

(2016) 06 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 484 of 2013 and CMP Nos. 1298 of 2013 and 781 of 2013

Dr. Mir Zaffar Aman

APPELLANT

Vs

State of Jammu and Kashmir

RESPONDENT

Date of Decision : 08-06-2016

Acts Referred:

Constitution of India, 1950 — Article 309
Constitution of Jammu and Kashmir, 1956 — Section 124
Jammu and Kashmir Civil Service Regulations, 1956 — Article 163, Section 128, Section 203
Jammu and Kashmir Civil Services (Leave)

Citation : (2017) 1 ESC 456 : (2017) 3 SCT 302

Hon'ble Judges : Mr. N. Paul Vasanthakumar, CJ., Mr. Ali Mohammad Magrey and Mr. Dhiraj Singh Thakur, JJ.

Bench : Full Bench

Advocate : Mr. Altaf Haqani, Mr. R.A. Jan, Senior, with Ms. Amani Syed, Advocates, for the Petitioner; Mr. D.C. Raina, Advocate General, with Mr. Asif Maqbool, GA, for the Respondent

Final Decision : Disposed Off

Judgement

Per Magrey J.—While hearing the above writ petition at admission stage, the learned Writ Court (one of us, Magrey J.) was confronted with

two different views expressed by two (rather three) different Division Benches of this Court on one and the same point concerning the fall out of

treatment of the period of unauthorised absence of a Government servant as dies non on his seniority. The following two questions were,

accordingly, framed by the learned Writ Court vide its order dated 04.04.2013 and referred for decision by a larger Bench of the Court:

(i) If the provisions of SRO 80 dated 10.12.1978 (should read as 10.12.1972) and SRO 321 dated 07.12.1995 do not make it impermissible to

count the period of unauthorized absence, treated as dies non, towards the seniority, whether the act and factum of treating the period of

unauthorized absence as dies non by itself would disentitle the absentee/employee from counting such period towards his seniority; and

(ii) Whether the period of unauthorized absence of the petitioner herein with effect from 01.01.1989 to 06.03.1995 could be dealt with and treated

under SRO 321 dated 07.12.1995 and/or SRO 514 dated 22.11.1999, both issued much after the rejoining of the petitioner, or it could only be

dealt with and treated under SRO 80 dated 10.12.1972 having been in operation when the petitioner had incurred the liability to punishment for

unauthorized absence?

2. First of all, a short resume of the factual background attendant to the petitioner's case in context of which the above referred to questions

have arisen.

3. The petitioner was appointed as a Veterinary Doctor in the State Animal Husbandry Department on 26.06.1982. He unauthorisedly absented

from duty with effect from 01.01.1989 to 06.03.1995 (six years, two months and six days). On joining back, the Government vide order no.247-

ASH of 1995 dated 07.12.1995 treated his period of absence as 'dies non'. According to the petitioner, his service was not subjected to

any interruption and, consequently, he was granted two time-bound promotions in the years 2004 and 2010. His seniority on the basis of his total

length of service, including the period treated as dies non, was appropriately fixed at serial no.55 of the Veterinary Assistant Surgeons vide final

seniority list issued under Government order no.50-ASH of 2013 dated 27.02.2013. However, subsequently, the Government issued order

no.99-ASH dated 28.03.2013 stating therein that the issue had been examined in detail in accordance with the rules and that it had been felt that

inadvertently the import of 'dies non', which included loss of seniority, had not been implemented in the case of the petitioner like similarly

placed officers and, consequently, by Government order no.99-ASH dated 28.03.2013 the petitioner's seniority position was re-fixed and

changed from 55 to 273-A.

4. The petitioner challenged the legality of the aforesaid Government order no.99-ASH dated 28.03.2013 mainly on the ground that his period of

unauthorized absence was governed by the provision of Article 163 of the J&K Civil Service Regulations, 1956 as amended vide SRO 80 dated

10.12.1972 and not the one as amended vide SRO 321 dated 07.12.1995 or SRO 514 dated 22.11.1999. Before the learned Writ Court, the

petitioner's learned counsel contended that since he had incurred the punishment for unauthorized absence with effect from 01.01.1989 to

06.03.1995 during the currency and applicability of SRO 80 of 1972 dated 10.12.1972, he could be subjected to the rigors of only that SRO and

not the ones contemplated or stipulated by the later SROs, namely, SRO 321 dated 07.12.1995 or SRO 514 dated 22.11.1999. The submission

was buttressed by a Division Bench decision of this Court in *Zahoor Hussain Zargar v. State of J&K*, 2011(I) SLJ 437, wherein it was held

that having incurred the liability to punishment for unauthorized absence during the operation of SRO 80 of 1972, the appellant therein could be

deprived of only those service benefits which the Government instructions introduced vide SRO 80 of 1972 had contemplated and not those which

came into force much after the appellant therein had been deemed to have rejoined the Department.

5. However, on the very same point, there have been two other Division Bench Judgments of this Court in *Dr. Ashiq Hussain v. State of J&K*,

2004(I) SLJ 143, and *Dr. Mohammad Afzal Wani v. State of J&K*, 2009(II) SLJ 447, rendered much earlier in point of time to the decision

in *Zahoor Hussain Zargar v. State of J&K* (supra).

6. In *Dr. Ashiq Hussain v. State of J&K* (supra), the Division Bench took the view that when a period is directed to be treated as "dies

non" the period in question does not count for any service benefits which would otherwise accrue during that period, including pension,

increments, experience and seniority. In *Dr. Mohammad Afzal Wani v. State of J&K* (supra), it was held that the seniority begets from the

length of service of an employee. The period of unauthorized absence treated as "dies non" washes away the period of service from an

employee's service which is treated as "dies non". The said period thus cannot be treated as continuous period of service and would not

count for seniority.

7. It is the above conflicting view taken in the latter Division Bench judgment in

Zahoor Hussain Zargar v. State of J&K (supra) that necessitated the present reference.

8. It may also be mentioned here that in Dr. Mohammad Afzal Wani v. State of J&K (supra), the Division Bench judgment was rendered on

29.10.2008 and therein the interpretation of the word "dies non" was elaborately expounded together with its consequences on the service,

seniority and other service benefits of a Government servant independent of the implication thereof as explained and clarified by the relevant SROs.

