

(1998) 06 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 667/1992

Bashir Ahmad Shah

APPELLANT

Vs

State of Jammu and Kashmir

RESPONDENT

Date of Decision : 30-06-1998

Acts Referred:

Civil Services Regulations, 1956 — Article 163
Constitution of India, 1950 — Article 14

Citation : (1999) 2 SriLJ 333

Hon'ble Judges : Nisar Ahmad Kakru, J

Bench : Single Bench

Advocate : M.Abdul Qayoom, J.A.Kawoosa, Advocates appearing for the Parties

Judgement

1. The petitioner had proceeded abroad (England) for higher studies after obtaining no objections certificate from the Government vide

communication No: MDA1463/73 dated 18111976 which is reproduced hereunder:

Sub: Grant of noobjection certificate in favour of Dr. Bashir Ahmad Shah Assistant Surgeon to proceed abroad for higher studies.

I am directed to convey no objection of the health and F.I. Department of Dr. Bashir Ahmad Shah Assistant Surgeon Civil secretariat Dispensary's

proceeding abroad for higher studies for a period of two years subject to the following terms and conditions:

i/ the state Government will not bear any financial liability during the study/training period;

ii/ the doctor will not claim any promotion or higher scale of pay out side the normal course merely on the basis of higher (qualification

iii/ on his return he will be retaken in service only as Assistant Surgeon. The

period of his absence abroad shall be regularised under rules after he actually hands over the charge of his post for the purpose. A copy of charge report relating to the handing over charge of the post by doctor may be supplied to this department also.

2. Petitioner left the country in April, 1977 subsequent to the no objection. The petitioner overstayed for five years and about nine months in connection with his studies. The petitioner resumed his duties on 21st. Jan. 1985. After resuming the duties the petitioner sought regularisation of the above said period on the analogy adopted by the respondents in case of Doctothers whose particulars stand reflected in the application. The petitioner has made a specific averment in the writ petition that the respondent No.3 had made a recommendation to the respondent No.2 for regularising his services on the analogy evolved in respect of other similarly situated doctothers The petitioner has annexed Government order forming annexures PI and P2 which substantiate his argument that the similarly doctothers have been allowed certain benefits including the increment whereas these benefits are denied to the petitioner.

3. Petition came to be admitted by virtue of order dated 25/5/1992. Several opportunities were granted to file counter. Counter was not filed. Petition came up for consideration on 27/9/1993 before the court. Court granted last and final opportunity of three months to the respondents to file counter and it was provided in the order itself that failure to file the counter would lead to the presumption of correctness in respect of averments contained in para 6 (Subparas a,b and c). State did not choose to avail of the opportunity to file the counter, as such averments made by the petitioner in the writ petition are unrebutted. The court had forewarned the respondents that in case they choose not to file the counter, presumption of correctness would work against them, that apart, the averments being unrebutted no option is left for the court but to presume correctness. In this view of the matter it be, comes necessary to find out as to what is connoted by the averments reflected in the above said para and subparas and conjoint reading of these paras depicts that respondents have regularised the period spent by the Doctothers on foreign assignments, allowing them the increments whereas in case of petitioner deviation is resorted to.

4. The admitted case of the parties is that the petitioner had proceeded abroad with prior permission accorded vide Government order reproduced

hereinabove and in terms of the said order the period spent on foreign assignment was to be regularised in accordance with the rules which was

accordingly regularised vide Government order No: 83HMEof 1991 dated 15/10/1991, treating it as dies non which is impugned through this writ

petition and the avernments made in the writ petition reveal that grievance of the petitioner is only in respect of denial of increments and the

petitioners main ground of challenge is based on the plea of discrimination and to substantiate this plea, the petitioner has put forth such instances

where respondent No.1 has allowed increments and the particulars of these Doctors, eight in number are detailed in annexure PB to the writ

petition. Petitioner has also relied at Government order No: 63HMEof 1990 dated 19/1/1990 passed in favour of Dr. Nazir Ahmad Lone,

Government communication No: MD(G) 163/83 dated 7/8/ 1986 passed in favour of four other Doctors and Government order No: 45HME

of 1989 dated 9/1/1989 passed in favour of a lady Doctor namely Dr. Mehmooda Parveen and these orders form annexures PI to P3 to the writ

petition. These annexures are appended with the writ petition to substantiate the plea of discrimination. The pleadings of the petitioner have gone

unrebutted and learned counsel for the respondents has not denied the correctness of annexures but contests the contention of learned counsel for

the petitioner on the ground that similar treatment is claimed on the basis of such orders which are not legally sound and according to him allowing

of similar treatment would result in commission of another wrong.

