

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP (C) no. 2043/2021
CM no. 6739/2021

Reserved on 15.04.2022
Pronounced on 22.04.2022

Shahnawaz Shah

.... Petitioner(s)

Through: Mr Syed Faisal Qadri, Sr. Advocate with
Mr Mansab Wadoo, Advocate

V/s

High Court of JK and others

... Respondent(s)

Through: Mr N. A. Beigh, Sr. Advocate with
Mr Sofi Manzoor, Advocate,
Ms Asifa Padroo, AAG

CORAM:

Hon'ble Mr Justice Ali Mohammad Magrey, Judge
Hon'ble Mr Justice Puneet Gupta, Judge

JUDGMENT

Per Magrey, J

1. Challenge in the instant petition, is laid to the Order bearing No. 925 of 2021/Psy dated 30.09.2021 for short impugned order, in terms whereof the service of the petitioner has been terminated with immediate effect in application of Rule 21-(1) (b) of the Jammu and Kashmir Civil Services (Classification, Control And Appeal) Rules, 1956, for short CCA Rules of 1956, on the grounds taken in the memo of writ petition.

2. Briefly put the case of the petitioner is that he has been appointed against the post of Orderly in terms of Order No. 427 dated 16.1.2020 against the available vacancy in District Srinagar, issued by the Principal District & Sessions Judge, Srinagar, on the basis of the selection made by the Selection Committee and as approved by the Competent Authority, and while performing his duties as such in the court of Principal Judge, Family Court, Srinagar, amidst the ongoing Covid-19 Pandemic, the petitioner proceeded on leave. The petitioner, however, was treated by the competent authority to be on unauthorized absence and initiated disciplinary action and issued the memorandum/ charges along with note of explanation to the petitioner in terms of communication no.3313/PDJS/Adm/2021 dated 31.08.2021. The articles of charges contained the allegations against the petitioner vis-à-vis his unauthorized absence from duties w.e.f. 22.05.2021 to 27.05.2021. The petitioner responded

by filing reply on 9th September, 2021, and subsequent thereto, the respondents issued the impugned order.

3. Respondents, upon notice appeared and filed their reply wherein the claim of the petitioner has been resisted.

4. Perusal of the file reveals that the petitioner initially has been issued a show cause notice dated 21st May, 2021, asking him to explain his position within one (01) day of the issuance of the notice, which was followed by another notice dated 4th June, 2021 bearing No. 64/PJFC, asking him to explain his unauthorized absence as also for submitting a fake Covid-19 report. The notices were responded to by the petitioner in terms of the reply dated 4th June, 2021, stating therein that he had isolated himself for having developed covid symptoms and for his ill health he could not attend the office. The reply was followed by an application dated 7th June, 2021 wherein petitioner had tendered an apology and undertaken to remain careful in future. Thereafter, the Principal Judge, Family Court, Srinagar, in terms of communication No. 72/PDFCS dated 14.06.2021, addressed a communication to respondent no.1 seeking action under law against the petitioner after detailing out the alleged delinquency of the petitioner. It further appears from the perusal of the file that a *Fact-Finding Enquiry Report*, based on the statements of the officials of the Family Court, Srinagar, has been prepared by the respondent no. 3 and submitted to the respondent no. 1 vide No. R/R/HC/SGR/159 dated 02.08.2021. Thereafter, the respondent no. 2, in terms of communication No. 244/Psy-581 dated 26.08.2021, sent a copy of the Memorandum/ Charge Sheet to the Principal District & Sessions Judge, Srinagar, for serving the same upon the petitioner, wherein 15 days' time had been allotted to the petitioner for filing his reply to the same. The chargesheet was finally served upon the petitioner by the Principal District & Sessions Judge, Srinagar, vide his communication no. 3313/PDJS/Adm/2021 dated 31.08.2021. The chargesheet was replied by the petitioner on 09.09.2021, which did not find favour of the respondents, therefore, they issued the order impugned terminating his service.

5. We have heard learned counsel for the parties.

6. Mr Faisal Qadri, learned senior counsel for the petitioner, has invited attention of the court to the memorandum of charges served upon the petitioner on 31.08.2021 so as to demonstrate that the charge against the petitioner of having remained unauthorizedly absent which *per se* amounts to misconduct and not unsatisfactory performance of service. He submits that the charge, even upon

being established to be correct, does not entail the major punishment of termination.

