HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on : 20.04.2022
Pronounced on : 28.04.2022

WP(C) No.1106/2020
CM No.2650/2020

Mushtaq Ahmad Peer ...Petitioner(s)

Through:- Mr. Z.A.Qureshi, Sr. Advocate with
Ms.Rehana, Advocate

V/s

University of Kashmir and others ...Respondent(s)

Through:- Mr. T.H.Khawaja, Advocate

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. The petitioner is aggrieved and has assailed the order of University of Kashmir (hereinafter "respondent-University") issued by its Assistant Registrar Administration bearing No.F.451.Pen.WH-Adm-TW/KU/18/5718 dated 28th August, 2018, whereby the monthly pension drawn by the petitioner has been withdrawn with immediate effect in terms of Article 168 of the J&K Civil Service Regulations.

2. The impugned order is assailed by the petitioner on the ground that the pension of the petition has been withdrawn in terms of Article 168 of J&K Civil Service Regulations by treating the petitioner as having been convicted of serious offence whereas the fact remains that the petitioner is in appeal against his conviction before this Court and, therefore, he is

deemed to be an under-trial and not convict. This is the short submission made by Mr. Z.A.Qureshi, learned Senior Counsel appearing for the petitioner.

3. The stand of the respondent, as can be culled out from the reply affidavit filed by the Registrar of the respondent-University, is that the petitioner has been convicted of serious offences for which he has been sentenced for a term exceeding twenty years and, therefore, in terms of Article 168 of J&K CSR, the petitioner is not entitled to pension. The respondent-University has, therefore, exercised the power available under J&K CSR and, as such, no prior notice was required to be issued to the petitioner. It is contended that issuance of notice would not have changed the position and, therefore, a useless formality.

4. Having heard learned counsel for the parties and perused the material on record, it is necessary to set out Article 168 of the J&K Civil Service Regulation, 1956, which reads thus:-

> "168. Further good conduct is an implied condition of every grant of a pension. The Government reserves to itself the right of withholding or withdrawing a pension. if a pensioner be convicted of serious crime or be guilty of grave misconduct. Further, the grant will be subject to the condition that the pensioner does not engage himself in any contract, lease or any profession which has anything to do with the Department or Departments of the State wherein he served prior to his retirement."

5. From a reading of Article 168 of J&K CSR Vol.1, it is abundantly clear that the government is well within its right to withhold or

withdraw pension, if pensioner is convicted of a serious crime or is guilty of grave misconduct.

6. It is seen that the petitioner was working as Director/Professor in the Computer Department of the University of Kashmir since the year 1989 and was sent on deputation to the Board of Profession Entrance Examinations as Chairman for a period of two years or till he attains the age of 65 years, whichever was earlier. This was done by the Government vide its notification dated 28th February, 2009. The petitioner retired on superannuation w.e.f. 31st August, 2010. It was only in the year 2013, a case FIR No.24/2013 came to be registered against the petitioner for offences under Section 406, 420, 120-B read with Section 5(1)(d) and Section 5(2) of J&K Prevention of Corruption Act. Since the FIR against the petitioner was registered after his superannuation, as such, the respondent-University vide order dated 23.11.2010 accorded sanction to the grant of pension and other pensionary benefits in favour of the petitioner. The FIR was investigated by the Vigilance Organization and the challan against the petitioner and 43 other accused was presented before the Court of Special Judge (Anticorruption Court), Srinagar.

7. It is not in dispute that along with others, the petitioner has been convicted of the offences and has been sentenced to undergo sentence for a period ranging more than twenty years. Taking note of the conviction of the petitioner, the respondent-University issued the impugned oroder by invoking Article 168 of the J&K CSR and stopped the pension of the petitioner.

8. The argument raised by Mr. Qureshi, learned Senior Counsel appearing for the petitioner to assail the impugned order is two fold:-

i) that the order impugned has been issued without providing the petitioner an opportunity of being heard;

ii) that since the appeal against conviction and sentence awarded to the petitioner is pending before the High court, as such, the petitioner cannot be treated as a convict for the purpose of Article 168 of J&K CSR.

9. So far as the first argument of learned Senior Counsel is concerned, the same is devoid of any substance or merit and, therefore, deserves to be rejected outrightly. It is not denied by the petitioner that he has been convicted for the offence under Sections 406, 420 and 120-B RPC read with Sections 5(1)(d) and 5(2) of the J&K Prevention of Corruption Act and has been sentenced to undergo sentence for a period ranging upto twenty years. The trial Court has also imposed heavy fine in addition to the sentence of imprisonment. It also cannot be disputed that the offences for which the petitioner has been convicted are serious offences and that the petitioner has been held guilty of grave misconduct. The offences for which the petitioner has been convicted cannot, by any stretch of reasoning, be called minor or trivial in nature constituting no moral turpitude.

