

**HIGH COURT OF JAMMU AND KASHMIR AT
JAMMU**

SWP No. 2096/2009

Date of decision: 24.10. 2013

Javed Iqbal Mughal

vs.

State and ors.

Coram:

HON'BLE MR. JUSTICE JANAK RAJ KOTWAL-JUDGE

Appearing counsel:

For petitioner (s): Mr. D. C. Raina, Sr. Adv. with
 Mr. Anil Verma, Advocate

For respondent(s): Mrs. S. Hakim, Dy. AG.

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| (i) | Whether to be reported in
Press, Journal/Media: | Yes |
| (ii) | Whether to be reported in
Journal/Digest: | Yes |
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1. This is a writ petition.
2. Heard. I have perused the record.
3. Facts, which are undisputed and necessary for disposal of this writ petition, may be stated thus:
4. Petitioner is a College Lecturer. At the relevant time he was posted at Government Degree College, Kargil. The College closed for winter vacation in December, 2003 up till February 29th 2004. Petitioner, therefore, left the station. He had to join his duties on 01.03.2004. He, however, did not join and absented continuously after that for his own reasons, which according to him, were his family and personal problems. Government, Higher Education Department, taking petitioner's absence from duty as unauthorized, vide Government

order No. 192 HE of 2004 dated 29.07.2004, placed him under suspension 'pending enquiry into the matter'.

4.1 Under Secretary to Government, Higher Education Department, vide No. Edu.Coll/Coord-Comp/Lect/2004 dated 11.01.2005 asked and gave final opportunity to the petitioner 'to explain his position for remaining absent from duty unauthorizedly with effect from 01.03.2004', directing further that reply must reach the Administrative Department by or before 31.01.2005. Petitioner submitted a detailed reply dated 24.01.2005. In sequel to the said reply, the Under Secretary vide Order No. Edu.Coll/Coord-Comp/Lect/2004 dated 27.06.2005 asked the petitioner 'to produce necessary Medical Certificate of all doctors, who have treated him, his mother and son during the period in question'. This was followed by the 'FINAL NOTICE' No. Edu. Coll/Coord-Compl/Lectt/04 dated 26.09.2005 issued by the Department and published in Newspaper asking the petitioner 'to join his duties forthwith by or before October, 10th 2005, failing which, his services will be terminated in accordance with rules'.

4.2 Petitioner's contention is that pursuant to the 'FINAL NOTICE' which, according to him, was published in the newspaper on 13.10.2005, he approached Principal of the College at Kargil on 21.10.2005, who, however, did

not allow him to join. The petitioner got his attendance marked by the Deputy Commissioner, Kargil and with the intervention of the Deputy Commissioner and the Administrative Department he joined the college on 01.12.2005, pursuant to a direction dated 18.11.2005 issued by the Department to the Principal to allow the petitioner to join.

4.3 Under Secretary to Government, Higher Education Department, vide No. Edu. Coll/ Coord/ Complaint/ Lect/05 dated 3. 4. 2007 issued Office Memorandum with Article of Charges to the petitioner informing him that it was proposed to hold inquiry against him under Rule 33 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules of 1956 (for short CC&A Rules). He was asked *inter alia* to submit within ten days of the receipt of the memorandum a written statement in his defense and also state whether he desires to be heard in person. Petitioner was informed further that if he does not submit his written statement of defense on or before the specified date or he does not appear in person before the Inquiry Authority or otherwise fails or refuses to comply with the provisions of Rule, 33 of above Rules, inquiry may be held against him *ex parte*.

4.4 Article of charge served to the petitioner reads:

“Whereas, Shri Javed Iqbal Mughal, Lecturer in English, Govt. Degree College Kargil, has remained on unauthorized absence from his duties w.e.f. 1.03.2004 to 1.12.2005 and from 1.3.2006 till date.”

4.5 Petitioner submitted his reply to the Article of Charge supported with documents on 08.04.2007. Commissioner/ Secretary to Government of Jammu and Kashmir, Higher and Technical Education Department, however, issued Govt. Order No. 211-HE of 2007 dated 19.09.2007. This order in its relevant portion reads:

“....Shri Javeed Iqbal Mughal, Lecturer in English, Govt. Degree College, Kargil who was placed under suspension vide Govt. order No. 192-HE of 2004 dated 29.7.2004 is **hereby reinstated** in service with immediate effect with the following conditions:

- 1.The period of suspension w.e.f. **01.03.2004 to 21.10.2005** is treated as **dies-non** which will not count for purpose of pension, pay, leave and increments.
- 2.
- 3.The period from **22.10.2005 till he reports back** for duty will be treated as **leave whatever kind** may be due to him.
- 4.
- 5.A **censure entry** under Rule 30 of J&K CSR's may be recorded in his Service Book.

