HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on 04.04.2024
Pronounced on 20.04.2024

SWP No. 2900/2016

Vinod Kumar …..Appellant(s)/Petitioner(s)

Through: Mr. Rahul Pant, Sr. Adv. with
Ms. Arushi Shukla, Adv.

vs

Jammu Municipal Corporation and another ….. Respondent(s)

Through: Mr. S. S. Nanda, Sr. AAG

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. The petitioner has challenged order No. JMC/Legal/170-71 dated 25.09.2017 issued by respondent No. 1, whereby his service period with effect from 23.12.1988 to 26.02.2001 has been treated as *dies non*. Challenge has also been thrown to enquiry report bearing No. MJ/Estt/4054 dated 26.08.2017 with a direction to the respondents to release salary of the petitioner with effect from 23.12.1988 to 26.02.2001 and to promote him to the post of Senior Assistant with effect from July, 2002.

2. As per case of the petitioner, he was appointed as Junior Assistant in the Jammu Municipal Corporation in the year, 1983 and he was placed under suspension in December, 1988. He approached this Court by way of a writ petition bearing SWP No. 228/1989 challenging his order of suspension. Vide judgment dated 06.09.1989 passed in the aforesaid writ petition, the respondents were directed to pay subsistence allowance to the petitioner

and they were directed to expedite holding of enquiry so as to conclude the same within a period of one month.

3. It seems that the enquiry was not concluded within the stipulated time and this compelled the petitioner to file another writ petition bearing SWP No. 500/2000. The said writ petition was disposed of by this Court in terms of order dated 04.04.2000 and the respondents were directed that in case enquiry has not been completed, they shall release full pay of the petitioner and they shall hold enquiry against the petitioner day to day basis. Pursuant to this order, the respondents issued order bearing No. MC/Estt/13829-32 dated 08.03.2001 whereby the petitioner was reinstated into service. A show cause notice dated 14.12.2000 was issued against the petitioner and on 11.01.2005, an order came to be issued by respondent No. 2 whereby punishment of Censure was imposed upon him and the period of his unauthorized absence with effect from 23.12.1988 to 26.02.2001 was treated as *dies non*.

4. The petitioner again approached this Court by way of another writ petition bearing SWP No. 652/2005 challenging the aforesaid order dated 11.01.2005. The said writ petition came to be disposed of by this Court in terms of judgment dated 11.12.2015, whereby a direction was issued to the respondents to hold a fresh enquiry in accordance with law by providing adequate opportunity to the petitioner. The impugned order dated 11.01.2005 was also quashed. Pursuant to judgment dated 11.12.2015, a notice dated 21.09.2016 was served upon the petitioner and he was asked to submit his reply to certain questions to which the petitioner responded.

Prior to this, the petitioner had been promoted as Senior Assistant in the year 2010 and he had superannuated on 31.01.2012.

5. After the afore-stated events, the petitioner filed the present writ petition seeking a direction upon the respondents that his promotion to the post of Senior Assistant be reckoned from the year, 2002 when he was actually due for such promotion. However, during the pendency of writ petition, the petitioner came to know that the respondents have issued the impugned order dated 25.09.2017, whereby his period of absence with effect from 23.12.1988 to 26.02.2001 has been treated as unauthorized absence and it has been considered as *dies non*. Accordingly, the petitioner amended the writ petition and laid challenged to the aforesaid order as well.

6. The petitioner has challenged the aforesaid action of the respondents by pleading that the subject matter of enquiry had all along been his absence from duty for one day in the year, 1988 when he was deputed on election duty, but he has been treated to be absent from duty for the entire period with effect from 23.12.1988 to 26.02.2001. It has been further pleaded that the petitioner, during the aforesaid period of his suspension, was regularly attending his duties and he had even discharged his election duty for which he had been also paid his dues. It has been further contended that after the superannuation of the petitioner, it was not open to the respondents to continue the enquiry against him. It has been contended that in fact no enquiry was conducted by the respondents in accordance with the procedure established by law inasmuch as he was not associated with the so

called enquiry proceedings nor he was furnished copy of the enquiry report so as to enable him to file a representation against the said report.

