

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

SWP no. 494/2009, CMA no. 650/2009

Date of order: 14/11/2013

Mohd. Hayat

V. State of J&K & ors.

Coram:

Hon'ble Mr. Justice Hasnain Massodi, Judge

Appearing Counsel:

For the petitioner(s) : Mr. M. I. Sherkhan, Advocate.

For the respondent(s) : Mr. Gagan Basotra, Sr. AAG.

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| 1. Whether to be reported in | : | |
| Press/Journal/Media | | |
| 2. Whether to be reported in | : | Yes |
| Digest/Journal | | |
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1. Petitioner sometime before 15.11.2008 was recruited as Constable in Jammu and Kashmir Police, District Doda and allotted No. 694/D. He was deputed as Personal Security Officer with one Mushtaq Ahmad – a political activist, residing at Tillgra. On 21.11.2008, Selection Grade Constable (Sgct), Shri Hari Krishan No. 548/D through a written report informed SHO, Police Station Gandoh – that a search operation conducted by him and police personnel under his command, with the assistance of Shir Noor Mohd. Special Police Officer, Police Picket Buddli, to nab Shri Afraz Ahmed an active militant of LeT did not yield any results as Shri Mohd. Hayat, Constable 694/D – petitioner herein, present with the militant and his family prevented the police

party from opening fire on the militant and facilitated his escape.

2. The receipt of report from Station House Officer, Police Station, Gandoh prompted Senior Superintendent of Police, District Doda to direct a departmental enquiry against the petitioner vide Order no. 1201 of 2008 dated 22.12.2008, to be conducted by Station House Officer, Police Station, Gandoh.

3. The Enquiry Officer on 18.01.2009 served a chargesheet on the petitioner. The petitioner pleaded not guilty. He also submitted a written reply to the chargesheet stating therein that he was present in the house of the militant, namely, Afraz Ahmad to manage his surrender before the Police at the request of his father and that before his surrender would materialize a police party raided the house and the militant fled from the house. Petitioner denied that he was hand in glove with the militant or his family and insisted that he was only making an effort at the request of father of the militant, to engineer his surrender before the Police.

4. The Enquiry Officer recorded statements of as many as eighteen witnesses, gave petitioner an opportunity to cross examine the witnesses, allowed

the petitioner to make a statement in his defence and recorded statement of the witnesses examined by the petitioner in his defence.

5. The Enquiry Officer submitted his report vide No. 225/05-01/31/PSG dated 20.02.2009 to Senior Superintendent of Police, Doda. The later vide his no. OASI/Show cause/09/7619-21 dated 24.02.2009 issued a show cause notice to the petitioner, summarizing the allegations against him and called upon the petitioner to show cause against his removal from service - the punishment proposed to be imposed. Petitioner submitted his detailed reply on 02.03.2009. He reiterated his stand, spelt out in his reply to the chargesheet. Petitioner pleaded that the enquiry was conducted in disregard of rules, inasmuch as, the Enquiry Officer without recording any evidence framed chargesheet against the petitioner and also failed to handover copy of the enquiry report with the show cause notice to him, to enable him to reply the show cause notice. He threw challenge to appointment of SHO, Police Station, Gandoh as Enquiry Officer, on the grounds that the Enquiry Officer earlier recorded the report lodged by Selection Grade Constable (Sgct), Shri

Hari Krishan No. 548/D and recommended Departmental Enquiry against the petitioner.

6. The Senior Superintendent of Police, Doda not impressed by the reply to the show cause notice, on the next date of the receipt of the reply vide order no. 217 of 2009 dated 03.03.2009 removed petitioner from service.

7. Petitioner, questioned the order of removal from service in a statutory appeal before Inspector General of Police, Jammu Zone, Jammu. The appeal was rejected vide order no. 117 of 2009 dated 14.05.2009.

8. Petitioner, as his statutory remedy against order No. 217 of 2009 dated 03.03.2009 did not bear any fruit, questions the order no. 217 of 2009 dated 03.03.2009 through medium of the writ petition on hand. He assails the order on the grounds set out in the petition. His primary grievance is that Departmental Enquiry was not conducted in accordance with rules; that the petitioner was prejudiced because of non adherence to the rule and lastly that there was no substance in the allegation levelled against him and his defence was probabalized even by the statements of the witnesses recorded by the Enquiry Officer.

9. I have gone through pleadings and the record available on the file and have heard learned counsel for the parties.

10. The object of Departmental Enquiry is to unravel true facts touching misconduct alleged against a public servant, in a fair, impartial, transparent and hassle free manner, without allowing the matter to be caught in procedural wrangles. The role expected to be played by the Enquiry Officer, makes the duty with which the Enquiry Officer is saddled, onerous. The Disciplinary Authority or the Authority appointing an Enquiry Officer to conduct Departmental Enquiry is expected to realize that finding on facts returned by the Enquiry Officer are final as regards the Court called in exercise of its writ jurisdiction to examine the legality of the order passed on the basis of the enquiry. The writ Court is not to sit in appeal against the findings so returned and sift or reevaluate the evidence collected during enquiry. It is, therefore, important that the Enquiry Officer is not only impartial but in the facts and circumstances of the case appears to be impartial and free from bias, so that the delinquent official does not nurse an apprehension that justice may not be

done to him. Justice as we know, must not be only be done but must appear to have been done.

