

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 19.03.2024

Pronounced on: 29.03.2024

WP(C) No.1194/2023

ABDUL HAMID SHEIKH

...PETITIONER(S)

*Through: - Mr. Bhat Fayaz, Advocate, with
Ms. Ishrat Advocate.*

Vs.

UT OF J&K & ORS.

...RESPONDENT(S)

*Through: - Mr. Mohsin Qadiri, Sr. AAG, with
Ms. Maha Majid, Advocate.
Mr. Mubeen Wani, Dy. AG.*

CORAM:

HON'BLE MR. JUSTICE RAJNESH OSWAL

HON'BLE MS. JUSTICE MOKSHA KHAJURIA KAZMI, JUDGE

JUDGMENT

Oswal 'J'

1) The petitioner was dismissed from the police service by the respondent No.3 in exercise of powers under clause (b) of Proviso to sub-section (2) of Section 126 of the Constitution of the erstwhile State of J&K, vide order dated 10.01.2019, on the ground that the activities of the petitioner were highly prejudicial for maintenance of public order and detrimental to the security of the State, besides being unbecoming of a police official. The petitioner preferred an appeal against the order dated 10.01.2019 passed by the respondent No.3 which was dismissed by the respondent No.2 vide order dated 31.08.2022.

2) The petitioner approached the Central Administrative Tribunal, Srinagar Bench, through the medium of OA No.905 of 2022 thereby
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assailing both the orders mentioned above, which was dismissed by the learned Tribunal vide order dated 05.04.2023.

3) After suffering the dismissal of his above referred Original Application, the petitioner has filed the present petition for quashing the order dated 05.04.2023 and also the order dated 10.01.2019 passed by respondent No.2 as well as the order dated 31.08.2022 passed by respondent No.2 and for directing the respondents to treat the petitioner on duty for the entire period of dismissal, pay him the salary along with increments etc. and restore him to his due place in the seniority on the basis of date of appointment.

4) The present petition has been filed on the ground that the learned Tribunal has not appreciated the grounds urged in the application preferred by the petitioner and has passed the order in utter disregard of law and the provisions of Police Rules have been observed in breach. In nutshell, the contention of the petitioner is that the petitioner has been dismissed from service without following the procedure established by the law.

5) The respondents have filed the response stating therein that the petitioner was posted in JKAP-3rd Bn Security and deployed as PSO with Shri Mohammad Maqbool Ganie. Meanwhile, SSP, Anantnag, forwarded a confidential report dated 29.12.2018 to the headquarters stating therein that on the basis of an intelligence report, the petitioner was called for questioning and during interrogation, he revealed that

during Municipal Elections of 2018, when he was performing his duties as PSO, a vehicle bearing Registration No.JK18A-0320 (owned/driven by Tariq Ahmad Malik S/o Nazir Ahmad Malik R/o Danweth Kokernag) was hired by Anantnag Police for Local Bodies Elections of 2018, during which the petitioner acquainted himself with Tariq Ahmad Malik (driver) and held discussions with him regarding militancy and during discussion/conversation, he was told by Tariq Ahmad (driver) to avoid visiting his home because of tense situation in South Kashmir. In response, the petitioner told Tariq Ahmad (driver) that he had contacts with some militants and had provided them transport as well as ammunition many times. During election period, the duo had entered in to an agreement to provide arms and ammunition to the terrorists. The petitioner had hatched a conspiracy with Tariq Ahmad who was in contact with Junaid Ahmad Bhat (active militant of Hizbul Mujahideen outfit) to decamp with arms/ammunition of other PSOs of protected persons along with his allotted weapon and later on a drama of weapon snatching was to be staged by him. Such activities of the petitioner were considered highly prejudicial for maintenance of public order and detrimental for the security of the UT besides being unbecoming of a police official. In view of the anti-national activities of the petitioner, his retention in the Police Department was not found in the larger interest of the department and in view of his nefarious designs, there was no need to hold a departmental enquiry against the petitioner as he had himself confessed

his illegal activities. Since the grave misconduct of the petitioner was proved, he was dismissed from the police service vide order dated 10.01.2019. The respondents have further mentioned about filing of appeal and its dismissal vide order dated 31.08.2022. It is further stated that the Central Administrative Tribunal vide order dated 05.04.2023 has dismissed the application preferred by the petitioner against his dismissal from service. It is further averred that the petitioner was dismissed from police service for his grave misconduct, in exercise of powers under Section 126 of the Constitution of the erstwhile State of J&K and none of the fundamental, legal or statutory rights of the petitioner has been violated by the respondents.