7. The respondents have filed their reply to the writ petition in which they have submitted that the petitioner was placed under suspension in terms of order dated 24.12.1988 for having remained absent from duty and for having evaded election duty. He was reinstated with effect from 27.02.2001 in terms of order dated 11.01.2005 and the period of his unauthorized absence with effect from 23.12.1988 to 26.02.2001 was treated as *dies non* in terms of Article 163 of J&K CSR. It has been submitted that on the basis of enquiry conducted by the respondents, it was found that the petitioner had remained absent from duty during the aforesaid period. According to the respondents during the course of enquiry conducted pursuant to judgment dated 11.12.2015 passed in SWP No. 652/2015, the petitioner was served with a notice which he refused to acknowledge, whereafter, a detailed questionnaire was served upon him in terms of letter dated 21.09.2016 to which the petitioner responded. Thus, according to the respondents, full opportunity was given to the petitioner to present his case before the Enquiry Officer. It has been pleaded that the Enquiry Officer after obtaining report from all the Section Heads of the Jammu Municipal Corporation came to the conclusion that the petitioner had not performed his duties with effect from 23.12.1988 to 26.02.2001, though, the petitioner had claimed that he had remained present on duty during this period.

8. It has been pleaded that the Enquiry Officer submitted his report dated 27.06.2017 clearly stating therein that the petitioner had not performed his duties with effect from 23.12.1988 to 26.02.2001 and on the basis of the said report, impugned order dated 25.09.2017 was issued. It has been contended by the respondents that the enquiry against the petitioner was conducted in accordance with the directions of this Court passed in SWP No. 652/2015 as contained in order dated 11.01.2015. Therefore, it cannot be stated that the respondents could not hold enquiry against the petitioner simply because he had superannuated from service.

9. I have heard learned counsel for the parties and perused the record of the case.

10. From the pleadings of the parties, certain admitted facts emerge. It is not in dispute that the petitioner was placed under suspension by the respondents in terms of order dated 24.12.1988 for having remained absent from duty from 23.12.1988 and avoided discharge of election duty. It is also an admitted fact that pursuant of directions of the High Court in the earlier round of litigation between the parties, order dated 08.03.2001 came to be issued whereby the petitioner was reinstated in service and the enquiry was directed to be concluded. On 11.01.2005 an order came to be issued by the respondents whereby the petitioner was reinstated into service with effect from 27.02.2001 and his period of absence from 23.12.1988 to 26.02.2001 was treated as *dies non* and from 27.02.2001 he was treated to be as on duty. Further, in terms of aforesaid order, the petitioner was Censured for having remained on unauthorized absence. Order dated 11.01.2005 issued

by the respondents whereby the petitioner was Censured and his period of absence was treated as *dies non* came to be challenged by him by way of SWP No. 652/2005. The said writ petition was disposed of in terms of the following directions:

> "keeping in view the aforesaid circumstances, this petition is disposed of as under:
> (i) Order dated 11.01.2005 is quashed. The official respondents shall hold a fresh enquiry in accordance with law and provide adequate opportunity to the petitioner to participate in the same.
> (ii) The enquiry shall be concluded and the appropriate orders positively within a period of three months from today.
> (iii) The Commissioner, Municipal Corporation, Jammu to ensure that these directions are complied with in letter and spirit."

11. Pursuant to aforesaid directions, the respondents conducted the enquiry after the superannuation of the petitioner and on the basis of the report of the enquiry, impugned order dated 25.09.2017 came to be passed by the respondents. The question that is required to be determined by this Court is as to whether the respondents have conducted enquiry against the petitioner after his superannuation and, if so, whether the enquiry has been conducted in accordance with the law. The fate of the impugned order dated 25.09.2017 would depend upon the answer to the aforesaid questions.

12. The first contention that has been raised by learned Senior Counsel appearing for the petitioner is that it was not open to the respondents to hold an enquiry against the petitioner after he had superannuated from service. So the enquiry, if any, conducted by the respondents has no legal sanctity.

13. It is true that in normal course, enquiry cannot be held against a Government employee after he has demitted the office on superannuation. In the instant case as is clear from the directions dated 11.12.2015 passed by this Court, which have been quoted hereinabove that the respondents were directed to hold a fresh enquiry in accordance with law and provide adequate opportunity to the petitioner to participate in the same. The said order has been passed by this Court after the petitioner had already superannuated from service on 31.01.2012. So it was well within the knowledge of this Court that the petitioner had already superannuated from service and still then a direction was issued for holding of an enquiry against him. Thus, holding of the enquiry against the petitioner even after his superannuation was in pursuance to the directions of the Court. In these peculiar circumstances, the normal position of law that enquiry cannot be held against an employee who has demitted office on superannuation, would not apply to the instant case. Even otherwise an employer is entitled to hold an enquiry against his employee after his superannuation in service, when the same is provided for. In the instant case, the direction of this Court passed on 11.12.2015 justifies the action of the respondents in holding an enquiry against the petitioner even after superannuation.

