

HIGH COURT OF JAMMU & KASHMIR
AT JAMMU

SWP No.570/2005

Date of order: 24.11.2016

Kuldip Kumar

vs.

State and ors.

Coram:

Hon'ble Mr. Justice Alok Aradhe, Judge

Appearing counsel:

For the petitioner/appellant(s)	:	Mr. R S Thakur, Sr. Advocate with Mr. Pankaj Jamwal, Advocate. Mr. D S Chouhan, Advocate.
For the respondents	:	Mrs. Seema Shekher, Sr. AAG.

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| 1) | Whether to be reported in Press, Media | : | Yes |
| 2) | Whether to be reported in Digest/Journal | : | Yes. |

In this writ petition preferred under Article 226 of the Constitution of India read with Section 103 of the Constitution of the State of Jammu and Kashmir, the petitioner inter alia assailed the validity of the order dated 26.04.2005 by which the petitioner has been prematurely retired in exercise of powers under Article 226(2) of Jammu and Kashmir Civil Services Regulations. The petitioner has also prayed for a direction to the respondents to permit him to continue in service up to the age of superannuation.

2. Facts giving rise to the filing of the writ petition briefly stated are that the petitioner was appointed as Patwari. Thereafter by an order dated 02.04.2005, the petitioner was promoted to the post of Girdawar. It is the case of the petitioner that the petitioner performed the duties to the satisfaction of his superiors and no complaint was ever made against him at any point of time, however all of sudden by an order dated 26.04.2005, the petitioner has been prematurely retired from service in exercise of powers under Section 226(2) of the Civil Services Regulations. In the

aforesaid factual background, the petitioner has approached this Court.

3. Learned senior counsel for the petitioner submitted that the impugned order suffers from the vice of non application of mind and as there is no material on record to assess the unsuitability of the petitioner for continuance in service and to arrive at the conclusion that the retention of the petitioner in service is detrimental to public interest. It is further submitted that the service record of the petitioner has not been considered while passing the impugned order and merely in view of the fact that the First Information Report has been lodged against the petitioner, the same could not have form the basis, for taking a decision to prematurely retire the petitioner. It is also submitted that the petitioner is not even named in the First Information Report and there is no material on record to arrive at the conclusion that the reputation of the petitioner is very bad. It is also urged that the petitioner at the relevant time was posted as Reader in the office of Naib Tehsildar and the order of allotment has been passed by the Tehsildar and the petitioner is not even remotely connected with passing of the aforesaid order, which even otherwise was upheld by the Commissioner and by this Court in OWP No.734/2005 vide order dated 04.09.2013. Lastly it is urged that the impugned order is arbitrary and suffers from vice of non application of mind. In support of the aforesaid submissions, learned senior counsel for the petitioner has placed reliance on decisions of this Court in the cases, **State of J&K and ors. Vs. Janak Singh, 2010(4) JKJ 89, LPASW No.122/2016 dated 07.10.2016, CDLSW No.09/2010 dated 05.03.2010, Parshotam Singh vs. State and ors. 2010 Legal Eagle (J&K) 206, Ram Dass vs. State and ors.,**

2010 Legal Eagle (J&K) 563, Muhammad Yousuf Bhat vs. State of J&K and ors, passed in SWP No.1606/2015 dated 11.11.2016, Mohd Mehraj-ud-din Khan vs. State of J&K and ors passed in SWP No.1965/2003 dated 27.12.2005, Satish Chander Khajuria vs. State of J&K and ors, passed in SWP No.2220/2015 dated 15.07.2016, State of J&K and another vs. Satish Chander Khajuria passed in LPASW No.122/2016 dated 07.10.2016 and decision of High Court of Gujarat in the case of State of Gujarat vs. Suryakant Chunilal Shah, 1999(1) SCC 529

4. On the other hand, learned Senior Additional Advocate General submits that the premature retirement is not a penalty, but the order of premature retirement in instant case has been passed on the basis of input given by the Commissioner of Vigilance that the petitioner was involved in corrupt practices and was guilty of preparing forge documents. It is further submitted that the Vigilance Department has further found that the reputation of the official is very bad. Therefore a conscious decision has been taken by the respondents to prematurely retire the petitioner. It is further submitted that in order to pass the order of premature retirement, the Authority has to arrive at subjective satisfaction which is not open to judicial scrutiny until and unless the decisions suffers from the vice of *mala fides* or is arbitrary or is based on no material.
5. It is further submitted that the petitioner was involved in the manipulation of record which is a matter of grave concern and therefore, the petitioner has rightly been superannuated. In the facts of the case, no case for interference in exercise of powers under Article 226 of the Constitution of India read with Section 103 of Constitution of the State of Jammu and Kashmir is made out.

Lastly, it is urged that the decision taken against the employee can be taken merely on the basis of compliant also. However in the instant case, FIR has been lodged which is pending preliminary investigation. In support of aforesaid submissions, learned Senior Additional Advocate General has placed reliance on decisions of Supreme Court in the cases of **Rajasthan State Road Transport Corp. and others vs. Babu Lall Jangir, AIR 2014 Supreme Court 142, Posts and Telegraphs Board and others vs. C S N Murthy, (1992) 2 Supreme Court Cases 317, Shakti Kumar Gupta vs. State of Jammu and Kashmir and another passed in Writ Petition (C) No.355 of 2014 dated 11.12.2015**. In support of her submissions, learned Sr. Additional Advocate General has also produced the service record of the petitioner.