11. In the present case, the Enquiry Officer dealt with the matter as Station House Officer, Police Station, Gandoh. He recorded initial statement of Selection Grade Constable (Sgct), Shri Hari Krishan No. 548/D reflected as Report No. 15 in “Roznamacha” or “Daily Register”. He forwarded the copy of the Report to Senior Superintendent of Police, Doda with the following observations:-

“.....Constable-Mohd. Hayat has willfully after hatching a plan with the terrorist prevented police party from opening fire and played an important role in helping the terrorist to escape and such act is blatant violation of Police Rules. It is important to note that Constable – Mohd. Hayat had concealed the rifle belonging to the terrorist under his (*firran*) Kashmiri and no one can say what plans he had hatched against Security Forces. The Constable moving well his duty as a Police Personnel had played a front role in helping the terrorist to escape. Had the Constable not been present on spot, the police party would have definitely succeeded in its operation.

The matter deserves to be enquired, if necessary action is not taken against the Constable, he may with the help of the terrorists inflict loss of life and property on the Security Forces.”

12. The recommendation made by the SHO, Police Station, Gandoh while forwarding copy of Report no. 15 “Roznamacha” or “Daily Register” to Senior Superintendent of Police, Doda would reveal that he had already rushed to a conclusion, regarding involvement of petitioner in the alleged occurrence. He was so convinced of the involvement of the petitioner that he warned his superior officer that action against the petitioner was unavoidable and any laxity would expose the Security Forces to immense loss. Station House Officer, Police Station, Gandoh, therefore, should not have been entrusted with the enquiry against the petitioner. He because of the conclusion drawn by him before the enquiry, could not claim impartiality and his approach would not be free from bias. His appointment as Enquiry Officer would be in direct conflict with principle of natural justice, emphasizing that no one is to be judge of his own cause. Petitioner was right in having a doubt about impartiality of the Enquiry Officer. The enquiry,

conducted, therefore, cannot be basis for an order imposing punishment.

13. The enquiry against a Police Officer subject to J&K Police Act, 1950 and J&K Police Rules, 1960 is to be held in strict accordance with the procedure prescribed under the Rule 359 J&K Police Rules, 1960.

The procedure to be followed by the Disciplinary Authority on receipt of the complaint alleging misconduct against a Police Officer and by the Enquiry Officer from the date the enquiry is initiated and thereafter by the Disciplinary Authority on receipt of the enquiry report has been examined and the safeguards available to a delinquent official serialized

in Abdul Sattar Lone v. State of J&K 2011 (4) JKJ

587 (HC) as under:-

“1) Whenever a definite complaint of misconduct is received against Police officer, the officer receiving the complaint is to immediately record statements, if any, in support of the complaint and through usual channels forward the complaint with the statements, if any, to the Superintendent of Police or other gazette officer under whose immediate control the officer receiving the complaint, is serving. The police or other officer if satisfied that a prima facie case for enquiry is made out is to entrust the enquiry as far as possible to a Gazetted Officer

empowered to inflict a major punishment upon the delinquent officer.

2) The officer conducting the enquiry is to summon the delinquent police officer, read out to him the statements summarizing the alleging misconduct so as to give notice to such police officer of the circumstance in regard to which evidence is to be recorded. In case the delinquent police officer admits the misconduct alleged against him, the officer conducting enquiry may then and there record a final order if it is within his power to do so or forward the matter to an officer empowered to pass a final order.

3) If the delinquent police officer does not admit the alleged misconduct, the enquiry officer is required to record such evidence oral and documentary in proof of accusation as is available and necessary to support the charge. Whenever possible, witnesses are to be examined in presence of the delinquent police officer and such officer given opportunity to examine the witnesses unless he is of the opinion that the presence of the witness can not be secured without undue delay and expense or inconvenience. In later case the statement of the witness recorded and attested by Magistrate, may be considered though not recorded in presence of the delinquent officer and without opportunity to cross examine the witness to such officer.

4) When the evidence is recorded and it is found not to substantiate the accusation, the officer is to recommend his charge to the Superintendent of Police or other officer so empowered. However, if the evidence collected substantiates the accusation of misconduct, the officer is to frame a formal charge/

charges in writing explain the charges to the delinquent police officer and call upon him to answer the charge.

