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(2018) 10 J&K CK 0010

In the Jammu And Kashmir High Court

Case No : Service Writ Petition No. 2601 Of 2015

Gh. Nabi Ganai @APPELLANT@Hash State Of Jammu & Kashmir And Others

Date of Decision : 03-10-2018

Acts Referred:
Jammu & Kashmir High Court Rules, 1999 — Rule 33

Citation : (2018) 10 J&K CK 0010

Hon'ble Judges : M. K. Hanjura, J

Bench : Single Bench

Advocate : Rizwan, G. Q. Bhat, S. Naqshbandi

Final Decision : Dismissed

Judgement

1. The facts that stem out from the instant petition are that the petitioner was initially on 9.2.1988 engaged as a daily-rated worker in the respondent department and he continued to serve as such till 31.01.2013. In terms of the relevant rules and regulations incorporated in SRO 64 of 1994, the petitioner was due to be regularized on 9.2.1995 on the completion of seven years' continuous service as a daily-rated worker. The petitioner was denied the benefit of the said SRO. He knocked at the doors of the court for the redressal of his grievances and the court directed the respondents to regularize the petitioner on the due date. It is contended that the petitioner fell ill and could not attend to his duties with effect from 12.11.1996 to 26.11.2000 and later on he came to be retired on 31.1.2013. The petitioner was regularized vide order dated 10.02.2014 with effect from 01.4.1995 and it was directed that the period during which he did not work shall be decided separately. Later on by virtue of the impugned order this period of absence was treated as "dies non" and it is this action of the respondents that the petitioner has challenged in this writ petition inter alia on the grounds that it is illegal and arbitrary. He has also contended that he has not been given an opportunity of being heard while passing the said order.

2. The respondents have vehemently contested the claim of the petitioner by stating that the petition of the petitioner is devoid of any merit and substance.

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He voluntarily left the service on 12.11.1996 without following the due procedure and resumed the duty on 26.11.2000. It is also stated that the services of the petitioner were regularized after his retirement and the administrative department vide order dated 8.9.2015 has observed that "dies non" is applicable to the regular employees only under the rules in vogue.

The petitioner was regularized after the period of his absence from the duty and hence there has beena break in his services and the period of this absence from the duty has to be deleted from his service record.

3. Heard and considered.

4. In case titled Mir ZaffarAman (Dr.) versus State of J&K and others, reported in 2017 (2) JKJ 105 (HC) (FB), the import and the extent of the word "dies non" has been elaborately dealt with and the relevant extracts thereof are detailed below:

"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 vs. 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 jurisdicus' 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.' For the

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reasons recoded in this judgment, we subscribe to the view taken by the Hon'ble Division Bench in defining 'dies-non' in Dr. Ashiq Hussain'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 'dies non', 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 June3 09, 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 hereinabove, 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 hereinabove, 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)".

5. The term 'dies non' is a shortened form of 'dies non jurisdicus' which means a period during which no legal business is transacted or which cannot be reckoned or calculated for any purpose. Dies non is only a concession allowed to 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 the service benefits which would otherwise have accrued to an

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employer during that period, including pension, increment, experience and seniority, had he transacted any legal business. The law does not envisage or convey that an opportunity of being heard should be given to an employee before the period of his absence is directed to be treated as dies non. The rules of natural justice do not come into play in such an eventuality. Unauthorized absence deprives and divests an employee from any service benefit which would otherwise have accrued to him during that period.

6. In view of what has been said and done above, there is no merit in the petition of the petitioner. It is devoid of any substance. It entails dismissal, as a corollary to which the same is dismissed.

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