6) Learned counsel for the petitioner has vehemently argued that the procedure envisaged under Section 126(2)(c) of the Constitution of the erstwhile State of J&K read with Article 311 of the Constitution of India and in terms of Rule 359 of J&K Police Rules has not been complied while dismissing the petitioner from service and the respondent No.2 has dismissed the appeal preferred by the petitioner without appreciating the grounds urged by the petitioner. The Tribunal too has not appreciated the contentions raised by the petitioner. He further stated that the report of CID of Police further reveals that no FIR has been registered against the petitioner for any such misconduct and, as such, there is nothing on record to ignore the aforesaid report of the CID or to belie the same. He has placed reliance upon the judgment

of the Hon'ble Supreme Court of India in **Union of India and another vs. Tulsiram Patel, (1985) 3 SCC 398.**

7) *Per contra*, Mr. Mohsin Qadiri, Sr. AAG, has met the submissions made by learned counsel for the petitioner by urging that there were serious allegations against the petitioner and taking into consideration those serious allegations, the petitioner was ordered to be dismissed from police service by the respondent No.3 and the appeal preferred by the petitioner was also dismissed by the competent authority. He further submitted that the learned Tribunal has also rightly dismissed the OA filed by the petitioner by placing reliance upon various pronouncements of the Hon'ble Supreme Court.

8) We have heard learned counsel for the parties and perused the record.

9) The allegations against the petitioner as mentioned in the order impugned dated 10.01.2019 are extracted as under:

"During interrogation subject revealed that in the year 1997 he was appointed in Police Department as Constable and presently posted in Security JKAP-3rd Sec. Battalion and performing his duties as PSO with one protected person namely Sh. Mohd. Maqbool Ganie (BJP Candidate) R/o: Issus Achabal A/P. Universal Hotel Khanabal Anantnag since February, 2018. According to subject that during Municipal Elections 2018, a vehicle bearing Reg. No. JK18A-0320 (Owner / Driver Tariq Ahmad Malik S/o: Nazir Ahmad Malik R/o: Danweth Kokernag) was hired by Anantnag Police for Local Bodies Elections, 2018. He was deputed with a person namely Sh. Mohd. Maqbool Ganie (BJP General Secretary District Anantnag) R/o. Issus Achabal. According to subject, the said P.P. has been provided 02 PSOs from DPL Anantnag namely 1. SPO Amir Hamid No. 1516/SPO & SPO Arshid Ahmad No. 185/SPO. During election period subject was talking with Tariq Ahmad Malik Driver regarding militancy

who told him to avoid visiting his home because situation is tense in Kashmir valley especially in South Kashmir. In reply to this he (Ab. Hameed) said to Tariq Ahmad (Driver) that he is in contact with some militants and had provided them transport as well as ammunition many times. During Election period the duo had entered in an agreement that the arms and ammunition will be provided to terrorists. Abdul Hameed was ready to give arms / ammunition to Tariq Ahmad who was in contact with Junaid Ahmad Bhat (Active militant of HM outfit R/o: Hangalgund Kokemag. He was decamp with weapon of other PSOs of protected person alongwith weapon of the subject. later stage a drama of weapon snatching was to be made by him."

10) The respondent No.3 while considering the activities of the petitioner as highly prejudicial and detrimental for the maintenance of public order and detrimental for the security of the State, has come to the conclusion that the activities of the petitioner are unbecoming of a police official. The respondent No.3 has further recorded his satisfaction that in view of antinational activities of the petitioner, his retention in the department would not be in the larger interest of the department and in such circumstances **"there is no need"** to hold a departmental enquiry as the petitioner in his interrogation has himself confessed his nefarious activities. With above mentioned findings and observations, the respondent No.3, in exercise of powers under Section 126(2)(b) of the Constitution of the erstwhile State of J&K, ordered the dismissal of the petitioner from the services of the respondent department.