5) The Inquiry officer after the charge/ charges are framed in writing is to explain it to the delinquent officer, and ask the delinquent police officer to furnish list of the defence witnesses whom he wishes to call along with summary of the facts as to which such witnesses are to testify. The Inquiry officer thereafter has to record the statement of the defence witnesses whom he decides to admit, in presence of the delinquent police officer, who is also to be allowed address/ put questions to the witnesses as he may deem fit. The delinquent police officer is also to be given opportunity to file documentary evidence and in this regard to have access to official files and papers except such as form part of the confidential record.

6) The Inquiry Officer, after the defence is concluded, is to allow the delinquent police officer to make a statement in reply to the charge and if he so chooses to file his written statement. The Inquiry Officer independent of the option exercised by the delinquent police official to file a written statement, would be competent to put all such questions to him which he may see fit to be put arising out of the charge.

7) The Inquiry officer after the delinquent police officer closes his case files his written statement and answers questions, if any, put to him, is to pass order or may be warranted under facts and circumstances of the case or forward the case with his recommendations to an officer empowered to pass such order.

However, no officer is to be dismissed or removed by an authority subordinate to that by which he was appointed.

8) The punishment of dismissal, removal or reduction in rank is not to be imposed unless delinquent police officer is given a reasonable opportunity of showing cause orally and also in writing against the action proposed to be taken against him. However, such right may be denied if the delinquent officer is dismissed, removed or reduced in rank on his conviction on a criminal charge or the authority is of the opinion that it is not reasonably practicable to give the delinquent police officer an opportunity of showing cause or where the Governor is satisfied that in the interest of the security of the State it is not expedient to give that officer such an opportunity.

9) The Authority competent to order dismissal, removal, or reduction in rank, is not merely to give an opportunity to the delinquent police officer to show cause against the proposed action but provide the officer copy of the enquiry report and the record, so as to enable the delinquent police officer to exercise his right to show cause against the proposed action in a meaningful manner.”

14. In the present case, the Enquiry Officer without recording any evidence straightway, framed charge against the petitioner and thereafter recorded evidence, though in his presence. The Enquiry Officer was required to readout to the petitioner, the statement

summarizing the allegation of misconduct and in case petitioner did not admit such misconduct, record evidence in his presence giving him an opportunity to cross examine the witnesses. In the event, evidence recorded was found to substantiate the accusation of misconduct, a formal charge in writing was to be framed, explained to the petitioner and called upon to answer the chargesheet. In the present case, the charge was framed without recording any evidence on 18.01.2009 and evidence was thereafter recorded on 09.02.2009 to 14.02.2009. The petitioner because of departure from the procedure laid down under Rule 359 J&K Police Rules, 1960 was prejudiced as the Enquiry Officer without having any evidence before him had concretized the charge against the petitioner not only pointing to a preconceived notion as regards misconduct alleged against the petitioner but depriving the petitioner of right to convince the Enquiry Officer that the evidence brought on record did not substantiate the accusation and formal charge was not required to be framed on the basis of such evidence.

15. The Disciplinary Authority i.e. Senior Superintendent of Police, Doda on receipt of the Enquiry Report issued a show cause notice to the

petitioner without appending copy of the Enquiry Report with the show cause notice. The Disciplinary Authority in terms of Rule 359 J&K Police Rules, 1960 was under statutory obligation to provide copy of Enquiry Report to the petitioner so as to enable him to make an effective use of right available to him in terms of the aforesaid Rule. The show cause notice No. OASI/Show cause/09/7619-24 dated 24.02.2009 dated and the Order No. 217 of 2009 dated 03.03.2009 do not indicate that copy of the Enquiry Report are provided to the petitioner with the Show Cause notice requiring him to show cause against his removal from service. Failure on part of concerned officer to provide copy of the Enquiry Report has reduced compliance with Rule 359 (11) J&K Police Rules, 1960 to an empty formality.

16. It is important to note that all the infirmities in the enquiry including disability suffered by the Enquiry Officer to act as such and failure to provide copy of the Enquiry Report alongside the show cause notice, were expressly pointed out by the petitioner in his reply to show cause notice. The grounds urged in the writ petition, therefore, cannot be *pooh –poohed* or ignored as an afterthought and not agitated at the right stage.

17. Against the backdrop of above discussion, it is not necessary to examine whether the defence set up the petitioner was sufficiently corroborated by the evidence recorded in support of the charge and, therefore, not to be ignored by the Enquiry Officer and whether the punishment imposed is disproportionate to the misconduct alleged against the petitioner.

18. For the reasons discussed, the writ petition is allowed. The order No. 217 of 2009 dated 03.03.2009 passed by Senior Superintendent of Police, Doda - respondent no. 3 removing the petitioner from service and the order of the Appellate Authority are set aside. The respondents are directed to reinstate the petitioner, with liberty to initiate departmental enquiry against the petitioner afresh in accordance with rules. The period with effect from dismissal of the petitioner till he is allowed to resume his duty, shall be decided in light of outcome of enquiry, if any, directed against the petitioner.

(Hasnain Massodi)
Judge

Jammu
14.11.2013
Parshant