

(2012) 05 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 788 of 2011

Dr. Sunil Kumar Raina and Another and Dr. Anuradha Kerni and Others APPELLANT

Vs

State of Jammu & Kashmir and Others RESPONDENT

Date of Decision : 17-05-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Jammu and Kashmir Civil Services (Leave) Rules, 1979 — Rule 15, 61, 61(1), 61(3), 62

Citation : (2012) 05 J&K CK 0009

Hon'ble Judges : Muzaffar Hussain Attar, J

Bench : Single Bench

Advocate : Abhinav Sharma, for the Appellant; Neeru Goswami, Dy. AG, for the Respondent

Judgement

Muzaffar Hussain Attar, Judge

Case: SWP No. 788/2011 CMP No. 1138/2011 c/w

Contempt (SWP) No. 242/2011

SWP No. 789/2011 CMP No. 1139/2011

Contempt (SWP) No. 243/2011.

1. In these petitions similar questions of law are involved and at the request of learned counsel for the parties, are taken up together for final

disposal. Petitioners are substantively holding the posts of Assistant Surgeon in the State Health Department and pursuant to the common entrance

test conducted by the J&K Board of Professional Entrance Examination (for short 'BOPEE') in the year 2011, were selected to undergo various

post graduation medical courses in Government Medical College, Jammu. These

petitions are filed with the prayer that the communication No. HD (Gaz) Gen-73/2011 dated 29.03.2011, which has emanated from respondent no. 1 and is addressed to respondent no. 2 be quashed to the extent it provides that the period of post graduation course to be undergone by the petitioners be treated as study leave, and to the extent the pay and allowances is denied to them. It is also prayed that respondents No. 1 to 3 be directed to pay salary and other allowances during the aforementioned training period to the petitioners.

2. On notice issued, respondents 4 and 5 have filed objections/reply affidavit.

3. Mr. Abhinav Sharma, learned counsel for the petitioners submitted that petitioners, who are undergoing the post Graduation course, are entitled to receive salary for period of three years, viz. the training period. Learned counsel in order to bring home his point submitted that though the petitioners are governed by the J&K Civil Services (Leave) Rules, 1979 (for short 'Rules of 1979'), but the provision contained in Chapter-III and Article 111-A to 166-C of the J&K Civil Service Regulations (Volume I) (for short 'Regulations') are also applicable to the Government servants/petitioners, who are appointed after 1st January' 1979, as same are not in-consistent with the Rules of 1979. Learned counsel invited the attention of the court to Article 44-A which falls in Chapter III of the Regulations and submitted that in terms of the said Article, petitioners are undergoing training course and are entitled to receive the pay/presumptive pay which they were drawing prior to their selection for undergoing the same. Learned counsel submitted that Chapter VI which refers to 'study leave' of Rules of 1979, is not applicable to this case, inasmuch as, petitioners have not applied for grant of study leave and that study leave can be granted for a maximum period of 24 months, whereas petitioner training course is of 36 months duration. Learned also invited attention of the court to notification No. MCI-18(1)/90-Med. dated 22nd August' 2000 issued by the Medical Council of India, New Delhi, wherein and whereunder, with the previous sanction of the Central Government, regulations called 'The Postgraduate Medical Education Regulations, 2000' (for short 'Regulations of 2000') have been notified and submitted that the post graduation course is a training course which has to be undergone in a college and thus Article 44-A of Regulations is attracted and

petitioners would be entitled to receive pay/presumptive pay which they were drawing before they were selected to undergo the said training

course. Learned counsel also referred to communication dated 11.04.2012 issued by the Principal, Government Medical College, Jammu

addressed to the Commissioner Secretary to the Government, Health and Medical Education Department, Civil Secretariat, Jammu wherein the

said authority was informed that since the inception of P.G. courses in the said college, salary/perks to in-service post graduate students, who had

undergone P.G. course, prior to petitioners selection to undergo the said course, were being paid as per LPC received from the relieving

department. This communication, produced at hearing was ordered to be taken on record. Learned counsel, accordingly, prayed for allowing of

the writ petition.