During the course of hearing of this Reference another judgment delivered by the learned Writ Court on 30.03.2011 in Masood Alamgir Shah

(Dr.) v. State of J&K, 2011(2) JKJ 489, was brought to the notice of the Court wherein the Court at para 11 of the judgment, as would be

referred to hereinafter, has obviously taken a different view than expounded in Dr. Mohammad Afzal Wani v. State of J&K (supra). What is

unfortunate on the part of the counsel concerned, especially those representing the State, is that none of the above two judgments in Dr. Ashiq

Hussain v. State of J&K (supra) and Dr. Mohammad Afzal Wani v. State of J&K (supra) seem to have been brought to the notice of the

Court, at least none is referred to therein.

9. So, in short there is a great deal of inconsistency subsisting in the view expressed on the connotation and implication of the word "dies non" used

in the Government instruction appended to Article 163 of the Jammu and Kashmir Civil Service Regulations, 1956 (for short CSRs) contained

under Part III therein under the caption "Leave Rules" as also with regard to principal provision of Article 163 CSR read with the relevant

provisions of the CSR. Before referring to Article 163 CSR, it may be mentioned here that the Regulations contained under aforesaid Part III of

the CSR commence with a note at the very threshold thereof to the following effect:

Note. "Rules in this Chapter do not apply to the employees who have joined service on or after 01.01.1979 and those who were in service on

31.12.1978 but opted for the Jammu and Kashmir Civil Service (Leave) Rules, 1979. Such of the provisions in this Chapter as are of the general

nature and are not inconsistent with the Jammu and Kashmir Civil Services (Leave) Rules, 1979 will however apply to all employees.

10. However, there is no provision akin to Article 163 of the CSR contained in the J&K Civil Services (Leave) Rules, 1979 (hereinafter, 1979

Leave Rules), nor is the said provision inconsistent with any of the provisions contained therein. Therefore, undisputedly, it applies to all employees.

11. This also needs to be mentioned at the very threshold that the provision contained in Article 163 of the CSRs has been culled out by the

Government and/or its functionaries as a device to reach out a special concession to those Government servants who absent themselves from duty,

mostly for long periods of time, almost abandoning their services, to induct them back in service without resort to disciplinary action against them,

treating their period(s) of service rendered till the date they absent themselves and the benefits accruing thereby as intact so as to lend a continuity

in their past and the future service. It should be borne in mind that unauthorised absence from duty or overstaying leave is an act of indiscipline

attracting disciplinary action, but no such action is initiated or taken.

12. Article 163 of the CSR provides for leave without allowances and it prescribes as under:

163. Leave without allowances: Extraordinary leave without allowances may in case of necessity and when no other leave is by rule admissible, be

granted for such time as may be necessary. Time spent on leave under this Article does not count as service for other leave. Subject to the

provisions of Article 113 there is no limit to the length or frequency of leave under this Article. It may not be granted in combination with the grant

of other leave, except as provided in Article 130. But it may be granted in continuation of other leave if circumstances arise which prevent the

return of the officer to duty and which in the opinion of the Government or the authority empowered to grant leave, are such as to justify the

concession. No officer is entitled to extraordinary leave.

13. By notification, SRO 80 dated 10.02.1972, the Governor of the State in exercise of the powers under proviso to Section 124 of the

Constitution of J&K, directed certain amendments in the CSR in the shape of inserting Government instructions below Article 163 and,

consequently, renumbering the existing note below Article 128 as Note 1 and inserting note 2 thereunder. For facility of ready reference, the

notification is quoted hereunder

Government of Jammu & Kashmir

Finance Department.

Notification

Dated 10th Feb., 1972

S. R. O. 80: In exercise of the powers conferred by Proviso to Section 124 of the Constitution of Jammu and Kashmir, the Governor is pleased to

direct that the following amendments shall be made in the Jammu and Kashmir Civil Services Regulations Volume 1 (3rd Reprint Edition 1971)

namely:-

In the said Regulation, (1) the following shall be inserted as Government Instructions below Article 163. â?

Government Instructions: No period of unauthorized leave, 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 â??dies nonâ?? (not qualifying for any

remuneration). The â??dies nonâ?? in such cases shall not disturb the title of earned leaves 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 penalized

effectively to the extent that all leaves at his credit should forfeit or his increment postponed.

14. Subsequent thereto, the Government issued notification SRO no.321 dated 07.12.1995 which is quoted hereunder:

SRO 321. - In exercise of the powers conferred by proviso to Section 124 of the Constitution of Jammu and Kashmir, the Governor is pleased

to make the following amendments in the Jammu and Kashmir Civil Services Regulations Volume I, namely: In the said rules:

The existing Government Instruction below Note 4 to Article 163 shall be recast as under:

Government Instruction: No period of unauthorized 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.

Explanation: The import of term "dies-non" is that:-

(a) It does not qualify for any remuneration (Pay and allowances).

(b) It does not count for pension

(c) It does not count for increment.

(d) It does not cause any interruption for leave earned upto the date preceding that on which the period of "Dies-non" has commenced

unless it is the intention of the competent authority to have such period of leave forfeited in which case mention about it should be made in the order

itself.

(e) It does not cause any interruption for the past service qualifying for pension By order of the Government.

15. Thereafter, the Government issued yet another notification, being SRO 514 on 22.11.1999, to the following effect:

SRO 514: In exercise of the powers conferred by Section 124 of the Constitution of Jammu and Kashmir, the Governor is pleased to direct that

the following amendment shall be made in Jammu and Kashmir Civil Service Regulations Volume-I:- In the said Regulation:

The existing Explanation of Government Instruction below note 4 to Article 163 shall be recast as under:

Explanation:- The word "Dies-non", an abbreviated form of "Dies-non-Juridicus" means a day on which no legal business is

transacted or which is not reckoned for some particular purpose. The period which is directed to be treated as "Dies-non" cannot therefore

be counted for service benefits otherwise available for that period. In fact, the period required or ordered to be treated as "Dies-non"

is by way of concession for permitting the beneficiary thereof to have service in continuation of period before the beneficiary proceeded on

unauthorized absence for a particular period. Literal meaning of 'Dies-non' would boil down to mean that this period is not capable of being

counted at all for purposes of possible benefits to the beneficiary. Rights which have accrued to him till the date of his proceeding on unauthorized

leave or right which may accrue to him after he is allowed to join service as a result of direction that the period of absence be treated as

'Diesnon' remain quite intact, but no benefit whatsoever can accrue to him as a result of, call it concession or legal fiction of construing the

period of unauthorized absence as 'Dies-non' under any circumstances. This period cannot count for any purpose, whatsoever.