Consequent upon his reinstatement, Shri Javed Iqbal Mughal is transferred and posted in Govt. College Rajouri against an available post.

By order of the Govt. of Jammu and Kashmir.”

(Emphasis supplied)

4.6 Petitioner represented against the said order by making representation dated 1. 1. 2008. Under Secretary to Government, Higher Education Department, however, vide his communication No.

Edu-Coll/Coord/Complaint/08 dated 02.04.2008 informed the petitioner that Order No. 211-HE of 2007 dated 19.09.2007 has been passed in accordance with rules after proper appreciation of facts and the replies and no case for review of the decision has been made out.

5. Petitioner feeling aggrieved, has assailed in this writ petition Order No. 211-HE of 2007 dated 19.09.2007 and communication No. Edu-Coll/Coord/Complaint/08 dated 02.04.2008 and seeks **Writ of Certiorari** quashing them and **Writ of Mandamus** directing the respondents to treat the entire period of suspension of the petitioner as on duty and to grant all consequential service benefits to him.
6. Petitioner has contended that the Order dated 19.09.2007(supra) is harsh, stigmatic and punitive. He assails the impugned orders on the grounds that the Order dated 19.09.2007 is violative of the principles of natural justice as major penalty has been imposed without conducting inquiry as contemplated under rules inasmuch as neither any Inquiry Officer was appointed nor the petitioner was provided opportunity to defend himself. It is contended that the impugned order is arbitrary and unreasonable as disproportionate major penalty has been imposed without any inquiry.

7. Respondents have filed objections at pre-admission stage, which have been treated as counter to the writ. While not disputing the fact situation as paraphrased above, it has been contended by the respondents that the petitioner had failed to respond to the show cause notices and resume duty despite various notices. He was served with Office Memorandum and Article of Charges and the impugned order was issued after obtaining reply to the charges. It is worthwhile to quote the two objections raised by the respondents in their reply:

“27. That representation of petitioner was rejected on 2. 4. 2005, the writ petition challenging the order of rejection after such a long time renders the writ petition liable to be rejected on this score alone.

28. That the order impugned has been passed taking into account the conduct of petitioner for remaining absent from duty unauthorisedly and cannot be termed as arbitrary, as alleged. The writ petition needs to be dismissed.”

8. Learned counsel for the petitioner, Mr. D. C. Raina, Sr. Advocate, submitted that having opted to hold disciplinary inquiry against the petitioner by serving him Office Memorandum and Article of Charge, respondent no. 1 has taken U-turn contrary to the rules by opting not to appoint Inquiry Officer and complete the inquiry and resorting to impose penalty of censuring the petitioner and treating suspension period as dies-non. Mr. Raina, therefore, submitted that impugned order is liable to be quashed being

arbitrary, contrary to rules and violative of principles of natural justice. In support Mr. Raina relied upon 2006 (1) SLJ 51.

9. Per contra, Ms. Hakim, learned Dy. AG submitted that impugned order has been passed after taking into consideration the reply to the charge sheet submitted by the petitioner.
10. As per the Article of Charge served upon him, the petitioner remained on unauthorized absence from duty in two spells; from 01.03.2004 to 01.12.2005 and from 01.03. 2006 till the date of the charge, that is, 03.04.2007. Under Article 128 of the J&K Civil Services Regulations (CSR), unauthorized absence from duty or overstaying the leave involves loss of appointment of a Government servant. Rule 128 though contemplates loss of appointment as automatic upshot of unauthorized absence from duty, that is, it terminates the service but it is now well settled that no order of termination of service of a Government servant on account of unauthorized absence from duty or overstaying the leave can be passed without holding inquiry against him after serving Articles of Charges in terms of Rule 33 of the CC&A Rules. Unauthorized absence from duty is rather taken as misconduct in service that embarks serious consequence of termination of service due to loss of appointment.

11. In this case the Administrative Department, after proceeding in a right direction by serving Office Memorandum and Article of Charge on the petitioner, however, seems to have gone astray and resorted to kneejerk action. By the Office Memorandum dated 03.04.2007, while serving Article of Charge on him, the petitioner was informed that the Inquiry was proposed to be held against him under Rule 33 of CC&A Rules. Article of charge was served upon him and he was informed that inquiry will be held only if he does not admit Article of Charge. To say at the cost of repetition, period of unauthorized absence was shown in two spells:
 - i) 01.03.2004 to 01.12.2005 and
 - ii) 01.03.2006 to 03.04.2007 (date of office memorandum)
12. In his reply, the petitioner, while not denying his absence from duty had denied the charge to the extent of unauthorized absence. He rather had taken specific defence as regards the first spell of the absence. He contended that he could not report for duty on 01.03.2004 as his health had deteriorated due to a sudden attack of depression followed by an accident in which he sustained a severe fracture to his leg. He pleaded that he had sent an application for leave, whatever due to him, through his colleague Surinder Singh Parihar (lecturer in History). The said application,

