

Jammu & Kashmir High Court - Srinagar Bench

Reserved On: 01.06.202 vs State Of Jk And Others on 28 June, 2021

HIGH COURT OF JAMMU AND KASHMIR AT
SRINAGAR

WP (C) no. 2321/2
CM no. 4370/2019
CCP (S) no. 182/

Reserved on: 01.06.
Pronounced on: 28.06.

Mushtaq Ahmad Wani

...Petitioner (s)

Through:- Mr A. H. Naik, Sr. Advocate with
Mr Shabir Ahmad, Advocate

(Through video call from residence)

v.

State of JK and others

...Respondents

Through:- Mr Shah Aamir, AAG

(Through Video Call from residence)

Coram:

Hon'ble Mr Justice Ali Mohammad Magrey, Judge

JUDGMENT

1. By the instant petition, petitioner seeks a writ of certiorari to the effect that (i) Government Order No. 01-SKIMS of 2018 dated 06.01.2018, insofar as it pertains to the petitioner; (ii) Memorandum No. SIMS/Per/1317/2017/18-546- 51 dated 20.01.2018 along with Articles of Charge/ Statement of Imputation,

(iii) Notice bearing No. PS/Home/2018/78 dated 23.04.2018 issued by the Inquiry Officer; and (iv) Show Cause Notice issued by Respondent no. 3, bearing No. SIMS/Per/3591/2019-3353-59 dated 16.05.2019 be quashed. Petitioner has further sought a writ of Mandamus to the effect that i) petitioner be treated to have been in active service upto the date of his superannuation and

ii) his service benefits including gratuity, leave salary be released in his favour besides regulating his regular pension, on the grounds taken in the memo of petition.

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2. To appreciate the issue in its proper perspective, a brief look at the events, as they happened, is desired, thus:

3. Petitioner, a doctor by profession, has retired as Professor, in the department of Neurology, Sheri Kashmir Institute of Medical Sciences, Soura, Srinagar, for Short SKIMS, after having attained the age of superannuation. During his service, in the year 2018, the petitioner was availing winter vacation from 1st January, 2018 for a period of one month according to roster issued by the SKIMS in this behalf. The respondents, in terms of Government Order No. 01 SKIMS of 2018 dated 6th January, 2018, to be referred to as impugned suspension order, placed the petitioner and two other doctors under suspension pending enquiry and attached them with the office of the Divisional Commissioner, Kashmir.

4. It is further stated in the writ petition that since the impugned suspension order did not mention the reasons of the suspension, therefore, the petitioner approached the respondents to know the reasons of his suspension and he was surprised to know that on the basis of a sting operation carried out by some private journalist reflecting him and the other two doctors to be doing the private practice which is prohibited by the Service Conduct Rules of the SKIMS, the impugned suspension order has been issued.

5. Subsequent thereto, the petitioner, in terms of Memo No. SIMS/Per/1317/2017/18-546-51 dated 20.01.2018, has been asked to submit the written statement of defense on the allegations made in the Articles of Charges. The petitioner was served with the Statement of Imputation also. The petitioner, is stated to have replied to the chargesheet denying the allegation of having indulged in private practice. Thereafter, vide Notice dated 23rd April, 2018, the petitioner was asked by the Inquiry Officer to appear before him in person on 8 th AMJAD AHMAD LONE 2021.06.29 11:39 I attest to the accuracy and integrity of this document May, 2018 at 12.00 hours in his office chamber in Room No. 461, Civil Secretariat, Srinagar. The petitioner, pursuant to such notice, appeared before the Inquiry Officer and his statement came to be recorded wherein the petitioner denied the allegations. Subsequently, the petitioner retired from service on 31 st August, 2018, in terms of Notification No. SIMS/Per/Noti/2018-491-99 dated 20.01.2019.

6. Thereafter, a show cause notice came to be issued against the petitioner dated 16th May, 2019, by virtue of which the petitioner has been asked to show cause to why the penalty proposed by the Inquiry Officer during inquiry be not imposed upon him in terms of Rule 30 of the Jammu and Kashmir Civil Service (Classification, Control & Appeal) Rules, which prescribes reduction to the immediate lower post w.e.f. 6th January, 2018, besides regulating the period of suspension as leave whether kind due upto one day before his superannuation viz. 31.08.2018. The petitioner had to submit his reply within 15 days from the date of issue of the said show-cause notice.