Accordingly, the import of the term 'Dies non' is that:

- (i) It does not qualify for any remuneration (pay and allowances);
- (ii) It does not count for pension;
- (iii) It does not count for increments;
- (iv) It does not cause any interruption for leave earned upto the date preceding that on which the period of Dies-non has commenced;
- (v) It does not cause any interruption for the past service qualifying for pension;
- (vi) It shall not count for experience;
- (vii) During 'Dies-non' the concerned Government servant shall not be entitled for promotion;
- (viii) The concerned shall lose seniority in his cadre/category by the period which is treated as 'Dies-non'.

By order of the Governor.

16. We heard Mr. Altaf Haqani, learned counsel, for the writ petitioner. We also heard Mr. D. C. Raina, learned Advocate General. Mr. R. A.

Jan, Senior Advocate, who had been counsel for the appellant in the latter case, viz. Zahoor Hussain Zargar v. State of J&K (supra), in which

the Division Bench annunciated a view contrary to that of the earlier two Division Bench decisions of the Court on the point, volunteered to assist

the Court. He was allowed to make his submissions.

17. Mr. Haqani, principally founding his whole argument on the decision in Zahoor Hussain Zargar v. State of J&K (supra), submitted that

since the petitioner had incurred the punishment on account of having remained absent from 01.01.1989 to 06.03.1995, SRO 321 dated

07.12.1995 passed subsequent thereto and, in any case, after his joining the duties, could not be made applicable to him. With a view to putting across his point, Mr. Haqani heavily relied upon and invited our attention to SRO 80 of 1972 dated 10.12.1972 as well as the subsequent explanations introduced in terms of SRO 321 dated 07.12.1995 and SRO 514 dated 22.11.1999. He submitted that the Rule which was not in existence at the time the petitioner had incurred the punishment could not be made applicable retrospectively. To further buttress his argument the learned counsel submitted that in *Dr. Mohammad Afzal Wani v. State of J&K* (supra), the period of unauthorized absence with effect from 11.11.1995 to 21.01.1998 certainly pertained to the period when SRO 321 dated 07.12.1995 was operative, therefore, the law annunciated therein is not applicable to the instant case where the period of absence pertains to the period when the 1972 SRO was operative. The learned counsel submitted that once his period of absence was regularized by treating it as extraordinary leave without allowance, his service would not cease to be continuous and, therefore, the period of absence had to be treated towards his seniority, especially so in view of the fact that SRO 80 of 1972 dated 10.12.1972 did not envisage not treating the said period towards the seniority of the petitioner. Apart from the above decisions of this Court, the learned counsel cited and relied upon the decision of the Supreme Court in *Jeewanlal (129) Limited, Calcutta v. Its Workmen*, 1961 Legal Eagle (SC) 149 : AIR 1961 SC 1567; a decision of the Rajasthan High Court in *Dwarka Prasad v. Union of India*, 1972 LAB I.C. 1541 (V 5 C 311); and a decision of the Gujarat High Court in *Gopal T. Madnani v. State of Gujarat*. Mr. Haqani also sought to derive buttress from *Masood Alamgir Shah (Dr.) v. State of J&K* (supra).

18. Mr. R. A. Jan, Senior Advocate, while making his submissions, argued that, in fact, there is no conflict in the judgments, for, the same have been delivered in their respective peculiar fact situation and that the instant Reference is not competent. He submitted that SRO 321 of 1995 or SRO 514 of 1999 will not have retrospective effect. He further submitted that the judgment in *Dr. Mohammad Afzal Wani v. State of J&K* (supra) is per incuriam because it was against the provisions of the Jammu and Kashmir Civil Services (Leave) Rules, 1979. Mr. Jan, learned

Senior counsel also referred to Rule 24 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 to canvas that

seniority has to be determined by the date of first appointment to the service, class, category or grade with reference to which the question arises

and that when a period of absence is regularized, treating it as dies non the seniority will continue to have reference to the date of first appointment.

Further, inviting the attention of the Court to Rule 25 of the 1979 Leave Rules, the learned Senior Counsel submitted that if a Government servant

remains absent after the end of leave, he is not entitled to leave salary for the period of such absence and that such period has to be debited against

his leave account as though it were half-pay leave to the extent such leave is due and the period in excess of such leave due is to be treated as

extra ordinary leave. Inviting the attention of the Court further to Rule 23 of the 1979 Leave Rules, the learned counsel submitted that when no

other leave is admissible, then the Government has the discretion to grant extraordinary leave. According to the learned senior counsel, Article 163

of the CSRs is at variance with the provisions of the 1979 Rules and since the petitioner is an appointee after 1979, he is subject to the 1979 Rules

and, therefore, Article 163 of the CSRs was not applicable to him.

19. Mr. D.C. Raina, the learned Advocate General, invited the attention of the Court to Rule 33 of the High Court Rules and submitted that the

Reference is very much competent. He submitted that the explanations introduced in Article 163 of the CSR are only clarificatory and explanatory

in nature and they do not change the basic feature of Article 163 of the CSR. Any explanations and/or clarifications made in the Rule would be

applicable retrospectively.

20. We may mention here that some of the submissions made by Mr. R. A. Jan, Sr. counsel, are irrelevant to the questions for determination

before this Court, and, therefore, in that sense, are purely academic in nature; nonetheless, they represent the conspectus of an extensive subject

warranting some discussion.

21. As mentioned above, the first question referred for the decision of this Court is if the provisions of SRO 80 dated 10.12. 1972 and SRO 321

dated 07.12.1995 do not make it impermissible to count the period of unauthorized absence, treated as dies non, towards the seniority, whether

the act and the factum of treating the period of unauthorized absence as dies non by itself would disentitle the absentee/employee from counting

such period towards his seniority? This, therefore, calls for finding out the real legal connotation of the term 'dies non' which, independent of

the explanations introduced in the provisions would have its implication.

22. In order to find an answer to this question, apart from looking for the true connotation and interpretation of the word 'dies non', one

would need to go to the plain language of the relevant provision and the instructions/explanations introduced therein in 1972 together with other

provisions contained in the CSRs concerning the subject.