according to him, was received by the Principal of the College but he was not informed about the outcome thereof. He further pleaded that in the meantime his mother suffered a serious attack of hypertension and his two years son developed a sudden squint in his eye. He sent another application in the month of July, 2004 requesting the Principal for extension of leave. He pleaded further that on 29.07.2004, he was placed under suspension by the Government without any direction for his attachment during the period of suspension. Further he submitted that he furnished his reply to the Show Cause Notice issued to him dated 11.01.2005. He contended that vide notice dated 26.9.2005, published in the Daily Excelsior dated 13.10.2005, he had joined on 01.12.2005. To say precisely, petitioner had sought to put forth his defense against allegation of unauthorized absence from 01.03.2004 to 01.12.2005. As regards, the second spell of absence from 01.03.2006 to 03.04.2007, the petitioner in his reply to the Article of Charge pleaded that he had joined his duty after vacation on 01.03.2006, stayed there up to 22.4.2006 and came back after that to follow his case.

13. Before proceeding ahead, I may refer briefly and broadly to the rule position dealing with the punishment and inquiry for misconduct by a Government servant. Rule 30 of CC&A Rules provides

for punishment for misconduct. Punishment so provided can be broadly divided into two classes:

- (a) **Major penalties** that include; dismissal from service, removal from service and reduction in rank.
- (b) **Minor penalties** that include:
 - i) Censure;
 - ii) Fine not exceeding one month's pay;
 - iii) With holding of increments and/ or promotion;
 - iv) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders.

Rule 33, mandates holding of Inquiry against the delinquent Government servant after serving Articles of Charges to him before imposing major penalty of dismissal, removal from service or reduction in rank. Inquiry contemplates providing the Government servant opportunity to put in written statement in his defence, opportunity to be heard in person, opportunity of cross-examination of the witnesses produced against him at the inquiry and to give evidence and produce witnesses in support of his defense. Rule 34 mandates that, if after completion of inquiry the penalty proposed is dismissal or removal from service or reduction in rank, copy of proceedings as prepared under Rule, 33 should be provided to the delinquent and he be asked to show cause as to why penalty be not imposed on him. Rule 35, however, mandates providing adequate opportunity

to the delinquent for making representation if penalty proposed is other than the major penalty of dismissal, removal or reduction in rank. To say otherwise, if penalty proposed is minor penalty of censure, fine not exceeding one month's pay etc. the Government servant is required to give opportunity for making representation.

14. In this case the charge against the petitioner was that of unauthorized absence from duty and consequence thereof is termination of service due to loss of appointment as provided under Rule 128 CSR. As said above, unauthorized absence from duty is misconduct in service and involved loss of appointment. Termination of service due to loss of appointment on account of unauthorized absence undoubtedly is akin to major penalty of removal or dismissal from service and therefore, necessitates inquiry as envisaged under Rule 33 CC & A Rules.
15. The Administrative Department thus started well and correctly by serving the petitioner with the Office Memorandum and Article of Charge, informing him that inquiry in terms of Rule 33 CC&A Rules was proposed against him and providing him opportunity for submitting his defence (written statement). Petitioner submitted his reply and denied the charge to the extent of the absence being unauthorized.

What was, thus, required of the Department was to hold the inquiry with all its essentials. However, as said above, for unknown reasons, Department took a kneejerk by passing impugned order thereby censuring the petitioner treating the period of suspension as dies-non.

16. It is not understandable as to how the decision for passing order of censure has been taken because, as I have explained above, to censure a Government servant is, nonetheless, a punishment, though minor. Censure of a Government servant has serious repercussion in the career of a person and should not be ordered unless he had been given adequate opportunity of making representation and without taking into consideration the representation, if any, made by him.
17. Since the consequence of unauthorized absence from duty is loss of appointment leading to termination of service, question of censuring the delinquent may arise only if, after hearing the delinquent and having regard to his reply, termination of service is not found suitable. In that eventuality the next question would be that as regards the treatment to be given to the period of unauthorized absence or suspension, if any.

18. For whatever stated and discussed above, the irresistible conclusion is that respondent-Administration Department has faulted in not conducting and completing the inquiry against the petitioner, censuring him and treating the period of his suspension as dies-non without recording any finding.
19. Viewed thus, this writ petition is allowed and orders impugned are quashed by issuing **Writ of Certiorari**. Respondents/Administrative Department, however, will be at liberty to complete the inquiry initiated vide Office Memorandum dated 03.04.2007 and take the appropriate decision, as the case may be.

(Janak Raj Kotwal)
Judge

Jammu
24.10.2013
Karam