11) It is urged by the petitioner that the mandate of Section 126 (supra) has not been followed by the respondents in its letter and spirit.

Section 126 of the Constitution of erstwhile State of J&K, for the facility of reference, is extracted as under:

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 further 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; 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 inquiry; 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.”

12) The contention raised by the petitioner is that even if he was to be dismissed from service on account of threat to security of the State, still it was only the Governor who could have done the same, therefore, the order impugned passed by the respondent No.3 is without jurisdiction. The argument raised by the petitioner though appears to be attractive but deserves to be rejected on the ground that the respondent No.3 has

taken note of the illegal and anti-national activities of the petitioner while passing the impugned order. The respondent No.3 while passing the impugned order has recorded its satisfaction that the activities of the petitioners are not only detrimental for the security of the State but also highly prejudicial for the maintenance of public order. Besides this, a satisfaction has been recorded by the respondent No.3 that retention of the petitioner in the department on account of his anti-national activities would not be in the larger interests of the department. On this ground, the order passed by the respondent No.3 cannot be quashed.

13) The respondent No.3 has purportedly issued the order of dismissal of the petitioner in terms of clause (b) of Proviso to sub-section (2) of Section 126. Clauses (a), (b) and (c) of proviso to sub-section (2) of Section 126 operate as exception to the general principle that no person who is a member of civil service of the State or holds a civil post in the State shall be dismissed, removed or reduced in rank except after an inquiry, wherein he is informed of charges and shall be afforded a reasonable opportunity of hearing in respect of the charges. There is no cavil so far as power vested with the competent authority to dismiss or remove or reduce in rank, as the case may be, a person holding a civil post without inquiry is concerned provided the contingencies as provided in the exception to the general rule providing for inquiry exist. Clause (b) of Proviso to sub-section (2) of Section 126 provides that 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, then only such person can be dismissed or removed or reduced in rank by the said authority. So far as the present case is concerned, the respondent No.3, instead of recording its satisfaction that it is not reasonably practicable to hold such inquiry, has dismissed the petitioner from service by observing that there is 'no need' for enquiry as the petitioner has confessed his nefarious activities. The satisfaction to be recorded by the competent authority that holding of inquiry is reasonably not practicable due to some reason(s) is the constitutional obligation on the part of the competent authority before dismissing or removing or reducing the delinquent employee. The necessity of holding enquiry is not the mandate of clause (b) of Proviso to sub-section (2) of Section 126 of the Constitution of erstwhile State of J&K. Clause (b) of Proviso to sub-section (2) of Section 126 does not vest any such discretion with the competent authority to dismiss or remove or reduce in rank the delinquent employee only on the ground that there is no necessity of holding such enquiry. "Necessity of holding an inquiry" and the "Practicability of holding an inquiry" are two different expressions, connoting different meanings and cannot be used interchangeably. Necessity would mean requirement whereas the Practicable would mean the ability to do something successfully.

14) In **Union of India vs. Tulsiram Patel**, (1985)3 SCC 398, in para 134, it has been held as under:

130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the *Oxford English Dictionary* "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". *Webster's Third New International Dictionary* defines the word "practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". *Webster's Third New International Dictionary* defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". **Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.** It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidates witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. **A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail.** 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 inquiry as also the order imposing penalty-----.

(emphasis added)

15) Further, the Hon'ble Supreme Court of India in **Jaswant Singh vs. State of Punjab and others**, (1991) 1 SCC 362, while dealing with

the exercise of power as conferred by way of an exception under proviso (b) to sub-clause (2) of Article 311 of the Constitution observed as under:

“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 reasonably practicable to hold a departmental enquiry. This is clear from the following observation at page 270 of Tulsiram case:

“A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the department's case against the government servant is weak and must fail.”

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.”