7. In order to appreciate the point raised by Mr Faisal Qadri, learned Senior Counsel appearing for the petitioner, it has become necessary to reproduce the *Articles of Charges* hereunder:

“Annexure-1

Articles of Charges framed against Shri Shahnawaz Shah, Orderly posted in the Family Court, Srinagar.

1. *That you were posted in the Family Court, Srinagar as per the duty roster was duty bound to close the office after the working hours. On 21.05.2021, you left the office unlocked without caring for the safety and security of the record and the office, which amounts to dereliction of duty on your part.*
2. *That you remained un-authorisedly absent from duties in the Family Court, Srinagar w.e.f. 22.05.2021 to 27.05.2021, and when asked by the Presiding Officer to submit explanation in that regard, you had put up an alibi of having contracted Covid-19 infection, which you knew to be a false plea.*
3. *That in support of your plea of contracting Covid-19 infection you furnished a certificate dated 23.05.2021 issued by the Government—Gousia Hospital, Khanyar Srinagar, which was found to be fake, having not been issued by the said hospital, and you knew it to be so.*
4. *That your conduct amounts to dereliction of his duties, un-authorised absence from duties w.e.f. 22.05.2021 to 27.05.2021 and production of a fake document to justify your plea amounts to mis-conduct and a behaviour of un-becoming of a government servant, making you liable for penalty under Rule 33 of the J&K Civil Services (Classification, Control and Appeal) Rules 1956.*

*Principal Secretary
to
Hon’ble the Chief
Justice”*

8. Needless to mention that the memorandum of charges served upon the petitioner has been replied by him on 9th September, 2021 explaining the circumstances which compelled him to be on leave on account of having developed the Covid-19 Symptoms.

9. Mr Faisal Qadri, learned senior counsel, submits that the competent authority had decided to hold a regular enquiry in the matter in terms of Rule 33 of the CCA Rules of 1956 while taking into account the conduct of the petitioner as having remained unauthorizedly absent from duties.

10. The learned senior counsel further submits that the respondents, in case not satisfied with the reply submitted to the memorandum/ articles of charges, were required under law to proceed further in the matter by appointing the enquiry officer and adherence to the procedure of enquiry as established under law. But instead of doing so, they have terminated the services of the petitioner with application of Rule 21 (1) (b) of the CCA Rules of 1956, which as per the learned senior counsel is not only against the mandate of the scheme of law but contrary to it also. Learned counsel for the petitioner submits that the basis of the termination order with reference to the Rule *supra* is not available to the Competent Authority in the facts and circumstances of the case as the basis for termination in the instant case have reference to the unauthorized absence from duties which *per se* can be termed as misconduct and not the unsatisfactory performance of the duties.

11. Learned senior counsel further submits that the power of the Competent Authority available under the Rule *supra* is only to discharge the services of the probationer and not to terminate it. Mr Qadri, learned senior counsel, further submits that the fundamental rights of the petitioner as guaranteed under the Constitution as the ground pressed into service by the competent authority in terminating are violated as his service cannot be terminated in the manner it has been done and reflected in the order impugned. While reiterating the pleadings and the grounds urged in support of his submissions, the learned senior counsel has placed reliance on the judgment passed by the Hon'ble Supreme Court in case titled *V. P. Ahuja v. State of Punjab and others* reported as *AIR 2000 SC 1080* and of the Division Bench of this Court passed in case titled *State of J&K & others v. Kamal Kumar* reported as *2017 (3) JKJ 442*.

12. Learned senior counsel, therefore, submits that the impugned order being bad in law deserves to be set-aside.

13. On the other hand, Mr N. A. Beigh, learned senior counsel, while resisting the claim of the petitioner submits that there is nothing wrong about the impugned order as the petitioner has not shown due care towards his duties and has depicted the serious insubordination which warranted action. The learned senior counsel further submits that the petitioner had absented himself without

seeking permission from the competent authority and had supplied a fabricated certificate showing him to be infected with Covid-19 virus.

