

(2019) 04 J&K CK 0073

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1451 Of 2008

Abdul Rehman Sheikh

APPELLANT

Vs

State Of Jammu & Kashmir And Ors

RESPONDENT

Date of Decision : 30-04-2019

Acts Referred:

Constitution Of Jammu And Kashmir, 1956 — Section 43, 45, 126B
Jammu & Kashmir Civil Services (Revised) Pay Rules, 1992 — Rule 8, 9, 17
Jammu and Kashmir Civil Service (Classification Control and Appeal Rules,) 1956 — Rule 33

Citation : (2019) 04 J&K CK 0073

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Jehangir Iqbal, Asif Ahmad

Final Decision : Disposed Off

Judgement

1. In this petition, petitioner inter alia seeks following relief:

i) Writ of certiorari quashing the impugned order No. 298-F of 2008 dated 20-10-2008 passed by the respondent No. 2.

ii) Writ of Prohibition restraining the respondents from giving effect to in executing or acting in any manner in pursuance of the impugned order No. 298-RF of 2008 dated 20-10-2008.

iii) Writ of mandamus commanding the respondents not to cause any impediment in releasing of the benefits to which they are entitled to under and in terms of Government Order No. 13-PDD of 2004.

2. Facts giving rise to the filing of the petition quoted therein are that:

i) Pursuant to recommendations made by J&K Subordinate Service Recruitment Board petitioners No. 1 to 5 came to be appointed as Junior Engineers (Electrical) Grade II on regular temporary basis in the pay scale of Rs. 1400-

2300 vide Government Order No. 205-PDD of 1992 dated 21-10-1992. The petitioners No. 6 to 15 were also recommended by the J&K SSB and thereto were appointed as Junior Engineers (Electrical) Grade II on regular temporary basis in the pay scale of Rs. 1400-2300 vide Government Order No. 56-PDD of 1993 dated 30-03-1993.

ii) That the Government had also made appointments of Junior Engineers (Civil and Mechanical) in the year 1994 in the pay scale of Rs. 1400-2300 and on representation the government placed those Junior Engineers retrospectively in the pay scale of Rs. 1760-3200.

iii) That in view of the grant of pay of Rs. 1760-3200 in favour of Junior Engineers appointed in Civil and Mechanical wings, the representations were filed by the persons including that of the petitioners who were appointed as Junior Engineers (Electrical) prior to the appointments made of Junior Engineers in Civil and Mechanical Wings and it was contended that placement of Junior Engineers in Civil and Mechanical wings on the higher pay scale has created disparity in the pay scales of Junior Engineers appointed in Power Development Department and thereto persons appointed as Junior Engineers (Electrical) are also required to be placed in the pay scale of Rs. 1760-3200.

iv) That the matter was examined by the Government and the issue was also taken up with the Finance Department and after concurrence was conveyed/ granted by the Finance Department, sanction was accorded to the placement of 123 Junior Engineers including that of petitioners who were appointed vide Government Order No. 203-PDD of 1992 dated 30-03-1992 and No. 56-PDD of 1993 dated 30-03-1993 in place of the existing pay scale of Rs. 1760-3200. It is essential to state here that though the petitioners were placed in the pay scale of Rs. 1760-3200 but no retrospective effect was given to the said placement by the Government.

v) That as the case of the petitioners was that they are similarly situated with those of Junior Engineers who have been appointed in Civil and Mechanical wings and who were placed retrospectively in the pay scale of Rs. 1760-3200, the petitioners again represented for grant of retrospective effect to their placement as granted vide Government Order No. 355-PDD of 1997 dated 21-11-1999.

vi) That the placement in the higher pay scale was meant to remove the anomaly between the Junior Engineers Civil and Mechanical) appointed by the Public Works Department and the Junior Engineers (electrical) appointed by the Power Development Department from the date of their initial appointment, the matter in view of the representation filed by the persons appointed as Junior Engineers (Electrical;) in the year 1992-93 was again taken up by respondent No. 2 with that of respondent No. 3 and the same remained under protracted correspondence for some period of time and finally the finance Department vide its U. O. No. A/166(95)-726 dated 13-10-2003 gave its opinion and concurrence as under:

"The proposal put forth by the Power Development Department vide U. O. No. PDD/II has been agreed to in the principle by the Finance Department and conveyed vide No. A/166(95) 1627 dated 20-10-1997, it is for the department to settle the issue."