23. It is true that the Government Instruction inserted under Article 163 of the CSR vide notification SRO 80 dated 10.02.1972 did not speak

whether the period treated as 'dies non' would count towards seniority or not and so is the subsequent SRO, viz. SRO 321 dated

07.12.1095, silent about it. However, a plain reading of Article 163 CSR, inter alia, makes it out that the period spent on leave without allowance

does not count as service for other leave. In terms of the provision of Article 111-C of the CSR, leave is earned by duty only. As a necessary

corollary, the period spent on Extraordinary leave without allowances cannot be treated as period spent on duty. Once there is no duty performed,

there will be no pay and allowances paid. Cumulatively, therefore, the period in question will not count as service, will not earn leave, will not earn

pay and allowances. Obviously, therefore, it cannot be taken into account for any purpose whatsoever. This is what becomes axiomatic from a

plain reading of Article 163 CSR.

24. Now, coming to the explanation or clarification that was introduced in Article 163 of the CSR in the shape of Government Instruction pursuant

to SRO 80 dated 10.02.1972, it, inter alia, prescribed that where it was 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'. The expression was further qualified and explained within parens to mean 'not qualifying for any remuneration'. The

instruction further made it clear that the 'dies non' in such cases, i.e., where unauthorized absence was treated as 'dies-non' and the

intention was not to allow any pay and allowances for the said period, shall not disturb the title of earned leaves 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 penalized effectively to the extent that all leaves at his credit should forfeit or his increment postponed. This particular clause of the

instruction [the "dies non" in such cases shall not disturb the title of earned leaves 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 penalized effectively to the

extent that all leaves at his credit should forfeit or his increment postponed] assumes great, rather the vital importance. This speaks of no impact of

the treatment of the period of absence as "dies non" on the service rendered by the concerned employee prior to the date of his proceeding

on unauthorized absence and the benefits those might have accrued to him on that count. This is so because Article 163 itself excludes the

possibility of earning any leave during the period of absence treated as extraordinary leave. Therefore, there is no question of disturbing the title of

earned leave during this period because none is earned; the prohibition not to disturb such title certainly relates to the earned leave pertaining to the

period prior to the absence of the Government servant. The words "nor shall it constitute an interruption for service qualifying for pension, leave

and increment" also relate to the service rendered prior to the date the Government employee proceeded on unauthorized absence, not the period

of absence itself. This becomes further clear from the subsequent words used therein "unless it is the intention of the competent authority that a

Government servant shall be penalized effectively to the extent that all leaves at his credit should forfeit or his increment postponed". It is reiterated

the period of absence would not qualify for any leave nor would it qualify for any remuneration. So what leave could be forfeited or what increment

could be postponed when the same were not earned? Certainly, these are benefits which the absentee had earned prior to the date he absented

himself. Thus, the language of the instruction introduced vide SRO 80 of 1972 read with the provision of 163 CSRs make it manifest that the

period of absence, treated as "dies non", would not earn anything for an absentee, but, at the same time, would not impact the benefits

earned prior to the date the government servant absented himself.

25. The expression ""interruption for service"" used in the above provision has also to be understood in context of the provisions of the CSR

contained in Article 128 and 203 thereof. Article 128 provides as under:

128. Overstaying leave: Absence without leave or after the end of leave involves loss of appointment, except as provided in Article 203 (b) or

when due to ill health in which case the absentee must produce the certificate of Medical Officer.

This Article clearly stipulates that absence without leave involves loss of appointment, except, of course as provided in Article 203 (b). Loss of

appointment would naturally wash out every service benefit, not to speak of seniority that might have accrued to a Government servant by dint of

his service till he absented without leave or after the end of leave.

26. Article 203 referred to in Article 128 quoted above, mentions about interruptions. It states that an interruption in the service of an officer entails

forfeiture of his past service, except in certain cases mentioned thereunder. Reading the two provisions, viz. Article 128 and 203 of the CSRs

conjointly, the word ""interruption"" used in Article 203 of the CSR is used with reference to the period of absence and the loss it entails has

reference to the ""past service"" and the benefits accruing thereunder, not the ones which could, if any, accrue during the period of

interruption, i.e., the period of absence itself, meaning thereby the service rendered prior to the date the Government servant absents himself. In

other words, in terms of Article 203 CSR the period of absence of a Government servant would constitute interruption and it will have its impact of

loss of the service rendered and its benefits earned prior to the period of interruption; whereas in terms of Article 163 CSR and the instruction

introduced therein in 1972, in the event the period of absence is treated as dies non, both the interruption and its impact of loss would relate only to

the period of absence itself, not the period prior to that. Consequently, no service or any of its benefits can be earned by such an employee during

the period of absence / interruption but, at the same time, his service and benefits accruing thereunder rendered prior to the period of interruption

would be saved.

27. To put it straight, it becomes clear that the words ""nor shall it constitute an

interruption for service qualifying for pension, leave and increment",
used in the Government Instruction inserted under Article 163 CSR by SRO 80 of 1972, have reference only to the service rendered prior to the
date the Government employee proceeded on unauthorized absence, not the
period of absence itself, treated as dies non.

28. Let us now advert to the other aspect of the matter, i.e., the legal connotation of the word "dies non" used in the instruction introduced in terms of SRO 80 of 1972. The judgment in Dr. Mohammad Afzal wani v. State of J&K (supra) opens with the following words:

1. "Dies-non" seeks to unveil itself in its true legal character and real contextual spirit. This Latin word has ironically suffered in its texture

and legal meaning at the hands of authorities who as per their own understanding and choice have been giving different meaning at different times to it.

Webster (1913) defines "Dies-non" to mean:

"A day on which courts are not held, as Sunday or a legal holiday."

cgda.nic.in A government of India (Ministry of Defence) Website defines "Dies-non" to mean:

"Neither count as service or is a break in service."

Absence without permission. When on duty left without proper permission. While in office refuse to perform.

The expression "a day on which courts are not held, as Sunday or a legal holiday" may not convey the meaning of the word "dies non" in its true

sense unless the context of the expression is explained. This may better be explained by the following judgment rendered by the Calcutta High

Court in Ahad Baksh Molla v. Sheikh Babar Ali, 5 Ind Cas 416, on 10.01.1910, i.e., more than a hundred years back. The judgment

appearing on the Website of Indiankanoon.org is very short and is, therefore, quoted in full hereunder:

Calcutta High Court

Ahad Baksh Molla v. Sheikh Babar Ali And Anr.

on 10 January, 1910

Equivalent citations: 5 Ind Cas 416

JUDGMENT

Chatterjee, J.—The plaintiff presented a kabala for registration, the defendant denied execution and the Sub-Registrar refused registration. On

appeal the Registrar confirmed the order of the Sub-Registrar on the 29th November 1906. The Civil Courts being closed on the 29th December

on account of the Christmas holidays, the plaintiffs presented their plaint on the 2nd of January 1907, the next open day. The defendant pleads that

the suit is barred by limitation. The Court of first instance gave effect to this plea and dismissed the suit. The appellate Court has decreed the suit.