4. Mrs. Neeru Goswami, Learned Dy. Advocate General seriously contested the claim of the petitioners as projected in the writ petitions and

canvassed at the bar by the learned counsel for the petitioners. Learned counsel submitted that Article 44-A of the Regulations is not applicable to

the petitioners, inasmuch as, the said Article is applicable to those in-service Government employees who are deputed to undergo shorter courses.

Learned counsel in this behalf made reference to circular O.M. No. A/9 (77)-II-144 dated 10.12.2009, copy whereof produced by Mrs. Neeru

Goswami was ordered to be taken on record. Learned counsel invited the attention of the court to the Rules of 1979 and submitted that in terms

rule 67 read with rule 73, petitioners are not entitled to any salary while they are on study leave. Learned counsel submitted that in view of the

amendment made in Article 44-A and the Chapter VI of the Rules of 1979 vide SRO 122 dated 25.04.2000, the petitioners are not entitled to

any relief sought in the writ petitions. Learned counsel, accordingly, prayed for dismissal of the writ petitions.

5. In order to appreciate the controversy involved in the writ petitions Article 44-A of CSR, rules 15, 61, 62, 63, 67, 73 of Rules of 1979 and

clause 13.2 of Regulations of 2000 are taken note of: 44-A. (i) Unless otherwise provided for in these rules, Government servants deputed to

receive training in the Training Schools, Colleges, Institutions within the State shall during the period of such training be entitled to receive their

pay/presumptive pay which they would have drawn but for their deputation to such training, no substitute appointments/promotions shall be made

in place of the officers/officials deputed for such trainings. [Recast vide F.D. Notification SRO-122 dated 25.4.2000].

15. Application for leave, - Any application for leave or for extension of leave shall be made in Form I to the authority competent to grant leave.

61. Subject to the conditions specified in this chapter. (I) Study leave may be granted to a Government servant with due regard to the exigencies of

public service to enable him to undergo in or out of India a special course of study consisting of higher studies or specialized training in a

professional or technical subject having a direct and close connection with sphere of his duty.

2. Study leave may also be granted:

(i) for a course of training or study tour in which a Government Servant may not attend a regular academic or semi-academic Course if the course

of training or the study tour is certified to be of definite advantage to Government from the point of view of public interest and is related to sphere

of duties of the Government servant; and

(ii) for the purpose of studies connected with the framework or background of public administration subject to the conditions that:

(a) the particular study tour should be approved by the authority Competent to grant leave; and

(b) the Government servant would be required to submit on his return a full report on the work done by him while on study leave;

(iii) for the studies which may not be closely or directly connected with the work of a Government servant, but which are capable of widening his

mind in a manner likely to improve his abilities as a civil servant and to equip him better to collaborate with those employed in other branches of the

public service.

(3) Study leaves shall not be granted unless:

(i) it is certified by the authority competent to grant leave that the proposed course of study or training shall be of definite advantage from the point

of view of public interest;

(ii) it is for prosecution of studies in subjects other than academic or literary; and

(iii) it is for prosecution of studies in such specialties and subject which there may be dearth of officers in a Department;

(iv) the Department of Economic Affairs of the Ministry of Finance, Government of India agrees to the release of foreign exchange Involved in the grant of study leave, if such leave is outside India.

Study leave out of India shall not be granted for prosecution of studies in subjects for which adequate facilities exist in India or under any of the scheme administered by the Government of India.

(4) Study leave shall not ordinarily be granted to a Government servant:

(i) who has rendered less than three year's service under the Government or till he/she, if probationer, does not complete the period of probations

satisfactorily whichever is later. [Recast vide F.D. Notification SRO 273 dated 23.09.2005]

(ii) who is due to retire or has the option to retire from the Government Service within three years of the date on which he is expected to return to

duty after the expiry of the leave.

(5) Study leave shall not be granted to a Government servant with such frequency as to remove him from contact with a regular work or to cause cadre difficulties owing to his absence on leave.