10. In that view of the matter, the plea of the petitioner that he was not provided a prior opportunity of being heard is not tenable in law. This is so because had the petitioner been given an opportunity of being heard, the position would not have changed. The petitioner could not have, by any

stretch of reasoning, demonstrated before the respondent-University that the offences for which he has been convicted are not serious or do not constitute grave misconduct. Therefore, issuance of notice of hearing to the petitioner before passing of the order impugned, in the given facts and circumstances would have been a useless formality. The legal position in this regard is well settled. Hon'ble the Supreme in the case of **Dharmpal Satyapal Limited v. Dy. Commissioner of Central Excise, Guwahati, (2015) 8 SCC 519** has held that principles of natural justice in particular principle of *audi alteram partem* is not a straightjacket rule having universal application. There may be situations where it is felt that a fair hearing would make no difference---meaning that hearing would not change the ultimate conclusion reached by decision maker. In such situations fair procedure appear to serve no purpose since the right can be secured without according such treatment to the individual. The validity of any such order passed without hearing is to be adjudged on the touchstone of prejudice.

11. It is, thus, trite law that principles of natural justice supplement the enacted statute with necessary implications. Accordingly, the administrative authorities performing public functions are generally required to adopt fair procedure and in relation to variety of different circumstances. Ordinarily, when an administrative authority proposes to take action adverse to the interest of a person, it would adhere to the principles of natural justice and provide an opportunity of being heard to the person concerned irrespective of whether the statute governing such

action specifically provides for such notice of hearing or not. As observed above, like many other legal provisions and principles, this rule is also not absolute and is subject to well defined exceptions. Useless formality theory is one such exception but must not be readily resorted to in all cases. It is only where an exceptional case is made out for its exercise, this theory can be resorted to, to uphold the action even if it is taken without affording an opportunity of being heard to the person affected by such action.

12. In the instant case, the facts are not in dispute. The petitioner is a public servant and is convicted by a competent Court of law for various offences and has been sentenced to undergo sentence of various descriptions and heavy fine. The offences under Prevention of Corruption Act constitute grave misconduct and are always treated as serious offences. No amount of opportunity of hearing granted to the petitioner could have changed this decision and the notice of hearing, if given, would have turned out to be a futile exercise. I am, therefore, of the considered view that failure of the respondents to provide an opportunity of being heard to the petitioner before passing the impugned order does not vitiate the impugned order in any manner.

13. So far as argument of Mr. Qureshi that the petitioner cannot be treated to be a convict unless the conviction attains finality with the dismissal of appeal filed by the petitioner is concerned, the same, too, does not appeal to the logic. It is true that the appeal against the order of conviction and sentence is pending adjudication before this Court but that does not mean that the conviction of the petitioner is effaced. The

petitioner cannot claim that since appeal against his conviction is pending adjudication before the High Court, as such, he be not treated as a person convicted for the purposes of applying the provisions of Article 168 of J&K CSR.

14. The expression “conviction” as occurring in Article 311(2) second proviso has been subject matter of debate in many cases that came up before Hon’ble the Supreme Court. In the case of **Deputy Director of Collegiate Education v. S.Nagoor Meera, (1995) 3 SCC 377**, Hon’ble Supreme Court in the context of Article 311(2) proviso second in paras 8 and 9 held thus:-

> “8. We need not, concerns ourselves any more with the power of the appellate court under the Code of Criminal Procedure for the reason that what is relevant for clause (a) of the second proviso to Article 311(2) is the "conduct which has led to his conviction on a criminal charge" and there can be no question of suspending the conduct. We are, therefore, of the opinion that taking proceedings for and passing orders of dismissal, removal or reduction in rank of a government servant who has been convicted by a criminal court is not barred merely because the sentence or order is suspended by the appellate court or on the ground that the said government servant-accused has been released on bail pending the appeal.
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> 9. The Tribunal seems to be of the opinion that until the appeal against the conviction is disposed of, action under clause (a) of the second proviso to Article 311(2) is not permissible. We see no basis or justification for the said view. The more appropriate course in all such cases is to take action under clause (a) of the second proviso to Article 311(2) once a government servant is convicted of a criminal charge and not to wait for the appeal or revision, as the case may be. If, however, the government servant- accused is acquitted on appeal or other proceeding, the

order can always be revised and if the government servant is reinstated, he will be entitled to all the benefits to which he would have been entitled to had he continued in service. The, other course suggested, viz., to wait till the appeal, revision and other remedies are over, would not be advisable since it would mean continuing in service a person who has been convicted of a serious offence by a criminal court. It should be remembered that the action under clause (a) of the second proviso to Article 311(2) will be taken only where the conduct which has led to his conviction is such that it deserves any of the three major punishments mentioned in Article 311(2). As held by this court in Shankardass v. Union of India (1985 (2) S.C.R. 358):

> "Clause (a) of the second proviso to Article 311(2) of the Constitution confers on the government the power to dismiss a person from services "on the ground of conduct which has led to his conviction on a criminal charge." But that power like every other power has to be exercised fairly, justly and reasonably. Surely, the Constitution does not contemplate that a government servant who is convicted for parking his scooter in a no-parking area should be dismissed from service. He may perhaps not be entitled to be heard on the question of penalty since clause (a) of the second proviso to Article 311(2) makes the provisions of that article inapplicable when a penalty is to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly."