On consideration of the opinion and the observations made by the Finance Department vide their U. O. No. A/166(95)-726 dated 13-10-2003 the respondent No. 3 by virtue of its order bearing No. 133-PDD of 2004 dated 22-01-2004 ordered that the Government Order No. 355-PDD of 1997 dated 24-11-1997 shall have retrospective effect from the date of first appointment of the persons appointed as Junior Engineers (electrical). It is essential to state here that the retrospective effect was given only after the Finance Department agreed to the proposal as submitted by the Power Development Department.

vii) That despite clear cut instructions from the Government some of the DDO's did not fix the initial pay after allowing eight advance increments as per the Pay Revision Rules notified from time to time, the respondent No. 3 issued a circular dated 09-06-2004 whereby on examination of the issue it was clarified that in order to ensure uniformity of application of Rules, the Junior Engineers (Degree holders) appointed in the year 1992-93 are entitled to get their basic pay fixed at the initial higher start with eight advance increments from the date of their first appointment as provided in J&K Revised Pay Rules of 1992 and 1997.

viii) That as the issue was examined at various quarters and the opinion of the Finance Department is also sought in the matter, the petitioners were held entitled to the benefit as granted by the above referred to Government Orders and whatever mandatory benefits they were entitled to legally were in light of the above referred to orders released in favour of the petitioners.

ix) That notwithstanding the attendant facts and circumstances of the issue, the respondent No. 2 at the back of the petitioners and without hearing the petitioner's has issued the impugned order No. 298-F of 2008 dated 20-10-2008 whereby the circular issued by the respondent No. 3 has been deemed to have been rescinded ab-initio and the excess drawl of pay/allowance has been directed to be recovered.

3. Aggrieved of the order dated 20-10-2008, the petitioners challenge the same on the following grounds:

i) That the impugned order is an administrative order which involved civil consequences thereto affecting their rights of the petitioners.

ii) That whatever pay/allowance which is sought to be recovered by the respondents vide the impugned order has been paid to the petitioners by the respondents under and in terms of various government orders issued on the subject. It is submitted here that as put forth hereinabove the pay/allowance which is sought to be recovered has been granted to the petitioners after the matter was deliberated upon and discussed by the respondents at length. In this

regard it is reiterated that the orders issued pursuant to which the petitioners received the pay/allowance which is sought to be recovered were issued after getting the concurrence of the Finance Department. In this view of the matter there was no mis-representation or fraud on the part of the petitioners which entitled them to the pay/allowance which is sought to be recovered but as a matter of fact same was granted after proper application of the rules by the respondents.

iii) That by virtue of the impugned order, the recovery has been directed to be affected ostensibly on the ground that there is no provision of initial higher starting salary with eight advance increments in favour of Junior Engineers (Degree holders) appointed in the pay scale of Rs. 1760-3200. In this regard it is submitted here that the respondent No. 3 has lost sight of Rule 8 of J&K Civil Services (Revised) Pay Rules, 1992 whereby it is specifically provided that benefit of initial higher starting salary/advance increments for higher qualification in respect of Junior Engineers shall remain in operation till such time any fresh orders are issued in this behalf by the Government it is essential to state here that till date no such order has been passed whereby the benefit given in terms of Rule 8 of Revised Pay Rules of 1992 has been withdrawn by the Government. Needless to mention here that Degree Holders in the grade of Rs. 1300-2550 prior to issuance of Revised Pay Rules of 1992 used to get initial higher pay @ Rs. 1300+8 advance increments, similarly the Degree holders who were appointed at present in the grade of Rs. 4500-7000 are also getting initial higher start @ Rs. 4500+ 8 advance increments. In this view of the matter the provision for initial higher starting salary has always been there and is in vogue even today, the petitioners in this view of the matter cannot be discriminated.

iv) That admittedly the petitioners are Degree Holders and thereto are in possession of higher qualification viz-a-viz the persons who have been appointed as Junior Engineers on the basis of their being diploma holders. The grant of initial higher starting salary in favour of the persons holding a higher qualification is legally justiciable and is being done so as to grant benefit to a person who possesses higher qualification. In this view of the matter grant of benefit to the petitioners is permissible classification in order to promote efficiency in administration.

v) That respondent No. 2 has issued the impugned order purportedly in exercise of the powers conferred vide Rule 17 of the Revised Pay Rules 1992. It is submitted here that the said Rules has no application to the facts and circumstances of the case and the same has been wrongly applied.