14. The next question that is required to be determined is as to whether the respondents have held the enquiry against the petitioner in accordance with law and provided adequate opportunity to him to participate in the enquiry which is the mandate of order dated 11.12.2015.

15. In the above context, the provisions contained in J&K Civil Services (Classification, Control and Appeal) Rules, 1956 (hereinafter referred to as the CS(CAA) Rules, which are applicable to the employees of the Jammu Municipal Corporation, are required to be noticed. As per Rule 30 of Sub Clause (iii) of the aforesaid Rules with-holding of increments and/or promotions is one of the penalties, which may be imposed upon the member of a service. In the case of the petitioner, his absence from duty with effect from 23.12.1988 to 26.02.2001 has been treated as unauthorized absence and the said period has been treated as *dies non*. Though *dies non* is not specifically mentioned as a punishment in Rule 30 of the CS(CCA) Rules, yet by treating the absence of the petitioner as *dies non*, he has been subjected to loss of seniority and he has been also deprived of emoluments for the aforesaid period. This has led to his deferred promotion. Therefore, the punishment inflicted upon the petitioner would come within the purview of clause (iii) of the CS(CCA) Rules.

16. The procedure for holding an enquiry for imposing a penalty defined in Clauses (i), (ii), (iii) and (iv) of Rule 30 is prescribed in Rule 35 of the CS(CCA) Rules. It reads as under:

> "35. Adequate opportunity of making any representation be given to the officer concerned before issuing order imposing penalty. Without prejudice to the provisions of rule 33 no order imposing the penalty. (specified in clause (i), (ii), (iii) and (v)) of rule 30 (other than an order based on facts which have led of his conviction in a criminal court or by a court-martial, or an order superseding him for promotion to a higher post on the ground of his unfitness for that post) on any Government servant to whom these rules are applicable shall be passed unless he has been given an adequate opportunity of making any representation that he may desire to

> make any such representation, if any has been taken into consideration before the order is passed."

17. From a perusal of the aforesaid Rule, for imposing penalty *inter alia* specified in clause (iii) of Rule 30 of the Rules, a Government employee has to be given adequate opportunity of making representation before issuing the order imposing penalty and the said representation has to be taken into consideration before the order is passed.

18. Adverting to the facts of the present case, according to the respondents, the Enquiry Officer issued a notice to the petitioner during the course of the enquiry, which he did not acknowledge whereafter, a questionnaire was served upon the petitioner in terms of communication dated 21.09.2016 issued by the Enquiry Officer. It is admitted by the respondents that the petitioner responded to the said questionnaire vide communication dated 27.09.2016. In the said response, the petitioner claimed that he was wrongly placed under suspension for one day as he had discharged the election duties on 23.12.1988. It was also claimed by the petitioner in his response that in the order dated 24.12.1988, whereby he was initially placed under suspension, there was no direction with regard to his attachment, as such, he continued to attend the Cattle Pond Office, where he was serving at the time of his suspension but he was not allowed to mark his attendance during the period of his suspension.

19. It seems that initially the Enquiry Officer, in the absence of any record, could not reach any conclusion and thereafter, he decided to call reports from the Section Heads, who vide their various reports, informed the

Enquiry Officer that the petitioner had not attended duties in their respective Sections. On the basis of these reports, the Enquiry Officer concluded that the petitioner had remained on unauthorized absence from 23.12.1988 to 26.02.2001.

20. The learned Senior Counsel appearing for the petitioner laid much emphasis on the contention that it was incumbent upon the respondents to at least provide a copy of the enquiry report to the petitioner so that he could make a representation against the same before the Disciplinary Authority, but he was never provided the said copy and as such, the enquiry has not been conducted in accordance with law. In this regard, the learned Senior Counsel has relied upon the ratio laid down in the constitution bench judgment of the Supreme Court passed in **Managing Director, ECIL Hyderabad vs. B. Karunakara, (1993) 4 SCC 727**.