The defendant appeals and on his behalf it is contended that the appellate Court was wrong in law.

2. It is contended that Section 77 of the Registration Act provides 30 days as the period within which such a suit must be brought and Section 5 of

the Limitation Act has no application. In the case of Nijabutoolla v. Wazir Ali 8 C. 910 : 10 C.L.R. 333, it was held that Section 5 does apply

to such suits. In the case of Khetter Mohun Chuckerbutty v. Dinabashy Skaha 10 C. 265 it was held that Section 14 of the Limitation Act

was applicable to a similar suit. In the case of Nogendra Nath Millick v. Mathura Mahun Parhi 18 C. 368, it was held that Section 14 of the

Limitation Act was not applicable to a suit for arrears of rent under Act X of 1859. The case of Khetter Mohan Chuckerbutty 10 C. 265, was

referred to in the referring order as supporting the applicability of Section 14 of the Limitation Act to control Limitation rules under special Acts but

the Full Bench held that the decision of the Privy Council in the case of Annoda Persaud Mookerjee v. Kristo Coomar Moitro 19 W.R. 5 :

15 B.L.R. 60 (note) disposed of the case as arising under Act X of 1859 which is a complete Code in itself. No reference was made to the case

of Nijabatoolla 8 C. 910 : 10 C.L.R. 333. In the case of Abdul Hahim v. Latifunnessa Khatun 30 C. 532, the question of the applicability of

Section 14 of the Limitation Act to a suit under Section 77 of the Registration Act was considered to have been settled by the decision of the Full

Bench in the case of Nagenda Nath Mullick 18 C. 368 and the case of Khetter Mohun Chuckerbutty 10 C. 265 was considered as

overruled by the Full Bench. These are all the cases referred to on behalf of the appellant who contends that it must now be taken as settled law

that the provisions of the Limitation Act do not control the special rule of limitation in Section 77 of the Registration Act. Although the case of

Nijabatoolla 8 C. 910 : 10 C.L.R. 333 stands singly in favour of the respondent and has not been expressly overruled or dissented from in any case, the ratio decidendi of some at least of the above cases must be taken as barring the application of Section 5 of the Limitation Act to the present suit. It is contended on behalf of the respondent, however, that on general principles, this case, must be held to be within time. He contends that the respondent had up to the 29th December to file his plaint but this Courts were then closed and it was not through his default that the plaint was not filed on the 29th December there being no body to receive the same from the 29th December to the 2nd of January, these, days must be considered as dies non and in filing his plaint on the 2nd of January next, he was within time. This principle, the respondent contends, has been followed in a number of cases both in this Court and in some of the other High Courts. In the case of Shooshee Bhusan Rudro v. Gobind Chuder Roy 18 C. 231, it was held that the, deposit under Section 174 of the Bengal Tenancy Act for setting aside a sale could be made on the reopening day if the 30th day fell on a close holiday. Referring to the case of Waterton v. Baker L.R. 3 Q.B. 173 : 9 B. & S. 23 : 37 L.J.Q.B : 65 : 17 L.T. 468 : 16 W.R. 358, the Court said:

The broad principle there laid down is that although the parties themselves cannot extend the time for doing an act in Court, yet if the delay is caused not by any act of their own but by some act of the Court itself such as the, fact of the Court being closed, they are entitled to do the act on the first opening day"". The same principle was followed in the case of Peary Mohun Aich v. Anunda Charan Biswas 18 C.631, Sir Comer Petheram, C.J., who was a party to the Full Bench case of Nogendra Nath Mullick 18 C. 368, being one of the Judges. In the case of Surendra Narayan Mustafi v. Sauravini Dasi 3 C.L.J. 339, the same principle was followed in respect of a deposit under a compromise within a certain date when that date happened to be a close holiday. In the cases of Aravamudu Ayyangar v. Saniyappa Nadan 21 M. 385; Sambasiva Chari v. Ramsami Reddi 22 M. 179; Haji Ismail Sait v. The Trustees of the Harbour Madras 23 M. 389, similar view was taken in respect of other matters although it had been laid down by the Madras High Court that neither Section 7 nor Section 5 of the Limitation

Act controlled proceedings under Section 77 of the Registration Act. See *Veeramma v. Abbiah* 18 M. 99; *Nallappa Reddi v. Pamalingachi*

20 M. 250. The Legislature has adopted this general principle in Section 7 of Act 1 of 1887 and Section 10 of Act X of 1897 as applying to all

Acts passed after 1887 to which the Limitation Act does not apply. This, I think, is a legislative recognition of the broad equitable principle acted

upon by the Courts in certain cases while ignoring it in others. Although the Registration Act was passed 10 years before the Act of 1887, I do not

feel at all embarrassed in following this principle and I hold that the suit was within time. The appeal is accordingly dismissed with costs.

What transpires from the above judgment is that the words "'a day on which courts are not held'", called as *dies non*, represents a period to

be excluded from computation for purposes of limitation. By corollary, *dies non* is to be treated as if these days did not occur, exist or

come in between. In other words, these days are dropped from the calendar. Therefore, in law, the period of *dies non* is to be treated as

non-est and inconsequential. Hypothetically, it is just like folding the time in a manner that the day before the Government servant proceeded on

unauthorised absence is joined to the day he resumes his duties, ignoring the intervening period for all purposes. It may not even be termed as a

bridge connecting the two spells of service, for, the bridge would have its own span; whereas the period treated as *dies non* leaves no trace of the

time and pulls abreast and joins the two spells of service *dies non* prior to *dies non* and the other following it.