14. The learned senior counsel further submits that the petitioner while replying to the show-cause notice dated 4th June, 2021 had admitted the allegations levelled against him vis-à-vis his unauthorized absence and the submission of fake Covid-19 certificate. The learned senior counsel submits that there was no need to conduct an enquiry in the matter as the petitioner admitted the allegations.

15. The learned senior counsel further submits that the respondents have not violated any rule or regulation by issuing the impugned order. The learned senior counsel further submits that the case in hand is not a simpliciter case of absence from duties but a case of deception practiced by the petitioner on his superior officer in order to justify his unauthorized absence.

16. The learned senior counsel submits that a probationer can be terminated at any time during the period of probation by the Competent Authority when the authority is satisfied that it is unlikely that the probationer's conduct will improve making him suitable for his continuation in the service.

17. Considered the submissions and examined the material made available.

18. The material available on the file would demonstrate that the petitioner has been proceeded against from day first on account of his absence from duties. It appears that on 20th May, 2021, the petitioner had attended the duties but allegedly had not locked the court premises properly, therefore, on 21st May, 2021, a show cause notice was issued asking him to explain his position within one day. Another show cause notice was issued to the petitioner on 4th June, 2021, asking him to explain his position within two days for absenting himself and for not replying to the earlier show cause notice.

19. The petitioner has replied to the show cause notice on the same day i.e. 4th June, 2021, stating therein that he had developed symptoms similar to Covid-19 and with a view to save others from getting infected he stayed off the duties. To the allegation that he had left the office premises unlocked, the petitioner has taken a stand that he locked the premises nicely and does not know as to how the door was open.

20. Subsequent to the above reply, the petitioner has filed an application styled as confession application wherein the petitioner has tendered an apology for the mistakes and assured that he would not be repeating such acts again, therefore, has prayed for a lenient view in the interests of justice.

21. Thereafter, the Principal Judge, Family Court, Srinagar, has forwarded the un-authorized absence case of the petitioner to the respondent no. 1 for perusal and further necessary action.

22. The respondent no. 2 thereafter, appears to have issued a communication no. 224/Psy-581 dated 02.07.2021 entrusting a *Fact-Finding Enquiry* to the Registrar Rules, High Court of J&K and Ladakh, who in terms of communication, bearing No. R/R/HC/SGR/159 dated 02.08.2021, forwarded the report to the respondent no. 2, holding that *prima facie* the material on record supports the allegations levelled against the delinquent official, i.e. petitioner.

23. Thereafter, the petitioner was served with the memorandum/ chargesheet which he replied seeking a liberal view to be taken into the allegations framed in the chargesheet as also seeking pardon from the respondents.

24. The respondents, however, apparently not convinced with the reply of the petitioner, issued the impugned order and terminated his services.

25. The Rule 21 (1) (b) of the CCA Rules of 1956 having been invoked into service by the respondents for terminating the services of the petitioner, is taken note of hereunder:

“21. Suspension of probation period.

(1) At any time before the expiry of the prescribed period of probation, the Appointing authority may_

(a)....

(b) at its discretion terminate the probation of a probationer and discharge him from the service”

26. The order impugned is also taken note of hereunder:

“Subject:- Un-authorized absence of Shri Shahnawaz Shah, Orderly posted in the Family Court, Srinagar

ORDER

No. 925 of 2021/Psy Dated: 30.09.2021

The services of Shri Shahnawaz Shah, orderly posted in the Family Court, Srinagar are hereby terminated with immediate effect in terms of Rule 21 (1) (b) of the Jammu and Kashmir Civil Services (Classification, Control, and Appeal) Rules, 1956.

(By Order)

(Rajeev Gupta)

*Principal Secretary to,
Hon'ble the Chief Justice.”*

27. The petitioner is admittedly holding the post of Orderly against a clear vacancy and while on probation, has been terminated from service by

application of Rule 21 (1) (b) of the CCA Rules of 1956 on the charges of absence from duties. The power available with the competent authority under the said Rule is only to discharge the probationer from probation in the event the performance is found not satisfactory which is not the case set out against the petitioner.