21. The record produced by the respondents does not even remotely suggest that the enquiry report was at any time furnished to the petitioner nor does it suggest that copies of the communications furnished to the Enquiry Officer by the Sections Heads were provided to the petitioner. As has been already stated, Rule 35 of the CS(CCA) Rules clearly mandates that an employee has to be given an adequate opportunity of making a representation before imposing penalty specified in clauses (i), (ii), (iii) and (v) of the Rule 30 of the CS(CCA) Rules and the said representation has to be taken into consideration. There is nothing in the said Rule, which mandates an employer to furnish copy of the enquiry report to a delinquent employee. The question arises whether such a requirement can be read into

principles of natural justice. For understanding the legal position on this aspect of the matter, it would be profitable to refer to the relevant judicial precedents laid down by the Supreme Court.

22. In **Union of India and others v Mohd Ramzan Khan 1991 (1) SCC 588** the Supreme Court has held that whenever the Enquiry Officer is other than the disciplinary authority and report of the Enquiry Officer holds the employee guilty of charges, the delinquent employee is entitled to a copy of the report to enable him to make a representation to the Disciplinary Authority against it and that the non furnishing of the report amounts to a violation of the rules of natural justice. While deciding the reference in **B. Karunakara's case (supra),** an answering the question whether the report of Enquiry Officer is required to be furnished to the employee to enable him to make proper representation before the Disciplinary Authority, the Supreme Court formulated the following questions:

> "(i) Whether the report should be furnished to the employee even when the statutory rules laying down the procedure for holding the disciplinary inquiry are silent on the subject or are against it?
> (ii) Whether the report of the Inquiry Officer is required to be furnished to the delinquent employee even when the punishment imposed is other than the major punishment of dismissal, removal or reduction in rank?
> (iii) Whether the obligation to furnish the report is only when the employee asks for the same or whether it exists even otherwise?
> (iv) Whether the law laid down in Mohd. Ramzan Khan's case (supra) will apply to all establishments-Government and non-Government, public and private sector undertakings?
> (v) What is the effect of the non-furnishing of the report on the order of punishment and what relief should be granted to the employee in such cases?
> (vi) From what date the law requiring furnishing of the report, should come into operation?
> (vii) Since the decision in Ramzan Khan's case (supra) has made the law laid down there prospective in operation, i.e., applicable to

> the orders of punishment passed after 20th November, 1990 on which day the said decision was delivered, this question in turn also raises another question, vis., what was the law prevailing prior to 20th November, 1990?"

23. The Supreme Court after discussing its various judgments and the position of law on above aspect of the matter, answered these questions in the following manner:

> Hence the incidental questions raised above may be answered as follows:
> (i) Since the denial of the report of the Inquiry Officer is a denial of reasonable opportunity and a breach of the principles of natural justice, it follows that the statutory rules, if any, which deny the report to the employee are against the principles of natural justice and, therefore, invalid. The delinquent employee will, therefore, be entitled to a copy of the report even if the statutory rules do not permit the furnishing of the report or are silent on the subject.
> (ii) The relevant portion of Article 311(2) of the Constitution is as follows:
> "(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges."
> Thus the Article makes it obligatory to hold an inquiry before the employee is dismissed or removed or reduced in rank. The Article, however, cannot be construed to mean that it prevents or prohibits the inquiry when punishment other than that of dismissal, removal or reduction in rank is awarded. The procedure to be followed in awarding other punishments is laid down in the service rules governing the employee. What is further, Article 311(2) applies only to members of the civil services of the Union or an all India service or a civil service of a State or to the holders of the civil posts under the Union or a State. In the matter of all punishments both Government servants and others are governed by their service rules. Whenever, therefore, the service rules contemplate an inquiry before a punishment is awarded, and when the Inquiry Officer is not the disciplinary authority the delinquent employee will have the right to receive the Inquiry Officer's report notwithstanding the nature of the punishment.
> (iii) Since it is the right of the employee to, have the report to defend himself effectively, and he would not know in advance whether the report is in his favour or against him, it will not be proper to construe his failure to ask for the report, as the waiver of

his right. Whether, therefore, the employee asks for the, report or not, the report has to be furnished to him.

(iv) In the view that we have taken, viz., that the right to make representation to the disciplinary authority against the findings recorded in the inquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan Khan's case (AIR 1991 SC 471) (supra) should apply to employees in all establishments whether Government or non-Government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the Inquiry Officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

(v) The next question to be answered is what is the effect on the order of punishment when the report of the Inquiry Officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non- furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to a "unnatural expansion of natural justice" which in itself is antithetical to justice.