7. The petitioner is stated to have addressed a letter dated 23 rd May, 2019, addressed to respondent no.3 requesting therein that copy of the enquiry report and recommendations made thereof be furnished to him so that he files his response to the show-cause notice, however, despite receipt of the said letter by the office of respondent no. 3, the requested material has not been provided to the petitioner. The petitioner further reiterated his request for providing the above material vide letter dated 14th June, 2019. Thereafter, in terms of Government Order No. 61-SKIMS of 2019 dated 12.06.2019 the other doctor namely Dr Wajid Ali, who too was suspended on the same set of allegations as that of the petitioner, was only warned to be careful in future. AMJAD AHMAD LONE

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8. Aggrieved of the action initiated against him as indicated hereinbefore, the petitioner has filed this writ petition to seek the relief as reflected in the foregoing paragraphs on the grounds, that: no proper enquiry has been made in the case; nothing has been proved against the petitioner; the enquiry initiated and the report prepared pursuant to it, are based on surmises and conjunctures; the sting operation without any evidence about the allegation of indulging in private practice is no proof in law; for the purposes of conducting an enquiry there had to be necessary proof against the petitioner and in absence of which the enquiry conducted is bad in law; doing private practice cannot constitute a criminal offence as the same is against the mandate of the law laid down by the Hon'ble Apex Court; the respondents have arbitrarily proceeded against the petitioner and there has been violation of principles of natural justice and right of equality as for the same set of allegations the other doctor has been warned only while as the petitioner has been awarded punishment of reduction to the immediate lower post.

9. Upon notice, the respondents appeared and filed their reply resisting the claim of the petitioner.

10. The respondents have taken a preliminary objection to the stand of the petitioner stating that in terms of Government Order No. 195-F of 2000 dated 18.01.2000, all posts of SKIMS are non-practising posts, that is, private practice by faculty members and paramedical staff is banned. The faculty members of SKIMS are given a Non-Practicing Allowance (NPA) to the extent of 25% of their basic pay in lieu of not practicing within and outside the Campus during and after official hours; that the Criminal Law Amendment Act, 2002 declared private practice by Faculty Members and Paramedical Staff of SKIMS as a Criminal Offence. Therefore, since the petitioner, was caught in a sting AMJAD AHMAD LONE 2021.06.29 11:39 I attest to the accuracy and integrity of this document operation while conducting private practice, the writ petition of the petitioner deserves to be dismissed.

11. In the parawise reply, the respondents have stated that a sting operation was conducted by a Private News Channel namely Republic TV, wherein the three senior most faculty members of the SKIMS, including the petitioner, were shown to be indulging in private practice at their residences. It is further stated in the reply that petitioner was availing winter vacation w.e.f. 01.01.2018 till 28.01.2018 vide Order No. 1823 (Per) of 2017 dated 28.12.2017, however, being on winter vacation, does not absolve him of the basic principles of employment which debars him from indulging in private practice during his entire service, whether on duty or being on any kind of leave.

12. That the provisional pension case of the petitioner was forwarded to the Accountant General's Office for settlement in terms of Article-168D (1) read with Government Instruction No. 1 of Jammu and Kashmir Civil Service Regulations, 1956, however, a formal order of reinstatement a day before retirement of the petitioner could not be issued because of the pendency of the writ petition in hand. The petitioner is stated to be, getting the provisional pension benefits though. The petitioner sought a copy of the Enquiry Report and the orders passed by the Competent Authority, which were provided to him vide communication No. 302 02 (Misc)/2019-4448-49 dated 24th October, 2019. That on the basis of Enquiry Report submitted by the Enquiry Officer, the Competent Authority

approved the following course of action in respect of the petitioner:

i. "Reinstate Dr. Mushtaq Ahmad Wani with effect from 30.08.2018 (one day before his retirement).

ii. In terms of Rule 30 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956, impose a major penalty by way of reduction to the immediate lower post, that is, Additional Professor, with AMJAD AHMAD LONE effect from 06.01.2018 with scale of pay drawn by him 2021.06.29 11:39 I attest to the accuracy and had he not been promoted as Professor. integrity of this document iii. His intervening period of suspension shall be decided as leave whatever kind due."

13. It is further stated in the reply that in respect of Dr Wajid Ali, Ex- Professor and Head, Department of Paediatrics and Neonatology, who was also suspended along with petitioner for the same set of allegations, the Competent Authority approved the following action:

i. "Reinstate Dr. Wajid Ali with immediate effect.

ii. Dr. Wajid Ali should be administered a warning for remaining careful in future in the discharge of his duties. A watch also needs to be kept on his activities.

iii. His intervening period shall be decided as leave whatever kind due."

14. Heard learned counsel for the parties, went through the material made available and considered the submissions made.

15. The admitted position of the case is that the petitioner and two other doctors have been suspended on the charges of having indulged in private practice in violation of the Rules. The basis for reaching to such conclusion is stated to be a sting operation carried out by a private journalist who showed the petitioner and the other two doctors doing such practice on camera.

16. It is also admitted that one of the three doctors Dr Wajid Ali, Professor and Head, Department of Paediatrics and Neonatology, has been reprimanded only while as the petitioner, despite having retired from active service, has been awarded major punishment of reduction in rank and is only being paid the provisional pension. The question arises as to whether the respondents are justified in adopting two yardsticks in the matter?