15. Similarly, in **Union of India v. V.K.Bhaskar, (1997) 11 SCC 383**, the Apex Court relying upon **S. Nagoor Meera** (supra) in paragraph Nos.5 and 10 held as under:-

> “5. The Tribunal was, therefore, not right in holding that the respondent could not be dismissed by invoking the provision of Rule 19(i) of the rules because the appeal filed by him against the conviction and sentence is pending in the High Court.

> ……..
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> ……
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> 10. For the reasons aforementioned, the impugned judgment of the Tribunal cannot be sustained and has to be set aside. It is, however, made clear that in case the respondent is acquitted in the appeal filed by him, which is said to be still pending in the High Court, he can move the authorities for review of the said order of dismissal as per the law laid down by this Court."

16. The argument of delinquent based on the dictum of law laid down in **Akhtari Bi v. State of M.P., (2001) 4 SCC 355,** that appeal being a statutory right, the trial court's verdict does not attain finality during pendency of the appeal and for that purpose his trial is deemed to be continuing despite conviction, was considered by the Supreme Court in the context of Article 311(2) second proviso and what was held by Hon'ble the Supreme Court is found in para 8 of **K.C.Sareen v. CBI, Chandigarh, (2001) 6 SCC 584.** Para 8 of the judgment reads thus:-

> "8. By the said observation this Court did not mean that the conviction and sentence passed by the trial court would remain in limbo automatically when they are challenged in appeal. The said observation was made in a different context altogether when notice of the executive government was drawn to the need to appoint requisite number of judges to cope up with the increased pressure on the existing judicial apparatus, and for highlighting the consequences of non-filling existing vacancies of judges in the High Courts. We are unable to appreciate how the said observation can be culled out of the said context for the purpose of using it in a different context altogether such as this where the convicted accused is seeking to have an order of conviction suspended during the pendency of the appeal."

Equally relevant and apposite are the observations of the Supreme Court made in para 12 of **K.C.Sareen** (supra), which for facility of reference are also reproduced hereunder:-

> "12.Corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functioning of the public offices, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic polity. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior court. The mere fact that an appellate or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction it is public interest which suffers and sometimes even irreparably. When a public servant who is convicted of corruption is allowed to continue to hold public office it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction the fall out would be one of shaking the system itself. Hence it is necessary that the court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after

> conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a court order suspending the conviction.

17. Close to heels is the judgment of Delhi High Court rendered in the case of **S.P.Mishra v. Union of India, (2018) SCC Online Del 13160.** In the said case the President in the exercise of powers under Rule 9(1) of CCS(Pension) Rules, 1972 had imposed penalty of withholding 100% of the monthly pension otherwise admissible to the petitioner as well as forfeiture of his full gratuity on permanent basis. OA filed by the petitioner to challenge the aforesaid order was rejected by the Central Administrative Tribunal ["the Tribunal"]. The petitioner approached the Delhi High Court against the order of the Tribunal. A argument was raised on behalf of the petitioner that since his criminal appeal against his conviction was pending before the High Court and, thus, conviction had not attained finality. It was argued that the appeal was continuation of trial. Repelling the argument, a Division Bench of the Delhi High Court in para 10 of the judgment concluded thus:-

> "10. Thus, in view of our judgment in P.C.Misra (supra), we are of the view that for purpose of passing order under Rule 19(i) of the CCS(CCA) Rules or Rule 9 of Pension Rules-- as the case may be, the conviction of the Government Servant in respect of an offence which also tantamount to misconduct, is sufficient, and the pendency of criminal appeal before appellate Court is not an impediment to passing of an order under the above provisions. Mere filing of an appeal against conviction does not automatically stay conviction."

18. Viewed, thus, in the case in hand neither conviction nor sentence awarded to the petitioner is stayed and, therefore, for the purposes of Rule 168 CSR, the petitioner is a convict and continues to be so till exonerated by the appellate Court by reversing the judgment of conviction. Rule 168 CSR shall, therefore, operate and there is, thus, no illegality or infirmity in the impugned order. Consequently, the order impugned is upheld and the writ petition along with connected application is dismissed.

(**Sanjeev Kumar)**
Judge

SRINAGAR
28.04.2022
Vinod.

Whether the order is speaking: Yes
Whether the order is reportable : Yes