

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

SWP No. 1147/2009

Reserved on: 23.05.2022

Pronounced on: 03.06.2022

Abdul Rehman Dar

...Petitioner(s)

Through: Mr. Mir Manzoor Ahmad, Advocate.

Vs.

State of J&K & Anr

...Respondent(s)

Through: Mr. Mir Majid Bashir, Advocate.

CORAM: HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE

JUDGMENT

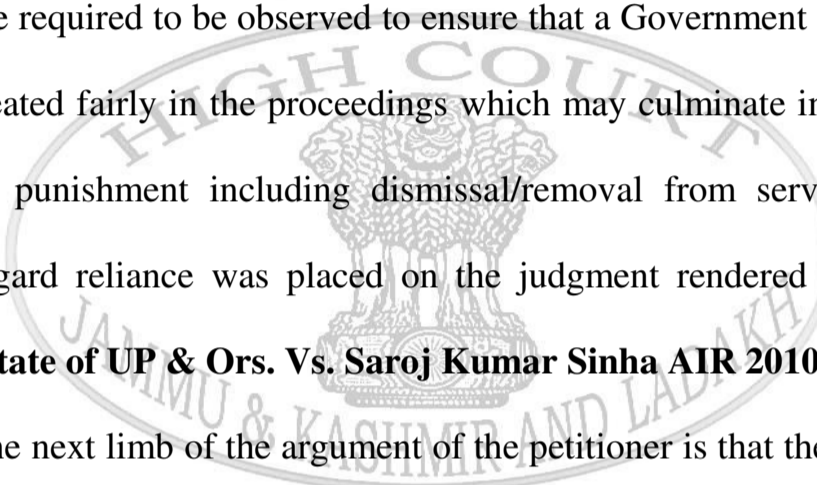
1. Petitioner, through the medium of instant writ petition, seeks quashment of the **Order No.538-B of 2009 dated 28.07.2009** (for short 'impugned order') issued by the Secretary J&K State Board of School Education Srinagar (respondent No.2 herein), whereby the petitioner was debarred from any further promotion for a period of two years with effect from the date he becomes eligible for the next promotion.
2. Briefly stated facts of the case are that the petitioner, who was working as Senior Assistant in the J&K State Board of School Education, had been served the show cause notice dated 24.04.2009 for accepting the examination application form of an ineligible candidate for secondary school examination Session-2008 Bi-annual. The said notice was replied by the petitioner, wherein it was admitted that he had accepted the admission form without assessing the previous attempts made by the said candidate. However,

respondents, after examining the reply to the show cause notice, found the same not satisfactory and passed the impugned order, whereby the petitioner was awarded the punishment debarring him from further promotion for a period of two years, compelling the petitioner to file the instant petition.

3. It would be worth to mention here that earlier this Court, vide order dated 26.08.2009, dismissed the said petition. An appeal bearing LPA No.188/2009 came to be filed against the said order of dismissal dated 26.08.2009. The Division Bench after hearing the said LPA, set aside the order dated 26.08.2009 passed by the Single Bench, vide its order dated 16.04.2013, remanding back the matter to the Writ Court with the request to decide the writ petition after hearing both the parties. Accordingly, the Writ Court heard the matter afresh and **admitted** the Writ Petition to hearing.
4. Thereafter, in terms of the order dated 24.06.2020, the Writ Court while observing that the matter falls within the definition of '*service matters*' as contained in **Section 3(q) of the Administrative Tribunals Act, 1985** which had become applicable to the Union Territories of Jammu and Kashmir and Ladakh after coming into force of the **Jammu and Kashmir Re-Organization Act, 2019** with effect from 31.10.2019, and **Section 29** of the said Act provides for transfer of the pending cases of such nature to the Central Administrative Tribunal, transferred the matter to the Central Administrative Tribunal Jammu Bench. However, the learned Tribunal sent back the matter with an observation that the Tribunal has no jurisdiction over the Jammu and Kashmir Board of School Education.

5. Respondents have filed their counter affidavit, wherein it is stated that the petitioner, while posted at Branch Office Kulgam in the year 2008 allowed one Mohammad Yaseen Magray to fill the admission/examination form of SSE (10th Class) Session-2008 Bi-Annual at late stage and entertained it notwithstanding the fact that the said candidate had already passed the SSE in the year 2003 under Roll No.610509. The form of the said candidate was accepted by the petitioner without checking the previous record. Respondents constituted a Fact Finding Committee to probe and fix the responsibility of the erring officer/official. The Committee held the said candidate guilty of unfair means and also held the petitioner responsible for the said irregularity. Respondents further stated that the Committee, so constituted, had considered the matter and decided to take a lenient view and only withheld the promotion of the petitioner for two years. It is further stated that the petitioner was given an opportunity of being heard during the course of probe, also was served the show cause notice, to which he had replied and the same was considered by the respondents but was found not convincing. Respondents in their counter affidavit had stated that none of the rights of the petitioner have been violated. The punishment imposed on the petitioner was only for dereliction of his official duty.
6. Heard learned counsel for the parties, perused and considered.
7. Learned counsel for the petitioner, while arguing the matter submits that holding departmental proceeding and recording finding of guilt against any delinquent and imposing punishment is a quasi-judicial

function and not administrative function. The authorities have to strictly adhere to the statutory rules while imposing punishment.

