

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

SWP No. 853/2008

Date of Decision: 28.07.2011

Surinder Kumar

v.

State of J&K & ors.

Coram:

Mr. Justice J.P.Singh.

Appearing Counsel:

For the Petitioner(s) : Mr. Abhinav Sharma, Advocate.

For the Respondent(s) : M/s S.C.Gupta, Sr.AAG & Gagan Basotra, AAG.

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| i) | Whether approved for reporting
in Press/Media | : | Yes |
| ii) | Whether to be reported
in Digest/Journal | : | Yes |
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The petitioner seeks quashing of Commandant, J&K Armed Police XII Bn Baramulla's Order No.462 of 2001 dated 27.7.2001, whereby he was removed from service as Constable w.e.f. 21.11.2000, besides a Command to the respondents to treat him in service with entitlement to all consequential benefits including salary, seniority and promotion.

The petitioner, a probationary Constable in the Jammu and Kashmir Armed Police proceeded on leave from Training Camp at Talwara on 06.11.2000 for solemnization of his marriage. He did not, however, report back for duty after the expiry of his leave period. Final Attendance Notice issued to him to report for duty, did not yield any result and he opted to remain absent despite having been informed that his failure to report would result in his removal from service.

The Commandant, therefore, removed him from service taking the view that he was not interested to serve any more and his absence would affect other members of the Force.

It was after about six years of his removal from service that he approached the respondents to join duty. His Representations were rejected by the Commandant and the Inspector General of Police in the year 2008.

According to him, because of his suffering from *Insomnia*, he was disabled to join duty and his removal from service was, therefore, unwarranted additionally because it was not preceded by any enquiry into his willful absence for which he was removed from service.

Referring to *Suresh Kumar vs. State of J&K and ors.* reported as 2006(2) JKJ 644, *Pavanendra Narayan Verma vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr.* reported as AIR 2002 Supreme Court 23, *State of Punjab and others v. Sukhwinder Singh*, reported as AIR 2005 Supreme Court 2960 and *Nehru Yuva Kendra Sangathan vs. Mehbub Alam Laskar*, reported as (2008) 2 Supreme Court Cases 479, the petitioner's learned counsel, Mr. Abhinav Sharma submitted that the petitioner's removal from service, without providing him opportunity of hearing and holding enquiry into the alleged misconduct, was violative of the service rules and the principles of Natural Justice and the Commandant's Order was, therefore,

liable to be set aside being in violation of the Service Rules and the principles of Natural Justice.

Questioning the maintainability of the Writ Petition on the ground of delay and laches, the learned State counsel, Mr. Gagan Basotra, AAG submitted that continued absence of the petitioner from duty during the period of probation eloquently demonstrates that he would not prove to be a good Police Officer and his removal from service, which infact was his Discharge therefrom, was justified, in the facts and circumstances of the case, warranting no interference by the Court in exercise of its Extra Ordinary Writ Jurisdiction.

I have considered the submissions of learned counsel for the parties and gone through the judgments referred to by the petitioner's learned counsel.

Besides referring to the petitioner's absence from duty, omission to join despite several notices and suspension for prolonged absence, the Order passed by the Commandant removing the petitioner from service, records that the petitioner had gone contrary to the discipline of the Police Force, which would affect the work and conduct of other officials of the Unit. Before ordering his removal, the Commandant, as indicated in the order, formed an opinion that the petitioner was not interested to serve in the department.

The question that, therefore, arises for determination is as

to whether the petitioner's removal from service was, for his misconduct, And enquiry before termination, was warranted, or whether it was a discharge simpliciter, attaching no stigma to the petitioner?

Although some surplusage is there in the Commandant's order of July 27, 2001 where he indicates that the petitioner's absence tantamounts to loss of service and action under Rule 339 of the Police Rules and Article 128 of the J&K Civil Services Regulations was warranted against him, yet the central idea which appears to have weighed with the Commandant in directing the petitioner's termination from service, was petitioner's continued absence, and on the basis thereof, the Commandant's conclusion, that the petitioner was no more interested to serve the department.

Rule 187 of the Jammu & Kashmir Police Rules empowers the Superintendent of Police to discharge from service, any Constable, who was found unlikely to prove an efficient Police Officer, within three years of his enrollment, i.e., the period of probation.

The view taken by the Commandant that the petitioner was not interested to serve in the department and his absence would be contrary to the discipline of Police Force which can affect the work and conduct of other officials of the Unit, suggests and demonstrates the Commandant's motive to

dispense with the service of the petitioner for his continued absence, which, according to him, was likely to result in indiscipline in the Police Force affecting the work and conduct of the other officials. In other words, according to the Commandant, the petitioner was not likely to prove beneficial to the Police Force as his retention would cause indiscipline and affect the working of the Force.

Misconduct contemplates an overt act or omission by an employee in the discharge of his duties and functions as such, which may entail disciplinary action, *inter alia*, of Removal from service. Such conduct has to be blameworthy, on the part of the employee, in the context of the Rules governing the Service. If an employee conducts himself in a way that was not consistent with due and faithful discharge of duties, it would be misconduct.