17. The answer, in my opinion, is an emphatic 'NO' as there was nothing distinguishable in the petitioner's case, at least there is nothing before this court, that would suggest that petitioner deserved to be proceeded differently. The AMJAD AHMAD LONE 2021.06.29 11:39 I attest to the accuracy and integrity of this document respondents were required to point out very clearly as to how the act of the petitioner constituted a more serious misconduct or the indiscipline compared to the other doctor who has been reprimanded only despite, admittedly, having indulged in the same act as that of the petitioner. The act of the respondents in awarding a major penalty to the

petitioner, therefore, is violative of Article 14 of the Constitution of India

18. In case titled Sengara Singh v. State of Punjab and others reported as AIR 1984 SC 1499, the Hon'ble Supreme Court allowed the appeal and set aside the judgment of the High Court of Punjab and Haryana which had dismissed the writ petitions of 100 members of police force who were, on the recommendation of the Committee, dismissed from service and prosecution launched against them for having participated in an agitation while as the 100 others were reinstated. The aggrieved challenged the action in a writ petition before the High Court of Punjab and Haryana which dismissed the writ petitions. However, the Hon'ble Supreme Court set-aside the judgment of the High Court and held as follows in paragraph 9:-

"9. Now if the indiscipline of a large number of personnel amongst dismissed personnel could be condoned or overlooked and after withdrawing the criminal cases against them, they could be reinstated, we see no justification in treating the present appellants differently without pointing out how they were guilty of more serious misconduct or the degree of indiscipline in their case was higher than compared to those who were reinstated. Respondents failed to explain to the Court the distinguishing features and therefore, we are satisfied in putting all of them in same bracket. On that conclusion the treatment meted to the present appellants suffers from the vice of arbitrariness and Article 14 forbids any arbitrary action which would tantamount to denial of equality as guaranteed by Article 14 of the Constitution. The Court must accordingly interpose and quash the discriminatory action."

(Emphasis supplied) AMJAD AHMAD LONE 2021.06.29 11:39 I attest to the accuracy and integrity of this document

19. Furthermore, the court has to see as to whether the grounds forming basis for suspension of the petitioner have any evidentiary value in law or not. The first thing that strikes mind is that the possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out as it may render the statement out of context, therefore, inadmissible. The Hon'ble Supreme Court, in case titled R. K. Anand v. Delhi High Court, reported as (2009) 8 SCC, 106, has, while referring to an article published in the Indian Police Journal, July- September 2004 issue under the title "Detection Technique of Videotape Alteration on the Basis of Sound Track Analysis" has quoted a passage, which is as follows:

"The acceptance of recorded evidence in the court of law depends solely on the establishment of its integrity. In other words, the recorded evidence should be free from intentional alteration. Generally, examination of recorded evidence for establishing the integrity/ authenticity is performed to find out whether it is a one-time recording or an edited version or copy of the original."

And further:

"Alteration on an audio recording can be of addition, deletion, obscuration, transformation and synthesis. In video recordings the alteration may be with the intention to change either on the audio track or on the video track. In both the ways there is always disturbance on both the tracks. Alterations in a video track are usually made by adding or removing some frames, by rearranging few frames, by distorting certain frames and lastly by introducing artificially generated frames. Alteration on a video recording (sic)."

20. However, since there is nothing in the shape of a videotape etc, produced before the court to point out that the petitioner has, in essence, indulged in AMJAD AHMAD LONE 2021.06.29 11:39 I attest to the accuracy and integrity of this document private practice, therefore, to return a finding vis-à-vis its authenticity or its evidentiary value, is out of place.

21. Having regard to what has been stated hereinbefore, the submissions made by learned counsel for petitioner carry weight and are persistent with law. In my opinion the treatment extended to the petitioner is discriminatory and violative of Article 14 of the Constitution of India. The punishment awarded to the petitioner, therefore, is held to be bad in law, therefore, deserves to be interfered with.

22. In view of above, the writ petition succeeds and is allowed as such along with all CMs and by a Writ of Certiorari i) the impugned Government Order No. 01-SKIMS of 2018 dated 06.01.2018 insofar as it pertains to petitioner ii) Memorandum No. SIMS/Per/1317/2017/18-546-51 dated 20.01.2018 along with Articles of Charge/ Statement of imputation; iii) Notice bearing No. PS/Home/2018/78 dated 23.04.2018 issued by Inquiry Officer (Principal Secretary to Government, Home Department); iv) Show cause notice issued by the respondent no. 3 bearing No. SIMS/Per/3591/2019-3353-59 dated 16.05.2019 are quashed. Respondents, by a writ of mandamus, respondents are commanded to release all the benefits including pensionary and retiral benefits including Gratuity, Leave Salary and regulate his regular pension, with effect from the date the same has become due to him, in such a way as if nothing incriminating was ever found against the petitioner.

23. Disposed of along with all CMs on the above lines. CCP (S) no. 182/2020

24. In the instant contempt petition the petitioner alleges violation of order dated 25.10.2019 passed in WP (C) no.2321/2019 in terms whereof respondents were directed to process the case of petitioner for according same AMJAD AHMAD LONE 2021.06.29 11:39 I attest to the accuracy and integrity of this document benefit which has been given to Dr. Wajid Ali, HOD, Paediatrics and Neonatology. Since the main writ petition stands finally disposed of and all the interim orders have merged with the final order, therefore, the contempt petition does not survive, as such, shall stand disposed of as settled with liberty to petitioner to approach the Court again, if the Judgment is not complied with.

(Ali Mohammad Magrey) Judge SRINAGAR 28.06.2021 Amjad lone PS Whether approved for reporting: Yes/No.

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