8. Another ground of contention raised by learned counsel for the petitioner is that when a departmental enquiry is conducted against a Government employee, it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with the closed mind. The Enquiry Officer has to be unbiased. The rules of natural justice are required to be observed to ensure that a Government employee is treated fairly in the proceedings which may culminate in imposition of punishment including dismissal/removal from service. In this regard reliance was placed on the judgment rendered in the case '**State of UP & Ors. Vs. Saroj Kumar Sinha AIR 2010 SC 3131**'.
9. The next limb of the argument of the petitioner is that the delinquent is entitled to a copy of the enquiry report for making representation against it, if he so desires, and non-furnishing of the enquiry report would amount to violation of natural justice. There is no question of furnishing copy of any report to the delinquent where the disciplinary authority is himself conducting enquiry. It is the further contention of learned counsel for the petitioner that if a departmental enquiry is initiated against Government employee but the same is not completed during the period of his service, it must be completed within six months after his retirement from service. No proceedings can be allowed to continue against the retired Government employee after six months of his retirement from service. It is being stated that the petitioner has since retired from service after attaining the age of superannuation.

10. Learned counsel further argued that a Government employee cannot be punished on the findings of a preliminary enquiry without holding a disciplinary enquiry after serving charge-sheet.
11. On perusal of the record, as has been produced, and the submissions made by learned counsel for the parties, the Enquiry Committee, which conducted the enquiry, held the petitioner responsible for omission and commission of act, accordingly recommended to withhold the promotion of the petitioner for a period of two years from the date he becomes eligible for next promotion. It appears that no subsequent enquiry was held in the matter; ultimately the impugned order was passed against him. The enquiry which was held in the matter was an preliminary enquiry which is always done in the cases of such incidents to find out who was responsible for the same.
12. The findings reached by the enquiry committee, as a result of the preliminary enquiry, cannot be said to be findings made against the petitioner in a departmental enquiry initiated against him for alleged negligence of duty or violation of the statutory rules. The authorities concerned took the view that the departmental enquiry into the incident was enough but that clearly is not right. At the departmental enquiry nobody is accused of negligence or dereliction of duty. It is a kind of investigation made by the department under statutory rules. Therefore, the petitioner is justified in challenging the validity of the impugned order on the ground that a proper enquiry has not been made and he has not been given a reasonable opportunity to meet the charge against him.

13. A Committee comprising of Joint Secretary General (KD) and Dy. Secretary Legal/Cert.(KD) delegated with the powers of Joint Secretary was constituted vide Order No. 757-B of 2008 dated 25.10.2008 to probe the case relating to submission of admission cum permission form of SSE (10th class) Bi-Annual 2008 (July) at late stage through Branch office Kulgam and his subsequent appearance in the said examination under Roll No.184538 when the said candidate is reported to have passed this examination in the year 2003 and was the student of B.A final year at that point of time. The committee was asked to submit the finding at the earliest and pinpoint the responsible officials of Branch office Kulgam for entertaining the form at late stage without any authority and without checking the previous particulars of the said form.

14. This committee vide No. F (Estt. Commtt) B/08 dated 17.03.2009 submitted its report after conducting the enquiry and had drawn conclusion that Mr. Ab.Ahad Yattoo, the then Section Officer Sub Office Kulgam had exceeded the powers beyond his jurisdiction ignoring his officer Incharge, whereas the petitioner Ab. Rehman Dar, the then Dealing Assistant, who was to ascertain the eligibility of the candidate as per his back reference which he didn't do, and that the dealing assistant was answerable as to why he had entertained the admission/permission form without checking the entries of the form, enrolment and marks certificate because the marks sheet shows re-appear in two subjects only, whileas the candidate mentioned all the subjects in which to appear in the enrolment and admission cum permission form. The committee, after conducting preliminary enquiry, recommended that Ab. Ahad

Yatoo, S.O be warned to be careful in future and to withhold the promotion of the petitioner herein for the period of two years from the date he becomes eligible for the next promotion. The committee further recommended to forward the case to the Director School Education Kashmir for further necessary administrative action against the then Principal/Incharge admissions, Govt. HSS, Devsar.

- 15.** Based on this report, show cause notice was issued to the petitioner vide No. E(Admn-B)CU/09 dated 24.04.2009, asking him to show cause as to why the proposed punishment be not imposed upon him and was asked to tender his reply within 15 days from the receipt of the notice. The petitioner in response to this notice, tendered his explanation, stating therein that one candidate namely M.Yaseen Magray S/O Ab. Salam Magray R/O Devsar, managed to fill up his admission form and his duly attested admission cum permission form through HSS Devsar, who had complete record in its possession about the candidate like enrolment/result etc.; and that the candidate had given the affidavit about his failure and through production of failure marks card after duly marked by the then S.O Ab. Ahad Yatoo, he had entertained his admission form without assessing the attempts of the said candidate. It is the school authorities who are on the fault where previous records are easily available and the other particulars of the candidate were also known. He prayed that the decision be reviewed as there was no misconduct on his part and it may be treated as out of oversight and the proposed heavy punishment would be injustice for him.