29. It may also be observed here that the term *dies non* has come up for interpretation before several High Courts in the Country from

time to time. Similarly, it came up for consideration before the Karnataka High Court in *Kanthraj A.N. v. Assistant Executive Engineer*,

decided on 25.08.1999, 2000 (84) FLR 270, ILR 1999 KAR 4347 (Website Indiankanoon). The relevant paragraph of the judgment is

quoted hereunder:

Under Annexure-C, the direction of the State Government is that not merely that the period from the date of the order of dismissal till the date of

reinstatement should be treated as *dies non*, but further that, during the said period of *dies non*, the workman would not be

entitled to any service benefits. Thus, it is in the contest of treating this period from the date of the order of dismissal till the date of reinstatement as

totally non-existent for any purpose that the State Government has used this word "dies non" in Annexure-C.

Normally, the term "dies non", an abbreviation of "dies non juridicus", is referred to as a day not juridical and a non-sitting day for the

Court such as Sunday, etc. That is how, according to the BLACK'S LAW DICTIONARY, this term means a day not juridical; not a Court

day; a day on which Courts are not open for business, such as Sundays and some holidays. JOWITT'S DICTIONARY OF ENGLISH

LAW (Second Edition) also gives the same meaning, namely, as a day on which no legal business can be transacted, such as Sunday, etc.

WHARTON'S LAW LEXICON (Fourteenth Edition) also gives the same meaning, namely that it is not a Court day. In addition to this

normal meaning, however, certain other dictionaries give the further meaning to the effect that the day concerned is not to be reckoned as a day at

all. According to PREM'S JUDICIAL DICTIONARY, it is a day not reckoned as a day. According to the OXFORD UNIVERSAL

DICTIONARY ILLUSTRATED (Third Edition) and the SHORTER OXFORD ENGLISH DICTIONARY, it is a day on which no legal

business is transacted, or which is not reckoned for some particular purpose. "Words and Phrases" Permanent Edition (Volume 12A), inter

alia, explains the effect of "dies non" as to postpone the enforcement of contract involved to the next day open to business transaction".

These definitions of the word "dies non" as contained in the above passage of the judgment of the Karnataka High Court also demonstrate

and establish only one thing, that it is not reckoned as a day for any purpose.

30. So, in light of the above discussions, it becomes clear that the period of absence treated as "dies non" has not to be taken into account

for any purpose whatsoever. Consequently, the use of the word "dies non" in the instruction introduced by SRO 80 dated 10.02.1972 by itself

connotes that treatment of the period of absence as "dies non", independent of the explanations added by the subsequent SROs, being SRO

no.321 of 1995 dated 07.12.1995 and SRO 514 of 1999 dated 22.11.1999, would disentitle the absentee/employee concerned from any kind of

benefit, which would include seniority and this period will not count towards his seniority. Therefore, it is immaterial that the SRO 80 dated

10.02.1972 and/or SRO no.321 of 1995 do not make it impermissible to count the period of unauthorized absence, treated as dies non, towards

the seniority; the factum of treating the period of unauthorized absence as dies non by itself would disentitle the absentee/employee from counting

such period towards his seniority. We hold as such and answer the first question accordingly.

31. The judgments cited and relied upon by Mr. Haqani, learned counsel for the petitioner in *Jeewanlal (129) Limited, Calcutta v. Its*

Workmen (supra) is founded on the definition of the expression "continuous service" contained in Section 2(eee) of the Industrial Disputes

Act, 1947. Furthermore, it was held therein that the expression "continuous service" may be statutorily defined in which case the definition

will prevail and that an award using the said expression may itself give a definition of that expression and that will bind the parties in dealing with the

claim arising from the award. This judgment is not relevant here and is wholly distinguishable. Incidentally, the decision of the Rajasthan High Court

in *Dwarka Prashad v. Union of India* (supra) is based on the above judgment. It, therefore, is not applicable herein. In *Gopal T. Madnani v.*

State of Gujarat (supra), the term "dies non" was neither involved nor did it fall for interpretation. It has no application to the present case.

32. So far as the second question referred to this Court is concerned, it concerns whether the period of unauthorized absence of the petitioner

from 01.01.1989 to 06.03.1995 could be dealt with and treated under SRO 321 dated 07.12.1995 and/or SRO 514 dated 22.11.1999, both

issued much after the rejoining of the petitioner, or it could only be dealt with and treated under SRO 80 dated 10.12.1972 having been in

operation when the petitioner had incurred the liability to punishment for unauthorized absence? This question flows from the very first question and

the answer thereto also lies in answer to the first question which stands already elaborately discussed.

33. Apart from the above, it may also be observed that an explanation appended to a statutory provision constitutes a part of the Statute. The

purpose of an explanation is to explain a concept or expression or phrase occurring in the main provision; its basic function is to elucidate the main

enactment. It only explains and does not expand or add to the scope of the original provision. These are basics settled by various Courts while

dealing with explanations under Statutes. In *Dattatraya Govind Mahajan v. State of Maharashtra*, (1977) 2 SCC 548, the Supreme Court,

while dealing with a point of interpreting an explanation appended to a Statute held as under:

“It is true that the orthodox function of an explanation is to explain the meaning and effect of the main provision in which it is an explanation and

to clear up any doubt or ambiguity in it. But ultimately it is the intention of the legislature which is paramount and mere use of a label cannot control

or deflect such intention. It must be remembered that the legislature has different ways of expressing itself and in the last analysis the words used by

the legislature alone are the true repository of the context and setting in which they occur”.

Again in *S. Sundaram Pillai v. V. R. Pattabhiraman*, (1985) 1 SCC 591, the Supreme Court, after noting its numerous earlier judgments on the

point, elaborately brought out the object of an explanation appended to a Statute. Para 53 of the judgment in this regard is quoted hereunder:

Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is.â

(a) to explain the meaning and intendment of the Act itself;

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which

it seems to subserve;

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful;

(d) an explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the

purpose of the Explanation in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true

purpose and intendment of the enactment; and

(e) it cannot, however, take away a statutory right with which any person under a "statute has been clothed or set at naught the working of an Act

by becoming an hindrance in the interpretation of the same.