28. The order of termination, impugned herein, has already been taken note of hereinabove and the same *ex facie* is stigmatic and punitive also as it is founded on the ground of alleged unauthorized absence which has been explained by the petitioner that he had developed the covid-19 symptoms, therefore, he, in order to save others from getting infected, stayed off. In fact, the officials of the Family Court, Srinagar, who have been examined by the Registrar Rules during Fact-Finding Enquiry have deposed that there was a roster of duties framed by the Presiding Officer for the Staff and the day the petitioner had remained absent probably appeared to be his off-day in terms of the said duty roster. This is one link that appears to have not been gone into by the respondents. It is coming to the fore from the statements of such officials that the duty roster of the staff was cancelled by the Presiding Officer on 21st May, 2021, itself when the petitioner was not present. In the said scenario it cannot be ruled out that the petitioner was under a bona fide impression that as per the duty roster he is not supposed to attend the duty for the day in question i.e. 21st May, 2021, when he was issued the show cause notice. Even otherwise, the plea taken by the petitioner in support of his defence that he had developed covid-19 symptoms, therefore, followed the standard procedure and stayed off to prevent others getting infected cannot be just brushed aside as the horrible situation emerging in view of the Covid-19 Pandemic at the relevant time has to be taken into consideration while taking a call on the issue.

29. From the perusal of the pleadings of the parties and on the strength of the documents enclosed with the pleadings as also from the perusal of the record it becomes quite explicit that the charge against the petitioner forming the basis for his termination has reference to unauthorized absence which is a *perse* misconduct. Whether the type of mis-conduct, as detailed out hereinabove, can form a ground for the Competent Authority to terminate the services of the incumbent official in application of Rule 21 (1) (B) of the CCA Rules of 1956 is replied in negative on the strength of the law laid down by the Hon'ble Supreme Court and this Court in catena of judgments.

30. The unauthorized absence cannot and must not amount to automatic cessation of service even if the delinquent is a probationer. The law on the point is no more *res integra*. The Hon'ble Supreme Court in case titled **V. P. Ahuja v. State of Punjab and others** reported as **AIR 2000 SC 1080** decided on 9th March, 2000, has held that a probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily. Paragraph nos. 7, 8 and 9 being relevant, are taken note of hereinbelow:

“7. A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated in a punitive manner without complying with the principles of natural justice.

8. The affidavits filed by the parties before the High Court as also in this Court indicate the background in which the order, terminating the services of the appellant, came to be passed. Such an order which, on the face of it, is stigmatic, could not have been passed without holding a regular enquiry and giving an opportunity of hearing to the appellant.

9. The entire case law with respect to a ‘probationer’ was reviewed by this Court in a recent decision in Dipti Prakash Banerjee v. Satvendra Nath Bose National Centre for Basic Sciences, Calcutta, (1999) 3 SCC 60: AIR 1999 SC 983: (1999) 1 JT (SC) 396: (1999 AIR SCW 605: 1999 Lab IC 1114). This decision fully covers the instant case as well, particularly as in this case, the order impugned is stigmatic on the face of it.”

31. The Coordinate Bench of this Court in case titled **State of J&K and others v. Kamal Kumar** reported as 2017 SLJ 699 has taken a similar view. Paragraph nos. 8 9 and 10, being relevant are taken note of hereunder:

“8. The issue as to whether a probationer can be terminated or his services can be dispensed with without conducting enquiry due to allegation was considered by Hon'ble the Supreme Court in the decision reported in AIR 1974 SC 2192 (7 Judges Bench) (Shamsher Singh v. State of Punjab & Anr.) wherein it is held that the decisive factor in the context of discharge of a

probationer from service is the substance of the order and not the form in determining whether the order of discharge is stigmatic or not or whether the same formed the motive for or foundation of the order. The same view was reiterated by Hon'ble the Supreme Court in the decision reported in (1992) 2 SCC 21 (Radhey Shyam Gupta v. U. P. State Agro Industries Corporation Ltd. & Anr.), (2008) 2 SCC 479 (Nehru Yuva Kendra Sangathan v. Mehbub Alam Laskar) and (2010) 8 SCC 220 (Union of India & Ors. V. Mahaveer C. Singhvi). In the decision reported in (2010) 8 SCC 220 (Union of India & Ors. V. Mahaveer C. Singhvi), a plea was taken that the respondent had been discharged from service by a simple order of discharge without a stigma, therefore, being a probationer he was not entitled to protection of Article 311 (2) of the Constitution of India. The said argument was repelled noticing the fact that due to allegations only he was discharged and the Special Leave Petition challenging the order of the High Court was dismissed with costs of Rs. 25,000/-.