5. The argument of learned counsel for the respondents could not be taken casually, therefore, Mr. Kawoosa, learned AGO was asked to point

out the vice, these orders suffer from and to drive home his contention, he has relied at SRO 321 of 1995 dated 7/12/1995 and according to him

in terms of said SRO the treatment of dies non disentitles a public servant to the increments. Implications of SRO 321 need not be dilated upon,

because it has no bearing on the case in hand for the simple reason that the petitioners foreign assignment stands settled by Government order No:

83HMEof 1991 dated 15/10/1991 i.e. half a decade prior to coming into being of SRO 321 dated 7/12/1995, therefore, it cannot have any

application to the petitioners case obviously contention fails.

6. Mr. Kawoosa's plea in the alternative is that Article 163 gives a power to the respondent No. 1 to deprive an employee of increment, therefore,

increments could not have been allowed to the beneficiaries of annexure PI to P3, relied at by the petitioner, and to appreciate this argument it

becomes necessary to refer to Government instruction No.3 incorporated to article 163 of the J and K Civil Service Regulations which is

reproduced hereunder:

No period of unauthorised leave or absence may be treated as extraordinary leave without allowances when a Government servant has at his

credit earned leave. Where it is the intention of the competent authority not to allow the concerned Government servant any pay and allowances

for the period of unauthorized absence the said period may be treated as "'dies non'" (not qualifying for any remuneration) The 'dies non' in such

cases shall not disturb the title of earned leave nor shall it constitute an interruption for service qualifying for pension, leave and increment unless it is

the intention of the competent authority that a Government servant shall be penalised effectively to the extent that all leaves at his credit should

forfeit or his increment postponed.

A plain reading of the instruction makes it emphatically clear that increment is permissible where treatment of 'dies non' is accorded for the period

of absence unless intention of the competent authority is to deny it. Examining the argument on the touch stone of the said instruction it is amply

clear that article 163 read with instruction 3 does not even whisper of a ban which would debar respondent No. 1 from exercising the power of

allowing the increment for period treatment as 'dies non' suffice to say that argument of Mr. Kawoosa AAG is untenable in law.

7. It requires to be noticed that denial of increment is possible in terms of article 163, provided, the competent authority has an intention to deny it

and here arises a question whether respondent No. 1 aimed at denial of increment to the petitioner and such intention can be gathered from the

relevant government orders bearing No: MDA1463/73 dated 18/11/ 1976 by virtue of which petitioner was granted permission to go abroad and

No: 83HME of 1991 dated 15/10/1991 by which petitioners period of foreign assignment has been settled but a perusal of these orders does not

at all indicate that the respondent No. 1 had any intention to deny the increment to the petitioner and the respondent No. 1 cannot interpret the

orders detailed in the para by importing words to the detriment of petitioner. Thus examining the issue from any angle, the only conclusion available is

that the respondent No. 1 had no intention to deny the increment to the petitioner.

8. The facts and circumstances of the case in hand reveal that the petitioner and beneficiaries of annexures PI to P3 do form one class. There is no

dispute that the principle envisaged under article 14 of the constitution applies to an administrative action as well and it is an administrative action

alone by which benefit has been conferred on some but to the exclusion of the petitioner, obviously, the petitioner has been singled out without any

peculiar difference and there is absolutely no justifiable reason for denying the similar treatment to the petitioner and the respondent NO. 1 having

failed to treat the petitioner alike his equals, such omission violated the mandate of article 14 of the constitution which envisages reasonableness

and fairness.

9. For what has been stated hereinabove this writ petition is allowed, writ of mandamus is issued with the direction to the respondents to allow the

increments to the petitioner on the analogy evolved in favour of Dr. Nazir Ahmad Lone vide Government order No. 63HME of 1990 dated

19/1/1990. No order as to costs.