An error or omission, not resulting in serious or atrocious consequences, may not, as such, amount to Misconduct. Likewise, one's competence to hold the post and discharge functions attached thereto with requisite efficiency may not be such acts or omissions by the employee which may be construed as his Misconduct.

The petitioner has not been attributed any such overt act or omission in the discharge of his functions and duties as a Constable, on the basis whereof, he was removed. On the

other hand, he was removed only for his prolonged absence which his employer considered not conducive to the good order and discipline in the Force. Such absence, may not, therefore, amount to Misconduct requiring an enquiry before the discharge of a probationer who had opted to remain absent allowing no chance to his employer to assess him for retention in service. His absence is clearly indicative of the fact that he was not interested to serve and prove himself fit for retention in service, in that, a probationer, who is required to prove him fit for retention in Service, cannot afford to remain on long absence, for such absence raises a presumption of his unfitness to prove a good Police Officer.

This apart, the facts and circumstances of the present case clearly reveal that the petitioner was not interested to undergo his probationary period as he has not placed anything on records, on the basis whereof, it be said that the petitioner was interested to complete his probationary period.

On the basis of the documents placed by the petitioner on records, which are his Medical Certificates issued in the years 2005, 2006 & 2007, it appears that the petitioner was not admitted in any Hospital during all these years and even prior thereto and appears to have been consulting the Doctors as an Out Door Patient. Even if, one were to accept the petitioner's plea that because of his sickness, he was disabled to join his

duty, his omission to report to his employer about his illness during all these years, cannot be justified, on any count whatsoever, for, if he could go to the Doctors to consult them, nothing would prevent him to approach his employer or apprise him about his illness. The explanation tendered by the petitioner for his absence on account of illness, therefore, does not inspire confidence.

A Probationer, who absents from duties and thereafter opts not to contact his employer for years together, cannot prove to be an efficient Officer in a Belt Force.

Such being the case, petitioner's discharge from service, which is not in any way stigmatic, cannot be faulted.

The petitioner's learned counsel's plea that the removal of petitioner was for misconduct and an enquiry was warranted before his removal is, therefore, found untenable.

I am supported in taking the above view that termination of petitioner's service for his long absence during his probationary period, is discharge simpliciter and the language used in the order not stigmatic, by *State of Punjab versus Sukhwinder Singh*, reported as (2005) 5 SCC, 569, *State of Punjab versus Rajesh Kumar*, reported as (2006) 12 SCC, 418 and *State of W.B & Ors. versus Tapas Roy*, reported as (2006) 6 SCC, 453. It would be advantageous to refer to what was held by their Lordships of the Hon'ble Supreme Court of India in

Tapas Roy's case supra:

"The order of discharge has, as we have already indicated, set out several instances of the respondent absenting himself unauthorisedly from the training centre. These facts have been relied upon for the purpose of concluding that the respondent was not interested in the training and had no respect for discipline. This conclusion was a ground for holding that the respondent was unsuitable for the Police Department.

The High Court was of the view that Rule 10 of the Rules did not apply to orders which were stigmatic. As has already been held by this Court in *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences* that in order to constitute a stigmatic order necessitating a formal inquiry, it would have to be seen whether prior to the passing of the order, there was an inquiry into the allegations involving moral turpitude or misconduct so that the order of discharge was really a finding of guilt. If any of these three factors are absent, the order would not be punitive. We have also held that stigma in the wider sense of the word is implicit in every order of termination during probation. It is only when there is something more than imputing unsuitability for the post in question, that the order may be considered to be stigmatic. In our view, the language, quoted earlier in the discharge order, cannot be said to be stigmatic as it neither alleges any moral turpitude or misconduct on the part of the respondent nor was there an inquiry as such preceding the order of discharge. The order has been passed strictly in terms of Rule 10 of the Rules. We are, accordingly, of the view that the appeal must be allowed. It is, accordingly, allowed and the impugned order is set aside."

Even otherwise, the petitioner's approach to this Court, after a period of about seven years of his discharge, disentitles him to question the respondents' action, for the power conferred on this Court under Article 226 of the Constitution of India and Section 103 of the Constitution of Jammu and Kashmir to issue Prerogative Writs, orders and directions, may not be exercised, in that, the power is meant to be exercised to advance the cause of justice and not to thwart it. The purpose of conferring power on the Court to issue Prerogative Writs is to see that no man was subjected to injustice in violation of law.

The Court has, therefore, to examine the case projected before it not merely to look at it from academic angle and pick out any error of law in the questioned action but to see as to whether or not any injustice had resulted on account of any erroneous interpretation of law.

Even if, the arguments of the petitioner's learned counsel were to be accepted that the petitioner was removed from service for his misconduct, without any enquiry, which, however, is not the correct position in law, as indicated in earlier part of the Judgment, the defect in the order may not need any correction, for, the petitioner's discharge for his continued absence during the period of his probation, when he had opted not to inform his employer for years together about the cause of his absence, in the facts and circumstances of the case, may not warrant interference.

The Writ Petition lacks substance and is, therefore, dismissed.

**(J.P. SINGH)
JUDGE**

JAMMU
28.07.2011
Pawan Chopra