16. On consideration of the show cause notice, respondents vide Order No. 538-B of 2009 dated 28.07.2009, finding the reply of the petitioner unsatisfactory, passed the following order:-

“...that he (Mr.Ab. Rehman Dar, S.A) be debarred from any further promotion for a period of two years, with effect from the date he becomes eligible for the next promotion.”

The petitioner aggrieved of this order has impugned the same in this writ petition.

17. On perusal of the record, it is crystal clear that no disciplinary committee was constituted by the respondents to conduct regular enquiry into the charges against the petitioner. The committee, so constituted, had been asked to pinpoint and probe into the irregularity committed by the officials of the Sub Office Kulgam including the petitioner, and to fix responsibility of the Principal HSS Devsar, S.O, and the petitioner herein. The committee had also recommended action to be taken against the then Principal HSS Devsar, the then S.O, who was warned to be careful in future, whereas the petitioner was recommended to be penalized by withholding his next promotion for a period of two years. Respondents acted upon the afore-stated report without conducting the disciplinary enquiry to look into the charge against the petitioner. As per the Service Law Jurisprudence, the official having committed misconduct during his service is to be charge-sheeted by framing articles of charge and to lead evidence before the enquiry officer as appointed, where the delinquent official must have a right to cross examine the witnesses and also lead evidence in his defense.

18. Here in this case it appears that the respondents have said goodbye to this established procedure and have hastily rushed to impose penalty, as was recommended by the committee, which was just holding preliminary enquiry to pinpoint and probe the role of the different officials including the petitioner herein. It was incumbent upon the respondents to appoint an enquiry officer, serve charge sheet upon the petitioner as delinquent, lead evidence in support of the charge of misconduct and allow him to bring evidence in his defense. Respondents have thus, committed grave irregularity by not conducting regular enquiry and imposing penalty of withholding next promotion of the petitioner for the period of two years from the date he becomes due for next promotion.

19. Hon'ble Supreme Court in case titled '**Kuldeep Singh Vs. Commissioner of Police & Ors., (1999) 2 SCC 10**', had held that where reliance was placed by the enquiry officer on the previous statement of the witness without supplying a copy thereof to the delinquent and without affording an opportunity to cross-examine the witness, and that the reasonable opportunity contemplated by Article 311(2) of the Constitution by providing an opportunity of being heard in accordance with the principle of natural justice, is not the compliance thereof. To conduct departmental enquiry against a Government servant is not a casual exercise. It cannot be conducted with a closed mind. The enquiry officer has to be unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but it is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of

punishment. Holding departmental proceedings and recording finding of guilt against any delinquent and imposing punishment for the same, is quasi-judicial function and not administrative function.

20. In this case, on the basis of record produced by the respondents, it can be concluded that only preliminary enquiry had been conducted and the purpose behind holding preliminary enquiry is only to take *prima facie* view as to whether there can be some substance in the allegations made against an employee, which may warrant regular enquiry. The evidence recorded in the preliminary enquiry cannot be used in regular departmental enquiry, as the delinquent is not associated with it and opportunity to cross examine the persons examined in such enquiry is not given. Using of such evidence has been held by the Hon'ble Apex Court in the case **Nirmala J.Jhala Vs. State of Gujarat & Anr., (AIR 2013 SC 1513)**, as violative of the principles of natural justice. A preliminary enquiry is only a fact finding enquiry for the satisfaction of the Authority as to whether the allegations noticed against the employee concerned deserve any merit and as to whether a departmental enquiry be initiated against the employee or not. There is no requirement under any statutory provision or otherwise which requires opportunity of participation of delinquent employee in the preliminary enquiry.

21. Hon'ble Apex Court in the case '**Amalendu Ghosh Vs. North Eastern Railway(By The District Traffic Superintendent) AIR 1960 SC 992**', had been pleased to hold that the government servant cannot be punished on the findings of preliminary enquiry without holding a disciplinary enquiry after serving a charge sheet.

22. On a close scrutiny of the case on hand having regard to the factual as well as legal aspects of the same, this Court comes to the conclusion that the penalty of withholding promotion of the petitioner herein from the date he becomes due for next promotion, is arbitrary and is not sustainable for the reason that no departmental regular enquiry was conducted into the alleged misconduct. The petitioner is stated to have superannuated and there is no question of conducting any enquiry against him at this stage. The penalty imposed on the petitioner in absence of being held guilty in regular enquiry is the abuse of power by the respondents and this arbitrary action on the part of the respondents cannot be upheld.
23. For the foregoing reasons and the observations made hereinabove, the impugned order, having been passed in arbitrary manner without conducting disciplinary enquiry into the alleged misconduct against the petitioner, is not sustainable.
24. As a sequel to the afore-stated discussion, petition is allowed and as a result the impugned order is quashed.
25. **Disposed of**, in terms of the above.

(M. A. CHOWDHARY)
JUDGE

Srinagar
03.06.2022
Muzammil. Q

Whether the order is reportable: Yes / No