62. The maximum amount of study leave, which may be granted to a Government servant shall be :

(a) ordinarily twelve months at any one time; and

(b) during his entire service twenty-four months in all (inclusive of similar kind of leave for study or training granted under any other rules).

63. (1) (a) Every application for study leave shall be submitted through proper channel to the authority competent to grant leave;

(b) the course or courses of study contemplated by the Government servant and any examination which he proposes to undergo shall be clearly specified in such application.

(2) Where it is not possible for the Government servant to give full details in his application or if after leaving India he is to make any change in the

programme which has been approved in India, he shall submit the particulars as soon as possible to the Head of the Mission or the authority

competent to grant leave as the case may be and shall not unless prepared to do

so at his own risk, commence the course of study or incur any expenses in connection therewith until he receives the approval of the authority competent to grant the study leave for the course.

67. (1) 'Study leave under these rules shall be sanctioned as leave without allowance. However, the period of Study Leave without allowances

shall not constitute any break in service but the period as spent on 'Study leave without allowance' shall count towards service and other

pensionary benefits. No substitute shall be appointed in place of officers proceeding for Study Leave.' [Recast vide F.D. Notification SRO-122

dated 25.04.2000]

73. 'Authority Competent to sanction study leave.-The concerned Administrative Department shall be competent to sanction study leave without

pay and allowances under these rules within/outside the state or outside the country.

Clause 13.2

All the candidates joining the Post Graduate training programme shall work as 'Full time Residents' during the period of training and shall attend not

less than 80% (eighty percent) of the imparted training during each academic year including assignments, assessed full time responsibilities and

participation in all facets of the educational process.

6. The issues raised in these writ petitions require to be resolved as it appear that the rules occupying the field do not deal with them in

unambiguous terms.

7. Admittedly, the petitioners are members of the services of State Health Department and are substantively holding the posts of Assistant

Surgeon. The pay attached to the post of Assistant Surgeon is fixed by statutory rules and petitioners are entitled to get the benefits of periodical

revisions in terms of pay rules. Before being selected to undergo the Post graduation courses, petitioners were being paid salary attached to the

post of Assistant Surgeon. After having been selected by the BOPEE to undergo the P.G. course, they applied to respondent no. 2 and requested

for being relieved, so as to enable them to join their respective post graduation courses in the disciplines and institutions allotted to them by the

BOPEE. Respondent no. 2 vide communication dated 17th March'2011 sought approval of respondent no. 1, who in turn vide communication

dated 29.3.2011 conveyed the approval for relieving the petitioners to undergo the post graduation courses however, it was made subject to

conditions that the training period would be treated as study leave in terms of SRO 122 of 2000 and they would not be entitled to any pay and

allowance.

8. In the afore-detailed backdrop, following questions arise for the consideration of the court:

1. Whether Chapter VI of the Rules of 1979 is applicable to the facts of the case? If yes. Whether still petitioners would be entitled to receive pay

and allowance which they were receiving prior to their joining Medical College Jammu to undergo the post Graduation Course.

2. If the Chapter VI of Rules of 1979 would not be applicable to the case of the petitioners, then whether their case would be governed by Article

44-A of the Regulations.

3. In the event, neither Chapter VI of Rules of 1979 nor Article 44-A of the regulations would be applicable to the case of the petitioners, then

how and in which manner their case is to be dealt with.

9. Before taking up question No. 1 for its consideration and for being answered, it will be appropriate to state that the BOPEE is creature of the

Statute called Board of Professional Entrance Examination Act. Statutory authority is charged with the duty of making selection of the meritorious

candidates to undergo post graduation course in different colleges of the State of J&K. BOPEE, though creature of statute, is a State Controlled

Authority. BOPEE, in accordance with the mandate of the statute, conducts entrance examination to select the meritorious candidates for

undergoing the post graduation courses. Eligible candidates can be both Government employees and non Government employees. The non

Government employees who are selected to undergo PG course are being paid monthly stipend which was enhanced vide Government order No.