6. I have considered the submission of both sides and have perused the record. A Three Judge Bench of Hon'ble Supreme Court in the case of **Baikuntha Nath Das and another vs. Chief District Medical Officer, Baripada and another, AIR 1992 Supreme Court 1020** has held that the order of compulsory retirement has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the Government. The Government or the Review Committee shall have to consider the entire record of service before taking a decision in the matter of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based

upon merit (selection) and not upon seniority. In the case of **State of Gujarat vs. Suryakant Chunilal Shah, 1999(1) SCC 529**, it has been held that performance of government servant is reflected in the Annual Character Roll entries and therefore one of the methods of discerning the efficiency on honesty and integrity of government servants is to look at Character Roll entries for the whole tenure from the inception to the date on which decision for his compulsory retirement has been taken. It has further been held that opinion with regard to integrity merely on the basis of First Information Report cannot be formed and involvement of a person in a criminal case does not mean that he is guilty as he is still to be tried in a Court of Law and truth has to be found out ultimately by the court whether prosecution is ultimately conducted. However, before that stage is reached, it would be highly improper to deprive a person of his livelihood merely on the basis of his involvement. In the case of **R C Chandel vs. High Court of Madhya Pradesh and another, (2012) 8 Supreme Court Cases 58**, it has been held that for formation of opinion for compulsory retirement, entire service record and overall profile has to be considered and adverse remarks although followed by promotion and grant of higher scale do not wipe out earlier adverse entries which have remained on record and continued to hold the field. A Division Bench of this Court vide order dated 07.10.2016 passed in LPA(SW) No.122/2016 has held that merely because FIRs are registered and some allegations were under probe, the same cannot form the basis of compulsory retirement.

7. In the backdrop of aforesaid well settled legal position, facts of the case may be seen. The respondents 1 and 2 in Para 5 of the

counter affidavit have disclosed the basis of passing of order of premature retirement as under:

It is submitted that the Committee has considered the case of the petitioner on the following inputs which were gathered in respect of the petitioner:-

“As per inputs given by the Commissioner of Vigilance, J&K, the official has been found indulging in corrupt practices. During investigation of case FIR No.21/2003 P/S VOJ, the official entered into criminal conspiracy with four private persons namely S/Shri Vijay Kumar, Tilak Raj, Nek Mohd. And Kashmiri Lal Bali and prepared fictitious documents. Many of these documents were prepared by him in his own hand. Subsequently, on the basis of these fictitious and forged revenue documents, 48 kanals of prima State land near National High Way close to Kathua was given away free to one Kashmiri Lal Bali, who otherwise was not entitled. Further investigation has indicted that this was done as a part of nexus between land grabbers and Revenue officials to benefit wealthy private parties.

As per information gathered from cross section of the people, the reputation of the official is very bad.”

From perusal of the averments made in the counter affidavit in its entirety, it is axiomatic that respondents 1 and 2 have not considered the service record of the petitioner for arriving at a conclusion whether the petitioner is fit for retention in service. The respondents have also not taken into account any entries made in the service record of the petitioner. The respondents have not taken into account any entry made in the service record which reflects that reputation of the petitioner is bad.

8. Thus, the impugned order has been merely passed on the basis of inputs given by Vigilance Department with regard to pendency of the First Information Report against the petitioner. Mere lodging of the First Information Report, if any against the petitioner, cannot form the basis of his compulsory retirement unless entire service record of the petitioner especially in the later part of the years in question is considered and the competent authority comes to a

subjective satisfaction that the retention of the service of the petitioner is not in public interest. The respondents in the instant case have failed to carried out the aforesaid exercise. The impugned order, therefore, is arbitrary and suffers from the vice of non application of mind.

9. So for as reliance placed by learned Senior Additional Advocate General in the case of **Rajasthan Road Transport Corporation and others (supra)** is concerned, the same is of no assistance to respondents 1 and 2 in the fact situation of the case as it reiterates the well settled legal position that decision with regard to compulsory retirement of employee, has to be arrived at after considering the entire service record of the employee and particularly service record of the immediate past and Washed Off Theory relating to adverse entries does not apply to compulsory retirement. Similarly, in the case of **Posts and Telegraphs Board and others (supra)**, it has been held that subjective satisfaction of the reviewing authority is not open to the court's interference in the absence of any mala fides. In the instant case, the respondents 1 and 2 have not considered the past service record of the petitioner, while forming the decision to compulsorily retiring the petitioner, therefore the aforesaid decision also is of no assistance to the respondents. In the case of **Shakti Kumar Gupta (supra)**, it has been held that if the competent authority arrives at justifiable conclusion with regard to integrity on the basis of record available, that itself would be sufficient to order premature retirement, however, in the instant case, service record of the petitioner has not been taken into account while drawing an inference against the petitioner that his integrity is doubtful. Therefore the aforesaid decision also does not apply to the fact situation of the case. Even

though the service record has been produced by the learned Sr. Additional Advocate General, the same has no bearing in the fact situation of the case as the respondents have not taken into account the service record of the petitioner while passing the impugned order.

10. In view of the preceding analysis, the impugned order dated 26.04.2005 is hereby quashed. The respondents are directed to reinstate the petitioner into service and to accord all consequential benefits. Needless to state that the respondents shall be at liberty to take action against the petitioner if so advised in accordance with the law.

Accordingly, the writ petition is disposed of.

(Alok Aradhe)
Judge

Jammu
24.11.2016
Raj Kumar

