence of first marriage, from which wedlock two children were born, has contracted 2nd marriage. The question which arises for consideration is as to whether for such act extreme punishment of removal from service is warranted.

8. Rule 10(2) as contained in Chapter-III of the Rules provides as under:-

Any person subject to the Act, who contracts or enters into a second marriage during the life time of his first spouse shall render himself ineligible for retention in service and may be dismissed, removed or retired from service on ground of unsuitability.

Provided that the Central Government may, if satisfied that there are sufficient grounds for so ordering, exempt any person from the operation of this rule.

9. The plain language of the Rule would provide that contracting of 2nd marriage will render a person ineligible for retention in service on the ground of un-suitability. The proviso provides for exemption from the operation of this Rule when there are sufficient grounds for so ordering. Here the first question is as to whether Rule is rigid the same has to be answered in negative because the proviso provides for exemption. When exemption is there then the case of such type has to be considered in a broader perspective and when considered in broader perspective it has to be seen whether there were sufficient reasons for a person to enter into 2nd marriage.

10. Firstly, Personal Law i.e, Mohammadan Law, to which respondent is subject, does not prohibit the contract of 2nd marriage. Rules regulate the service, when it is so, it is to be ascertained as to what were the compelling circumstances which forced a person to contract 2nd marriage. The statement of writ petitioner has been recorded by the Deputy Commandant wherein writ petitioner has stated that his first wife is mentally disturbed for the last four years and he looked after the said wife and two children. He contracted 2nd marriage that too in presence of whole family and relatives. When he was confronted with the notice (Memorandum) dated 15.04.2006 where under he was asked to explain his position, he had

sought three months time as he was motivating the family of the 2nd wife to work out for arrangement of divorce, which though under such circumstances is not even warranted under Personal Law but still petitioner for saving his service had volunteered to have recourse to extreme position.

11. The appellant has not acceded to the request of the writ petitioner to grant time instead has passed the order of removal from service. When the petitioner has sanction under Personal Law to contract 2nd marriage, to deprive him of the livelihood on such basis would straightway affect the religious freedom.

12. The bar created under Rule 10(2) of the Rules is not so harsh to entail removal of a person from the service. The bar is not absolute in its operation. The position of the bar is diluted because a person can contract 2nd marriage under exceptional circumstances. The exemption is permissible as per the proviso to the Rule as referred to above. For the violation of the bar which is flexible, extreme punishment of removal from service without having recourse to the due procedure as per the law established suggests arbitrariness in action. In a slipshod manner order of removal has been passed violating the principles of natural justice.

13. The arbitrariness in action is also supported by non-application of mind. Power under Rule 20(3) of the Rules have been invoked for passing the order of removal when the said Rule is not applicable, because in terms of Rule 10(2) on the grounds of un-suitability order of removal can be issued. The termination of service of enrolled person on the grounds on un-suitability is governed by Rule 25 of the Rules. Rule 25 enjoins to give full chance to the enrolled person to put-forth any reason he may wish to in favour of his retention in service and then Rule 25(2) enjoins upon the Authority (Commandant) to consider the explanation and then to call upon the enrolled person to retire or resign, on refusal to do so can be compulsorily retired or discharged from the service. Non-adherence to Rule 25 also renders the order of removal as bad in the eye of law more so when the punishment of removal from service has been ordered.

14. The judgment impugned rendered by learned Single Judge being short of reasons is not sustainable, as such, set aside. Keeping in view peculiar clear position, final adjudication is imperative. The order of removal

dated 24.05.2006, on scrutiny of the records, in the backdrop of relevant rules, as detailed hereinabove, is also found unsustainable.

15. Viewed thus the order of removal dated 24.05.2006 passed by the appellant is quashed. Resultantly, the respondent (writ petitioner) shall be

permitted to resume duties leaving it open to the appellant to initiate action afresh, if he so chooses. Further the appellant shall be free to settle the

intervening period during which respondent (writ petitioner) was out of service by sanctioning leave whatever kind due in accordance with the rules

or otherwise as shall be permissible.

Appeal accordingly succeeds and as such, disposed of.