494-HME of 2009 dated 16.11.2009. In terms of Government Order No. 110-HME of 2012 dated 14.02.2012, Government accorded sanction

to the extension of the dispensation of the stipend to those in-service doctors during the period of study as was available to the direct

candidates/General Category of PG students selected by the BOPEE which was already in place in terms of aforementioned Government order

dated 16.11.2009. The post graduate students who are not Government employees are being paid stipend which benefit has been extended to

those post graduate students who are government employees.

10. Court view on question No. 1: Chapter VI of Rules of 1979 deals with the study leave. Rule 61(1) of Rules of 1979 provides that the study

leave may be granted to a Government servant with due regard to the exigencies of the public service to enable him to undergo in or out of India a

special course of study consisting of higher studies or specialized training in a professional or technical subject having direct and close connection

with sphere of his duty. Sub rule 3 of rule 61 provides that study leave shall not be granted unless it is certified by the authority competent to grant

the leave, that the proposed course of study or training shall be of definite advantage from the point of view of public interest; it is for prosecution

of studies other than academic or literary; and it is for prosecution of studies in such specialties and subjects in which there may be dearth of

officers in the Department. Rule 62 of Rules of 1979 provides that the maximum amount of study leave, which may be granted to a Government

servant shall be ordinarily twelve months at one time and twenty four months during his entire service. Rule 63(1)(a) provides for submitting of

application for study leave through proper channel to the authority competent to grant the same. Rule 15 of Rules of 1979 provides as to how an

application for leave or for extension of leave is to be made to the competent authority.

11. What emerges from the appreciation of above rules is that in order to seek study leave an application has to be submitted to the competent

authority through proper channel and same can be granted only when the conditions contained in Rule 61 are complied with. Rule 62 further

provides for maximum duration for which study leave can be granted. Reverting back to the facts of this case, it transpires that post graduation

course is a 36 months course; no application has been filed by the petitioners to seek study leave and competent authority has not issued any

sanction for grant of study leave, inasmuch as, competent authority has not entered into satisfaction about the statutory requirements which would

enable it to sanction the study leave. The invocation of Chapter VI of Rules 1979 by respondent no. 1 appears to be not inconsonance with the

provisions of law. However, looking to rule 67 which has been recast vide F.D. notification SRO 122 of 2000 dated 25.04.2000, the authority

has been given power to sanction study leave, as leave without allowance, which otherwise would mean that employee in whose favour study leave

is sanctioned would be entitled to receive salary without allowance. Rule 73 of the rules 1979 which has been recast vide F.D. notification dated

25.04.2000 and further recast vide F.D. notification SRO no. 133 dated 17.04.2006 confers discretion on the Administrative Department to

sanction study leave without pay and allowance. The said rule, however, does not denude the competent authority of its power to order for

payment of salary while sanctioning study leave in favour of a Government employee. The rule 67 and 73 are to be read in conjunction and in

order to get proper legal results, they are to be construed harmoniously. Though Rule 66 of Rules of 1979 covers the exigency which may arise in

case course of study falls short of study leave, then in such eventuality course can be completed with the previous sanction of the competent

authority to grant leave to the period of short fall but same would be an ordinary leave. In the facts of this case, it is held that provisions of study

leave of Rules of 1979 are not applicable. The authority has not exercised power under Chapter VI of Rules of 1979.

12. Court view on Question No. 2: The Article 44-A provides that in the absence of any regulations Government servants deputed to receive

training in the Training Schools, Colleges, institutions within the State shall during the period of such training be entitled to receive the

pay/presumptive pay which they would have drawn but for their deputation to such training. In order to attract this provision, what has to be

ascertained is as to whether the selection of in-service candidates to undergo training in PG course in the College would constitute deputation in

terms of said rule. The word 'deputation' in common parlance and in its ordinary meaning would mean deputing an employee from one office to

another office or from one organization to another organization or from Government Department to another organization.