4. Respondents have filed their reply wherein it is stated as :

i) That it is submitted that the Finance Department has rescinded the Circular of respondent No. 3 vide No. PDD/AC/497 dated 09-06-2004 and none of the fundamental rights of the petitioner has been violated while issuing Government Order No. 298-F of 2008 dated 20-10-2008 and the said order was issued

pursuant to the recommendation of the committee constituted by the Finance Department.

ii) That the respondent No. 3 vide Circular No. PDD-11/AC/497 dated 09-06-2004 has allowed 8 advance increments in the pay scale of Rs. 1760-3200 to degree holder Junior Engineers whereas Jammu and Kashmir Revised Pay Rules 1992 do not have any provision of initial higher starting salary with 8 advance increments in favour of JE's degree holders appointed in the pre-revised pay scale of Rs. 1760-3200. The Finance Department constituted a committee vide Government Order No. 354-F of 2006 dated 30-11-2006 to examine the records relating to the issuance of erroneous circular NO. PDD-11/AC/497. The Committee so constituted submitted report upon which Government Order No. 298-F of 2008 dated 20-10-2008 that the above circular issued by the respondent No. 3 shall be deemed to have been rescinded abinito and recovery of excess drawl of pay by allowance, was against rules as such had no legal justification to continue nor created any right in favour of the petitioner.

iii) That the Finance Department thoroughly examined the matter in pursuance of the rules and came to the conclusion and constituted the committee thereafter and on the recommendation of the said committee constituted, rescinded the erroneous circular issued by the respondent No. 3 dated 09-06-2004.

5. Questions that fall for determination in light of the facts and grounds pleaded are:-

i) Whether in terms of J&K Civil Services (Revised) Pay Rules, 1992 eight advance increments had to be released in favour of the Junior Engineers (Degree Holders) appointed in the year 1992-93 including those appointed in Power Development Department and the reply of the same if in affirmative?

ii) Whether the respondents-Power Development Department has properly granted the said benefits in favour of the petitioners?

iii) Even in alternative if the reply of the question so emerging for determination would be in negative. Whether respondent No. 2 could direct recovery of the drawal if any made in excess from the petitioner borne on the service of the power development department?

6. Heard learned counsel for the parties.

7. Learned Senior counsel while relying on judgment of Hon'ble Apex Court in cases titled Syed Abdul Qadir and Others Vs. State of Bihar and others (2009) 3 SCC 475, hagwan Shukla Vs. Union of India and Others (1994) 6 SCC 154, Canara Bank Vs. V. K. Awasthy (2005) 6 SCC 321 and in State of Punjab and others vs. Rafiq Masih AIR 2015 SC 696 submits that the petition is required to be allowed. It is being contended by him that Rule 8 of J&K Civil Services (Revised) Pay Rules, 1992 normally envisages the degree holder Junior Engineers to be given benefit of advance increments. Reference of erroneousess attributed to the Circular according to him issued by the Power Development Department is

misplaced. It is also his contention that the circular issued by Power Development department on 09.06.2004 is sought to be withdrawn in terms of the impugned order yet the orders prior to it including the Government order No. 13-PDD of 2004 dated 22.01.2004 and orders regarding fixation of salary to the PDD JE's having not been withdrawn the impugned order could not come in the way of petitioners to draw the benefits in terms of the J&K Civil Services (Revised) Pay Rules, 1992 read with order issued by the PDD thereafter. It is also his contention that U.O No. A/166 (95)-726 dated 13.10.2003 has not been treated to be without any force, in terms of the impugned order or any other order by respondent No 2. Even if it would be assumed that the petitioners had not been entitled to additional benefit granted in terms of the Government Order No. 13-PDD of 2004 dated 22.01.2004 yet no recovery could be effected from them as they have not at any moment been attributed to have played any fraud or misrepresentation in getting the benefits released in their favour. Furthermore, the principles of law laid down by the Hon'ble Apex Court envisages that no arrears can be recovered from the employee unless opportunity of being heard is given to him. Explaining same, it is stated that since the release of increments in favour of the petitioners has resulted in increase in their salary, their salary could not be reduced as same would tantamount visit them with civil consequences. In any case, principles of natural justice according to him have been observed in breach with impunity by issuance of the impugned order and in light of the principles of law laid down by Hon'ble Apex Court referred above, no such recovery can be effected.