34. In the instant case, the treatment of the period of absence, which otherwise,

in terms of the provision of Article 128 CSR would result in loss of appointment, as dies non does not take away any statutory right with which the petitioner had been clothed nor does it set at naught the working of the provisions of Article 163 CSR. The explanation appended to the Government Instruction under Article 163 CSR by SRO 321 dated 07.12.1995 and SRO 514 dated 22.11.1999 only clarify the dominant object of the main provision of the SRO together with the Government instruction appended thereto vide SRO 80 of 1972 read with Articles 128 and 203 of the CSR. Therefore, the same cannot be treated to be amendments introducing any new provisions or conditions as would not be applicable retrospectively. In fact, it is settled law that conditions of service can, by virtue of the proviso to Article 309 of the Constitution of India, corresponding to the proviso to Section 124 of the State Constitution, be amended retrospectively, of course, subject to the condition that accrued rights are not taken away. Reference in this connection may be made to the decision of the Constitution Bench of the Supreme Court in *B. S. Vadera v. Union of India*, AIR 1969 SC 118, wherein the Supreme Court held as under:

It is also significant to note that the proviso to Article 309 clearly lays down that "any rules so made shall have effect, subject to the provisions of any such Act". The clear and unambiguous expressions used in the Constitution must be given their full and unrestricted meaning, unless hedged-in, by any limitations, the rules which have to be subject to the provisions of the Constitution, shall have effect, "subject to the provisions of any such Act. That is, if the appropriate Legislature has passed an Act under Article 309, the rules, framed under the Proviso, will have effect, subject to the Act; but, in the absence of any Act, of the appropriate Legislature on the matter, in our opinion, the rules made by the President or by such person as he may direct, are to have full effect, both prospectively and retrospectively. Apart from the limitations pointed out above, there is none other imposed by the proviso to Article 309 regarding the ambit of the operation of such rules. In other words, the rules, unless they can be impeached on the grounds such as breach of Part II, or any other Constitutional provision, must be enforced, if made by the appropriate authority.

The above law laid down by the Supreme Court was quoted in the subsequent case, *I.T.O. Alleppey v. M. C. Ponnose*, 1969 (2) SCC 351,

though distinguishingly in that case, in the following words:

7. It may be noticed that in a recent decision of the Constitution Bench of this Court in *B. S. Vadera etc. v. Union of India & others*, it has

been observed with reference to rules framed under the proviso to Article 309 of the Constitution that these rules can be made with retrospective

operation. This view was, however expressed owing to the language employed in the proviso to Article 309 that "any rules so made shall have

effect subject to the provisions of any such Act". As has been pointed out, the clear and unambiguous expressions used in the Constitution,

must be given their full and unrestricted meaning unless hedged in by any limitations. Moreover, when the language employed in the main part of

Article 309 is compared with that of the proviso, it becomes clear that the power given to the Legislature for laying down the conditions is identical

with the power given to the President or the Governor, as the case may be, in the matter of regulating the recruitment of Government servants and

their conditions of service. The Legislature, however, can regulate the recruitment and conditions of service for all times whereas the President and

the Governor can do so only till a provision in that behalf is made by or under an Act of the appropriate Legislature. As the Legislature can legislate

prospectively as well as retrospectively, there can be hardly any justification for saying that the President or the Governor should not be able to

make rules in the same manner so as to give them prospective as well as retrospective operation.

The proviso to Section 124 of the Constitution of Jammu and Kashmir is contextually *pari materia* with the proviso to Article 309 of the

Constitution of India. Therefore, even if it be assumed that SRO 321 of 1995 and SRO 514 dated 22.11.1999 were promulgated much after the

petitioner had absented himself, made himself liable to punishment or rejoined his duties, the provisions of the aforesaid SROs, in view of the

settled position of the law, could apply retrospectively, and it may be added thereto, especially so when the same were only by way of clarification

in nature.

35. Another important factor to be borne in mind is that the period of

unauthorised absence of the petitioner from 01.01.1989 to 06.03.1995 is stated to have been decided and treated as dies non by the Government vide order no.247-ASH of 1995 dated 07.12.1995. Incidentally, SRO 321 of 1995 was also promulgated on the very same day, inasmuch as it is dated 07.12.1995.

36. The arguments advanced by Mr. R. A. Jan, Senior Advocate, that there is no conflict in the judgments; or that the instant Reference is not competent or that the judgment in Dr. Mohammad Afzal Wani v. State of J&K (supra) is per incuriam are all untenable. Once the term dies non means what we have elaborately discussed above â?" the period is non est and not to be counted or taken into consideration for any purpose whatsoever â?" and since this term was introduced and existed in the Government Instruction under Article 163 CSR by virtue of SRO 80 of 1972, there is no question of the prevalence of different fact situations in the above said decided cases. We have also already mentioned there is no provision akin to Article 163 of the CSR contained in the J&K Civil Services (Leave) Rules, 1979, nor is the said provision inconsistent with any of the provisions contained therein. Therefore, undisputedly, it applies to all employees. So far as the argument of Mr. Jan, learned Senior counsel concerning Rule 24 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 is concerned, this point stands covered by our finding that when a period is treated as dies non, how the continuance of the service in that class, category or grade with reference to which the question arises would take place. To reiterate, we may say when a period of absence is treated as dies non, the seniority will continue to have reference to the date of first appointment and depend upon the length of service in that class, category or grade, of course, minus the dies non. As regards the other submission concerning Rule 25 of the 1979 Leave Rules, the learned Senior Counsel seems to forget that the provision relates to absence after expiry of leave, not unauthorised absence. Unauthorised absence from duty constitutes a misconduct involving loss of appointment. Reference to 1979 leave rules is irrelevant, for, there is no provision entitling a government servant to desert his duties. A Government servant cannot even proceed on leave unless it is sanctioned, except, of course, on medical grounds.

37. Reference may also be made to Rule 33 of the High Court Rules which deals with Reference to a large Bench. It reads as under:

33. Reference to a large bench. "The Chief Justice may constitute a bench of two or more judges to decide a case or any question of law

formulated by a bench hearing the case. In the later event the decision of such bench on the question so formulated shall be returned to the bench

hearing the case and that bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any,

arising therein;

Provided that whenever in any case a Division Bench differs from any other Division Bench of the Court on a point of law or usage having the

force of law such case of point shall be referred for decision by a larger bench to be constituted by the Chief Justice.