9. *In the present case the order of removal dated 09.10.2001 specifically states that respondent is still continuing on unauthorized absence although he is a probationer, therefore, he is removed from service with effect from 21.06.2001 i.e. from the date of his absence. The reason stated in the removal order being unauthorized absence, the removal order is not a discharge simplicitor. Hence the respondent is entitled to have the protection under Article 126 (2) of the Constitution of J&K.*

10. *One more aspect to be considered in this case is that whether the absence of the respondent was willful to impose a major punishment of removal from service. This issue was already considered by Hon'ble the Supreme Court in the decision reported in (2012) 3 SCC 178 (Krushnakant B. Parmar v. Union of India), and it was*

held that for punishing a person for unauthorized absence, willful absence must be proved and if the person has absented due to compelling circumstances, his absence cannot be held to be willful.”

32. In view of the legal position on the subject, the course adopted by the respondents in terminating the services of the petitioner under Rule 21-1-B of the CCA Rules of 1956 is uncalled for and declared to be bad in law.

33. The other important aspect of the matter is that the provision of law pressed into service by the respondents does not call for termination of a probationer on his unauthorized absence. The power, as observed hereinbefore, available with the competent authority under the said Rule is only to discharge the probationer from probation in the event his performance is not found satisfactory which is admittedly not the case set out against the petitioner. The petitioner has been proceeded against on account of unauthorized absence and not on unsatisfactory performance, therefore, the very provision of law, on which the order of termination is based, is against facts and irrational.

34. We are further fortified in our view by the judgment of this Court passed in the case titled *Mushtaq Ahmad Khan v. State of J&K and others* reported as 2004 (3) JKJ 10. Paragraph no. 13 of the said judgment, being relevant, is reproduced herein, thus:

“13. In the above premises, we are of the view that absence from duty, howsoever long, cannot result in automatic cessation of employment. In all such cases the person concerned has to be given an opportunity of hearing and, depending on the nature of defence taken by him, further action should be taken.”

35. Another significant aspect of the matter, as submitted by the learned senior counsel for the petitioner, is that the respondents have grossly erred in law in inflicting the punishment upon the petitioner on account of alleged five days (05) unauthorized absence as the allegation is not so grave to attract the major punishment of the kind adopted by the respondents. The argument of the learned senior counsel carries weight as the punishment is always required to be proportionate to the alleged charge. The gravity of the charge determines the severity of the punishment but in the instant case that principle also has not been followed. The proportionality refers to regulating the exercise of fundamental rights, the appropriate or least restrictive choice of measures as the case may demand. The contention of the learned senior counsel that the action of the respondents is disproportionate, in the circumstances, cannot be completely

brushed aside as the alleged absence for five days attributed to the Covid-19 symptoms by the petitioner has completely been overlooked and no minor

punishment has been resorted to. The Coordinate Bench of this Court in case titled *Manzoor Ahmad Bhat v. Union of India and others bearing LPA no. 108 of 2011 decided on 1st September, 2015*, has held that the dismissal from service for un-authorized absence of 10 days is not proportionate with the gravity of the charge levelled.

36. The respondents, having failed to adhere to the procedure as spelt out hereinbefore and having mechanically terminated the services of the petitioner by a stigmatic order, the impugned order cannot withstand the test of law.

37. For all what has been said hereinbefore, the writ petition succeeds and is allowed as such. The impugned order of termination bearing no. 925 of 2021/Psy dated 30.09.2021 is quashed. Consequently, the petitioner is held entitled to the service benefits under law and he shall be allowed to continue in service.

38. Disposed of on the above lines.

(Puneet Gupta)
Judge

(Ali Mohammad Magrey)
Judge

Srinagar
22.04.2022
Amjad lone, Secretary

Whether approved for reporting: Yes