8. On the other hand, learned AAG while controverting the contention raised by the learned counsel for the petitioners has submitted that order passed by the power Development Department forming Annexure E to the petition was ultra vires which is rightly withdrawn by the Finance Department. He has also made reference to the Section 43 and 45 of the Constitution of Jammu and Kashmir where under the Governor has a power to frame the rules for transacting the business of the government. According to him power lies with the Finance Department to issue the rules and orders with regard to the matter which have financial implication. He has also referred to para 4 of the counter affidavit in particular which states that Junior Engineers held to be not to the benefit entitled by the committee constituted Vide Government Order No. 354-F of 2006 dated 30.11.2006 in terms of the Rule 9 of the Revised Pay Rules.

9. Considered the rival arguments.

10. At the very inception, it needs to be noted that the petitioners herein have joined Power Development Department and Finance Department as respondents. Reply has been filed only by the Finance Department. It has based its reply on the report of the committee which is stated to have been constituted and of which reference has been given in the impugned order. Record of the committee constituted which is stated to have given detailed reply has not been brought on record or recommendation whatever made by it and the material or the rule

relied thereof for arriving the findings does not find reference in the counter affidavit so placed on record.

11. It is not in dispute that the petitioners have been appointed as Junior Engineers and are borne on the cadre of the PDD after the issuance of the J&K Civil Services (Revised) Pay Rules, 1992 which have come into force from 1st April 1992. The Power Development Department has stemmed its base to give benefits to the Junior Engineers including the petitioners under Rule 9 of the said Rules. It would be proper to have glance of the said rule herein:

(f) Junior Engineers presently in the scale of Rs. 1300-2550 will be placed in the revised pay scale of Rs. 1760-3200. The fresh recruitment to the posts of Junior Engineers (both Diploma and Degree holders) will be made in the pay scale of Rs. 1400-40-1800-EB-50-2300 and they will be placed in the higher revised pay scale of Rs. 1760-3200 after putting in eight years of service in the former pay scale. The Degree Holders will be entitled to eight advance increments on their initial appointment in the pay scale of Rs.1400-2300.

12. In terms of the impugned order, opinion has been framed as:

"Government of Jammu and Kashmir

Civil Secretariat Finance Department

Subject: Admissibility of initial higher starting salary of Junior Engineers with Degree in Engineering in terms of provisions of J&K Civil Service (Revised Pay) Rules 1987 and subsequent pay revisions of 1992 and 1998.

Government Order No. 298-F of 2008

Dated 20.10.2008

Whereas, the Jammu and Kashmir Civil Service (Revised Pay) Rules 1992 have been issued by the Government vide Notification SRO-75 dated 30.3.1992 and amended thereafter from time to time.

Whereas the J&K Civil Service (Revised Pay) Rules 1992 do not have any provision of initial higher starting salary with eight (8) advance increments in favour of Junior Engineers (Degree Holders) appointed/placed in the prescribed pay scale of Rs. 1760-3200 of the said rules;

Whereas, the Power Development Department issued Circular instructions bearing NO. PDD-II/AC/4/97 dated 9.6.2004 wherein some Junior Engineers of 192-93 batch with degree in Engineering placed in the prescribed pay scale of Rs. 1760-3200 were allowed initial higher starting salary with eight (8) advance increments from the date of their first appointments without the concurrence of Finance Department;

Whereas Finance Department constituted a Committee vide Government Order No. 354-F of 2006 dated 30.11.2003 to examine the records relating to the issuance of erroneous Circular No. PDD-II/AC/4/97 dated 9.6.2004.

Whereas, the Committee so constituted submitted a detailed report opining therein that the benefit of eight (8) advance increments allowed by the Power Development Department to 98 Junior Engineers (Degree holders) through the said erroneous Circular dated 9.6.2004 is incorrect and needs to be withdrawn immediately to keep the rules position straight in Power Development Department and other Engineering/Civil Departments and the excess pay thus drawn by these Junior Engineers should be recovered and further the excess pay drawn by the Junior Engineers in other Engineering Department, who also got the undue benefit as a result of repetition of such like erroneous instructions should also be recovered and pay fixed correctly; and

Now, therefore in exercise of the powers conferred vide Rule 17 of the Jammu and Kashmir Civil Services (Revised Pay) Rules, 1992 it, is hereby, ordered that the Circular No. PDD-II/AC/4/97 dated 9.6.2004 issued by the Power Development Department shall be deemed to have been rescinded abintio and recovery of excess drawal of pay/allowance by Junior Engineers in Power Development Department and other Engineering/Civil department in consequence thereof, shall be effected with immediate effect

By order of Government of Jammu and Kashmir

(Sd)

(B . B. Vyas)

Commissioner Secretary to Govt.