13. The State Government has created BOPEE, a Statutory authority, which is charged with the function of selecting eligible candidates to undergo

post graduation course. It is in fact State which through a statutory body is making selection of both eligible Government employees and non

Government employees to undergo post graduation courses. The candidates, so selected by the BOPEE, a statutory arm of the state, are being

imparted training in the Government colleges/Government control Colleges in the State of J&K. The Government colleges/Government Control

Colleges are under the control of the State Government and their affairs are looked by the Medical Education Department of the State

Government. In this backdrop, it is one Arm/Wing of the State which is undertaking the process of selecting meritorious candidates to undergo the

PG course and it is another wing/department of the Government which is imparting training to these selected candidates. In this backdrop it is ruled

that Government employees who are selected to undergo PG course, are in essence deputed to receive training in the colleges and are thus entitled

to receive pay/presumptive pay which they would have drawn but for their such deputation. Article 44-A is thus attracted to the facts of this case

and petitioners would be entitled to receive their pay/presumptive pay which they had drawn before being deputed to undergo PG course.

14. Even otherwise, it does not stand to reason as to how the Government has meted out uniform treatment to those doctors who are its

employees and to those who are not its employees by paying them stipend. The in-service Government doctors who are selected on the basis of

their merit to undergo the said course constitute one single class and those doctors who are not Government employees also selected on the basis

of their merit to undergo PG course constitute different class. In-service doctors, in accordance with statutory rules, are entitled to get many

benefits which include the salary attached to the post. Those doctors who are not Government employees are not clothed with any such benefit.

Treating two different and distinct classes by one yardstick cannot be accepted as Articles 14 and 16 of Constitution of India would not admit of

adopting such a course.

15. The issue may be looked at from yet another angle. Those doctors, who are not Government employees and are selected to undergo PG

course are being paid stipend. There has to be some purpose for paying stipend to such class of persons. It is not true that the Government is

doling out charity to such class of people. In terms of clause 13.2 of Regulations of 2000, a candidate who is joining the PG training programme

has to work as 'Full Time Resident' during the period of training. While undergoing training course, the full time residents have to perform duties as well. It appears that it is primarily for this reason that Government is paying stipend to those doctors who are not Government servants and who have been selected to undergo PG course. Those doctors who are Government employees and have been selected to undergo PG course, in terms of Regulations of 2000, are 'Full Time Residents' and thus besides undergoing training course have also to perform duties. For performing their duties as Assistant Surgeons they are paid salaries and while enhancing their professional skills they are simultaneously performing duties in the hospitals as 'Full Time Residents'; and on this reasoning also, they are entitled to be paid salary, if not allowances attached to the post. Denial of salary, in these circumstances, would be arbitrary and unreasonable and such an action would violate the constitutional guarantees contained in Articles 14 and 16 of the Constitution of India.

16. The impugned communication has the affect of depriving the petitioners of one of their guaranteed service rights viz. salary attached to the post of Assistant Surgeon. An employee can be denuded of his salary only in accordance with the procedure established by law. Petitioners by undergoing PG course have not ceased to be the Government employees. No such order is issued by competent authority. Even in the facts of this case, such an order in law cannot be issued. Depriving the petitioners of their salary which is guaranteed to them by the Statutory rules would result in their ceasing to be Government employees for the period they have to undergo the said training course. Such a situation cannot be countenanced in law.

17. For the above stated reasons it is held that petitioners, while undergoing PG course, would be entitled to receive the salary attached to the post of Assistant Surgeon without any allowance.

18. These petitions, for the above stated reasons, are disposed of along with all connected CMP(s) in the following manner:

19. By issuance of Writ of Certiorari, the condition 'that the period of Post Graduation Course will be treated as study leave without any pay and allowance' contained in impugned communication No. HD (Gaz) Gen-73/2011 dated 29.03.2011 is quashed. Respondents are directed to pay

the salary without allowances to the petitioners which they have drawn before their joining of PG course.

20. Contempt (SWP) Nos. 242/2011 and 243/2011

21. Since the main petitions have been disposed of, contempt petitions do not survive. Contempt petitions are disposed of.