38. As mentioned at the very outset in this order, and so also has been mentioned by the learned Writ Court in the Reference Order, the question

as to the meaning of the term "dies non" arose before a Division Bench of this Court in Dr. Ashiq Hussain v. State of J&K, 2004 (I)

SLJ 143. Therein the private respondent, Dr. Ghulam Jeelani, Associate Professor, Surgery, Government Medical College, Srinagar, had been

permitted to take up foreign assignment for two years with specific condition that no extension would be granted. This permission had been granted

to him vide letter dated 26.10.1988, but he submitted his departure report on 15.06.1991. Then he resumed his duties on 03.12.1994 and

requested for settlement of his period of absence. Out of the total period from 15.06.1991 to 02.12.1994, two years were treated as without pay

and allowances with rider that the period will not count for pension, increments and other benefits of service; and the remaining period of absence

of one year, 5 months and 17 days were treated as "dies non". When it came to filling up the posts of Professors, a communication dated

08.03.1996 was addressed to the Secretary, Public Service Commission, inter alia, stating therein that since the aforesaid period in respect of Dr.

Ghulam Jeelani had been treated as dies non, the same shall not count for seniority and related service benefits. Dr. Ghulam Jeelani filed writ

petition, SWP no.675 of 1996, challenging the aforesaid communication. The learned Writ Court granted an interim directed to the effect that his

case be considered without taking into account the aforesaid communication. Consequently, the Government vide communication dated

24.06.1996 wrote to the PSC that Dr. Ghulam Jeelani had the requisite teaching experience. In consequence thereof, Dr. Ghulam Jeelani was

promoted as Professor. That order was challenged by Dr. Ashiq Hussain in SWP no.2302 of 1996 which was dismissed the learned Writ Court.

In appeal, the Division Bench held as under:

“The remaining period of one year, 5 months and 17 days has been treated as dies non. The term ‘dies non’ is a shortened form of

‘dies non juridicus’ which means a period during which no legal business is transacted or which is not reckoned for any purpose. Dies non

is only a concession for permitting the beneficiary thereof to have subsequent service in continuation of the period of service before the beneficiary

proceeded on unauthorised absence. When a period is directed to be treated as ‘dies non’, the period in question does not count for any

service benefit which would otherwise accrue during that period, including pension, increment, experience and seniority.”

39. The aforesaid judgment was relied upon with approval in the subsequent Division Bench judgment in Dr. Mohammad Afzal Wani v. State

of J&K (supra). In fact, the above portion of the judgment was quoted in paragraph 24 therein with approval. Para 24 of the judgment together

with the conclusion recorded therein is quoted hereunder:

24. The Division Bench of this Court in case titled Dr. Ashiq Hussain v. State of J&K and ors, reported in 2004 (1) SLJ 143 has dealt with

the ‘Dies-non’ at para-11, which is reproduced as under:

“11. The term ‘dies non’ is a shortened form of ‘dies non juridicus’ which means a period during which no legal business is

transacted or which is not reckoned for any purpose. Dies non is only a concession for permitting the beneficiary thereof to have subsequent

service in continuation of the period of service before the beneficiary proceeded on unauthorised absence. When a period is directed to be treated

as ‘dies non’, the period in question does not count for any service benefit which would otherwise accrue during that period, including

pension, increment, experience and seniority. In that view of the matter, the learned Single Judge was not right in observing that the period of

unauthorised absence is to be counted towards the experience or seniority of respondent no.4 as Associate Professor or that order dated

21.12.1995, whereby the unauthorized absence of respondent no.4 was accorded, ought to have been challenged by the appellant. The appellant

was not required to challenge the order as it never adversely affected him. In fact, the order ought to have been challenged by respondent no.4

because it was he who was adversely affected by it inasmuch as the period spent outside the service by him was not (to) be counted for any

service benefit and that would also include seniority and experience as Associate Professor required for promotion to the post of Professor. In this

view of the matter, the order of the learned Single Judge in this regard is not sustainable in law.â??

For the reasons recoded in this judgment, we subscribe to the view taken by the Honâ??ble Division Bench in defining â??dies-nonâ?? in Dr.

Ashiq Hussainâ??s case.

It is worthwhile to mention here that in Dr. Mohammad Afzal Wani v. State of J&K (supra), the Division Bench elaborately dealt with and

discussed all the three SROs, more particularly SRO 321 of 1995 and 514 of 1999 and came to the above conclusion.

40. Unfortunately, however, in the subsequent Division Bench matter, viz. Zahoor Hussain Zargar v. State (supra), the Court has taken a

different view holding as under:

20. We have gone through the amendments introduced to the Government Instructions, referred to above and find that SROs 321 of 1995 and

514 of 22.11.1999 introduce extended definition of the expression â??dies nonâ??, than the one the Government had contemplated vide SRO 80

of 1972.

Having incurred liability to punishment for unauthorized absence during the operation of SRO 80 of 1972 the appellant could be deprived of only

those service benefits which the Government instructions introduced vide SRO 80 of 1972 had contemplated, and not those which came into force

much after the appellant had been deemed to have rejoined the Department on June 30, 1992.

41. The above, despite the fact that the judgment in Dr. Mohammad Afzal Wani v. State of J&K (supra) had been duly brought to the notice

of the Court which also had reference to the earlier DB judgment in Dr. Ashiq Hussain v. State of J&K (supra), in it, as indicated above. In

terms of the proviso to Rule 33 of the High Court Rules, 1999, quoted herein above, in the event the latter Division Bench, which decided Zahoor

Hussain Zargar v. State (supra) intended to differ from the view taken by the earlier two Division Benches referred to herein above, the only

course open was to refer the case or the point for decision by a larger bench to be constituted by the Chief Justice. Unfortunately, that has not

been done, thereby lending an inconsistency to the law. So is also the case with the decision in Masood Alamgir Shah (Dr.) v. State of J&K,

reported as 2011(2) JKJ 489 (HC), rendered by the learned Single Judge. Therein the learned Writ Court held that the unauthorised absence of

the petitioner therein from service which had been treated as dies non in terms of Government order no.938-HME dated 24.10.1986 would count

towards his service, increments and other pensionary benefits. This is wholly against the judgment rendered by the Division Bench in Dr.

Mohammad Afzal Wani v. State of J&K (supra).

42. In view of what has been extensively discussed and held by us in this judgment as to the meaning and import of the word "dies non"

mentioned in the Instruction introduced to Article 163 CSR vide SRO 80 dated 10.12.1972, together with the import of the Articles 128, 163 and

203 of the CSRs, we hold that the judgments in Zahoor Hussain Zargar v. State (supra) and Masood Alamgir Shah (Dr.) v. State of J&K

(supra) do not lay down a good law and, therefore, the same are hereby over ruled.

43. The Reference stands, accordingly, answered. Let the writ petition be listed before the learned Writ Court within a fortnight from today for

further proceedings, as may be warranted.