24. From the above analysis of law on the subject, it emerges that the ratio laid down by the Supreme Court in **Mohd. Ramzan Khan's case (supra)** applies to employees of all establishments whether Government, non Government, public or private, even if, the rules governing the disciplinary proceedings do not expressly provide for the same. It also emerges that whatever may be the nature of the punishment to be imposed, whenever an enquiry is held and punishment is proposed to be inflicted, an employee must have the benefit of report of enquiry so as to enable him to make a representation before the Disciplinary Authority. Thus, even if, Rule 35 of CS(CCA) Rules does not provide for furnishing of report of the enquiry to a delinquent employee, still then he has to be provided the same to enable him to make a representation.

25. In the face of aforesaid legal position, it is clear that respondent-corporation has not followed the mandate of law, neither in letter nor in its spirit. The petitioner has admittedly not been provided a copy of the enquiry report that could have enabled him to file a representation before the Disciplinary Authority. In fact, the petitioner came to know about the enquiry report and the order imposing punishment upon him only during the pendency of the present writ petition. Therefore, there was no occasion for the petitioner to make a representation against the report of enquiry whereby it was held that he had remained absent from duty with effect from 23.12.1988 to 26.02.2001 in an unauthorized manner. On the basis of this very report, the aforesaid period has been termed as unauthorized absence and has been treated as *dies non* thereby causing not only loss of emoluments to him but

also the loss of seniority to him. The impugned order, whereby the period of absence of the petitioner 23.12.1988 to 26.02.2001 has been treated as unauthorized and thereafter, the same has been treated as *dies non* is not tenable in law as such, the same deserves to be quashed.

26. Another aspect which is required to be noted is that a grave prejudice has been caused to the petitioner by omission of the respondents to furnish him a copy of the enquiry report. It has been consistent case of the petitioner that he had discharged election duties and because there were no directions as regards his attachment pursuant to his suspension, he continued to attend his duties in Cattle Pond Section of the respondent-corporation where he was posted at the time of his suspension. Had the petitioner been given an opportunity to make representation against the enquiry report, he could have placed before the Disciplinary Authority the material to substantiate his claim. This opportunity has been denied to the petitioner. The stand of the petitioner has been that he was not allowed to mark his attendance though he was attending the duties for the reason that there was no specific order of his attachment to any particular Section. Therefore, providing him opportunity to produce material to support the aforesaid claim was essential for complying with the principles of natural justice, which the respondents have failed to do. Thus grave prejudice has been caused to the petitioner because of non furnishing of report of enquiry to him. Thus, it is not a case, where no prejudice has been caused to the petitioner on account of omission of the respondents to furnish a copy of the report of the enquiry to the petitioner.

27. As per the law laid down by the Supreme court in **B Karunakara's case(supra),** once it is found that an employee has not been provided the copy of the enquiry report, liberty has to be given to the authority to proceed with the enquiry from the stage of furnishing of the report, but in the instant case, the same may not be feasible for the reason that the petitioner has superannuated from service in the year, 2012 and the respondents were time and again given opportunity to hold enquiry against the petitioner in accordance with law in various rounds of litigation between the parties, which they failed to do. In spite of consuming about two decades in holding enquiry against the petitioner for his alleged unauthorized absence from duty, the respondents have for one reason or the other, either delayed the conclusion of the enquiry or left lacunae in the enquiry proceedings. It would now be a futile exercise to again allow the respondents to proceed against the petitioner from the stage of furnishing of a copy of report of enquiry after he has demitted his office more than 12 years back.

28. For the foregoing reasons, the writ petition is disposed of in terms of the following directions:

(i) Enquiry report bearing No. MJ/Estt/4054 dated 26.08.2017 and order imposing punishment upon the petitioner bearing No. MC/Legal/170-71 dated 25.09.2017, whereby period with effect from 23.12.1988 to 26.02.2001 has been treated as *dies non* shall stand quashed.

(ii) The respondents shall pay to the petitioner the salary due to him from 23.12.1988 to 26.02.2001.

(iii) The petitioner shall be notionally promoted as Senior Assistant with effect from the date his immediate junior was granted promotion to the post of Senior Assistant and after allowing admissible increments on notional basis his case for grant of revised pension shall be processed by the respondent-corporation.

29. The petition stands disposed of.

(SANJAY DHAR)
JUDGE

Jammu
20.04.2024
Rakesh PS

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No