(emphasis added)

16) In **Reena Rani vs. State of Haryana**, (2012) 10 SCC 215, it has been held as under:

7. In the order of dismissal, the Superintendent of Police has not disclosed any reason as to why it was not reasonably practicable to hold regular departmental enquiry. **The learned Additional Advocate General fairly stated that the order of dismissal does not contain the reasons as to why it was not reasonably practicable to hold regular departmental enquiry against the appellant.** He also admitted that no other record has been made available to him which would have revealed that the Superintendent of Police had recorded reasons for forming an opinion that it was not reasonably practicable to hold regular departmental enquiry for proving the particular charge(s) against the appellant.

8. In view of the above, we hold that the learned Single Judge and the Division Bench of the High Court committed serious error by negating the appellant's challenge to her dismissal from service without enquiry. The Division Bench of the High Court did not examine the issue in the correct perspective and made general observations that each case is required to be decided on its own facts and no straitjacket

formula can be adopted to decide whether it is reasonable and practicable to hold regular enquiry for imposing major penalty of dismissal from service. Such general observations could not have been made basis for approving her dismissal from service without enquiry.

(emphasis added)

17) From the abovementioned pronouncements, it becomes clear that the competent authority can dispense with the inquiry but after recording satisfaction that there are sufficient reasons which make the holding of an enquiry not practicable. So far as the present case is concerned, the respondent No.3 has miserably failed to record its satisfaction that holding of an enquiry is not practicable due to certain circumstances.

18) We have examined order dated 31.08.2022 and also the order passed by the learned Tribunal and we find that neither the Appellate Authority nor the learned Tribunal has considered the contentions raised by the petitioner in its proper perspective. It is evident that the Appellate Authority while rejecting the appeal preferred by the petitioner was swayed away by the severity of the allegations and the learned Tribunal, without examining the mandate of section 126 of the constitution of the erstwhile State of J&K in right perspective, has proceeded to decide the case by dismissing the OA preferred by the petitioner.

19) We are conscious of the fact that the allegations against the petitioner are very serious in nature and taking into consideration the severity of the allegations, the respondent No.3 ought to have followed

the mandate of clause (b) of Proviso to sub-section (2) of Section 126 in its letter and spirit while issuing the impugned order of dismissal of petitioner from service, which has not been done. In these circumstances, we are left with no other option but to show indulgence.

20) In view of above, the order dated 10.01.2019 passed by the respondent No.3, order dated 31.08.2022 passed by respondent No.2 and the order dated 05.04.2023 passed by the learned Tribunal are not sustainable in the eyes of law. However, in view of severity of the allegations and in view of the judgment of the Hon'ble Supreme Court of India in **Reenai Rani vs. State of Haryana** (supra), we dispose of the present writ petition with the following directions:

- (I) The impugned orders dated 10.01.2019 passed by the respondent No.3, 31.08.2022 passed by respondent No.2 and the order dated 05.04.2023 passed by the learned Tribunal are set aside.
- (II) The respondents shall reinstate the petitioner within the period of three months from the date of receipt of the order. However, the respondents shall be at liberty to proceed against the petitioner, if they so desire, strictly in accordance with the law.
- (III) In the event the respondents choose not to proceed against the petitioner afresh, he shall be entitled to all the consequential benefits except the monetary benefits as in the CID report relied upon heavily by the learned counsel for the petitioner, it has been indicated that the petitioner is doing a private job.

21) This Court would be failing in its duty in not reminding the respondents of their responsibility to deal with the cases of like nature not in a casual and careless manner as has been in this case. Once there are serious allegations levelled against a delinquent employee which have the propensity of not only threatening the public order but also the security of the Country, then the respondents are expected to act with utmost care and caution. This Court hopes that in future when the respondents are confronted with such like matters, the mandate of the Constitution is followed in its true letter and spirit so as to leave no chance/occasion for such delinquent employees to make complaint in respect of infraction of constitutional mandate before this Court.

(MOKSHA KHAJURIA KAZMI) (RAJNESH OSWLA)
JUDGE JUDGE

Srinagar

29.03.2024

“Bhat Altaf-Secy”

Whether the order is reportable: Yes/No