Finance Department

13. In the prelude of the said order however it is being stated that the J&K Civil Services (Revised) Pay Rules, 1992 do not have any provision initially of starting salary with 8 advance increments in favour of the Junior Engineers appointed placed in the prescribed pay scale of Rs. 1760-3200. The said rule does not give any reference or clue as to how this recital has been incorporated in the said order if Rule 9 of the rules provided otherwise viz petitioners who claim to have been appointed on the dates mentioned above in the pay scale of Rs. 1400-2300. The fresh recruitment in terms of Rule 9 had to be made in this scale of pay. The appointees so engaged had to be given pay scale of Rs. 1760-3200, after putting eight years of service in the former pay scale. The degree holders have been held entitled to eight advance increment on their initial appointment in the pay scale of Rs. 1400-2300. Action whatever taken by respondent No. 3 in tune with this Rule would not be thus bad. Questions 1 and 2 referred supra stand answered accordingly.

14. Nonetheless the said fact only Circular issued by the respondent No. 3 has been sought to be withdrawn along with the benefit if any given in terms of the impugned order by taking resort to Rule 17 of the said Rules. However Government Order No. 13-PDD of 2004 dated 22.01.2004 issued by respondent No. 3 has not been adjudged to be without any force by respondent No. 3 in so

many words in terms of the impugned order.

15. The position unambiguously coming to fore on perusal of the material before me is that the petitioners herein have not been ordered to be provided an opportunity of being heard while issuing direction supra or while effecting the recovery of the benefits given in terms of the Government Order No. 13-PDD of 2004 dated 22.01.2004. The direction or instruction given for recovery in this regard is apparently in violation of the principles of natural justice. Legal position is clear that such an order directing the recovery has propensity of visiting the civil servants intended to be covered therein with civil consequences. It necessitates as a matter of fair play, they be put to notice. Admittedly, the petitioners herein have not been attributed any action or omission which could be inferred as a misrepresentation or fraud on their part, for deriving the benefits on the basis of Government Order No. 13-PDD of 2004 dated 22.01.2004 issued by PDD.

16. The adherence to the principles of natural justice is recognized by all civilized states and same is of supreme importance in our body politic. The first and foremost principle for determination of any difference or dispute between the parties or for taking an administrative action involving civil consequences is what is in general terms known as Audi Altram Paltram which requires that no one could be condemned unheard. Infraction of this rule having been made vividly, instructions issued for recovery vide impugned order are non est and without any force against the petitioners. As enunciated by their lordships in Syed Abdul Qadir's case referred above, that the relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. The exception to this rule is if an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess.

17. In the instant case, the Power Development Department-respondent No. 3 has ordered for payment of the benefits in terms of the Government Order No. 13-PDD of 2004 dated 22.01.2004 while recovery is sought to be effected in terms of Government Order No. 298-F of 2008 dated 20.10.2008 issued by Finance Department. The case would not be covered by any exception recognized by the courts for allowing the recovery from any civil servant deriving excess payment if any. Directing for pay reduction of a civil servant without adopting due course is even violative of Section 126-B of the Constitution of J&K and Rule 33 of Jammu and Kashmir Civil Service (Classification Control and Appeal Rules) 1956 and has to be adjudged so.

18. Viewing the matter in light of what has been stated above, the petitioners would be held entitled to the benefits granted to them in terms of the

Government Order No. 13-PDD of 2004 dated 22.01.2004. The pay of the petitioners cannot be reduced once granted by a competent authority unless same is done by taking recourse to statutory safeguards. The action contemplated to be taken in terms of the Government Order No. 298-F of 2008 dated 20.10.2008 (impugned order herein) for recovery of excess drawal of allowance by the petitioner herein (in terms of Government Order No. 13-PDD of 2004 dated 22.01.2004 read with circular dated 09.06.2004) is declared illegal and is quashed. Respondents are by issuance of writ of prohibition enjoined not to effect any recovery from petitioner herein without providing them opportunity of being heard.

Disposed of above.