

(2016) 10 J&K CK 0013

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 64 of 2008, MP No. 01 of 2016 c/w
Service Writ Petition (SWP) No. 2421 of 2012 and MP No. 01 of 2016

Kuldeep Singh

APPELLANT

Vs

State of J&K

RESPONDENT

Date of Decision : 25-10-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Constitution of Jammu and Kashmir, 1956 — Section 103

Citation : (2016) 4 JKJ 475 : (2017) LIC 1635

Hon'ble Judges : Mr. Alok Aradhe, J.

Bench : Single Bench

Advocate : Mr. R. Koul, Advocate and Mr. Rohit Kapoor, AAG, for the Respondents; Mr. Abhinav Sharama, Advocate, for the Appellant\Petitioner

Final Decision : Disposed off

Judgement

Mr. Alok Aradhe, J. - SWP No. 64/2008

In this writ petition under Article 226 of the Constitution of India read with Section 103 of the J&K State Constitution, the petitioners, who are

Medical Assistants, seek a direction to the respondents to accord them the benefit of SRO 81 dated 07.03.2006 retrospectively from the date of

their initial appointments and not from the prospective date with all the consequential benefits. The petitioners have also prayed for applying the

principle of 'reading down' SRO 81 dated 07.03.2006 and have prayed that the aforesaid SRO should be given effect from 30.03.1992 in order

to avoid it being declared unconstitutional. In order to appreciate the petitioners' grievance, few facts need mention, which are stated infra.

2. The petitioners were appointed as Medical Assistants in the year, 1993 in the pay scale of Rs. 950-1500/- . It is pertinent to note that

previously the post of Medical Assistant carried the pay scale of Rs. 900-1830/-. However, by SRO 75 dated 30.03.1992 of the Jammu and

Kashmir (1) Civil Services (Revised Pay) Rules, 1992, the existing pay scale of the post of Medical Assistant was upgraded to Rs. 1200- 2040/-.

However, it was provided that fresh appointments shall be made in the pay scale of Rs. 950-1500/- and incumbents shall be paid pay scale of Rs.

1200-2040/- after putting in eight years of service in the pay scale of Rs. 950-1500/-. The relevant extract read as under:

(1) Refer Book JK's Civil Services (Revised Pay) Rules manual in J&K (1973-2016). pay of Civil Servant is Revised by Rules issued by the J&K

Govt. Since 1972, the State of J&K has revised rules relating to pay in 1982, 1987, 1992, 1998 and 2009 are updated till June 2016. Posts are

designated under the Revised Pay Rules and all the rules have own impact and 1972 rules the revised pay subsequent rules. Along with ready

reckoner, govt. orders, circulars, clarifications etc. [2nd Ed. 2016 [Jay Kay reporter Pvt. Ltd.]]

(b) Patwaries:

All the Patwaries in the existing pay scale of Rs. 900-1830/- will be placed in the pay scale of Rs. 1200-2040/- Fresh appointments to the post of

Patwaries will initially be made in the pay scale of Rs. 950-1500/- and they will be placed in the pay scale of Rs. 1200-2040/- after putting in eight

years of service in the scale of Rs. 950-1500/-

(c) Medical Assistants:

The provisions of (b) above will apply in the case of Medical Assistants also mutandis.

3. Thereafter, vide SRO No.18 dated 19.01.1998 of the Jammu and Kashmir Civil Servicers (Revised Pay) Rules, 1998, which was made

effective retrospectively with effect from 01.01.1996. Under the aforesaid rules, the pay scale of Rs. 1200-2040/- was revised to Rs. 4000-

6000/- and pay scale of Rs. 950-1500/- was revised to Rs. 3050-4910/- and Rule 15 of the Rules provided that all the Medical Assistants

existing in the pay scale of Rs. 1200-2040 would be placed in the pay scale of Rs. 4000-6000/- and fresh appointments to the post of Medical

Assistant shall be made in the pay scale of Rs. 3050-4910/- and they would be placed in the pay scale of Rs. 4000-6000/- after putting in eight

years of service in the pay scale of Rs. 3050-4910/- The relevant extract of the Rule reads as under:

(b) Patwaries:

All the Patwaries in the existing pay scale of Rs. 1200-2040/- will be placed in the pay scale of Rs. 4000-6000/-. Fresh appointments to the post

of Patwaries will initially be made in the pay scale of Rs. 3050-4590/- and they will be placed in the pay scale of Rs. 4000-6000/- after putting in

eight years of service in the scale of Rs. 3050-4590/-

(c) Medical Assistants:

The provisions of (b) above will apply in the case of Medical Assistants also mutandis.

4. On a representation being made by the Medical Assistants, who were appointed after 30.03.1992 seeking release of the salary in the pay scale

of Rs. 1200-2040/- with effect from the date of their initial appointments on the ground that the Medical Assistants appointed prior to 30.03.1992

were being paid salary in the higher pay scale, the State Government issued SRO 81 dated 07.03.2006 by which a proviso was inserted after Rule

15 (c) of SRO 18 dated 19.01.1998, which reads as under:

Provided that all the Medical Assistants (Pharmacist) carrying the revised pay scale of Rs. 3050-4910/- shall be w.e.f. 1st April, 2005 placed in

the pay scale of Rs. 4000-6000/-. Future recruitment to the post of Medical Assistant (Pharmacist) will be made in the pay scale of Rs. 4000-

6000/-

The petitioners were deprived of the benefit of SRO 81 dated 07.03.2006 and are getting lesser pay. In the aforesaid factual background, the

petitioners have approached this Court.

5. Learned counsel for the petitioners submitted that the petitioners are carrying the same post and are performing the same duties, yet they are

being paid lesser pay. It is further submitted that the purpose of issuing of SRO 81 dated 07.03.2006 was to remove disparity between the

Medical Assistants who stood appointed prior to 30.03.1992 and those who stood appointed after 30.03.1992 and placing them in the same pay

scale. However, the disparity was removed with effect from 01.04.2005 by placing all the Medical Assistants in the pay scale of Rs. 4000-6000/-

instead of giving effect from 30.03.1992. It is also submitted that the by way of amendment in the SRO a class is created within class itself, which

is not permissible under Articles 14 & 16 of the Constitution of India. Lastly, it is urged that SRO 81 dated 07.03.2006 be read down and

disparity be removed by giving effect to the SRO with effect from 30.03.1992 instead of 01.04.2005 by applying the doctrine of 'reading down'.

In support of his submissions, learned counsel for the petitioners has placed reliance on the decision of Hon'ble the Supreme Court in the case of

State of Kerala and others v. Unni and another, (2007) 2 SCC 365.

6. On the other hand, learned Additional Advocate General, submitted that at the time of appointment of the petitioners a particular pay scale was

prescribed for the post of Medical Assistant. The petitioners with their eyes wide open have accepted the post and pay scale and they are

estopped from complaining now. It is further submitted that no relief can be granted to the petitioners as relief of quashment of proviso to Rule 15

(c) of SRO 81 dated 07.03.2006 has not been sought in the petition on the ground that the same is ultra vires. It is further submitted that the words

to the proviso are clear and unambiguous, therefore, the doctrine of reading down cannot be applied to the fact situation of the case. In support of

the aforesaid submissions, reliance has been placed on the decisions of the Supreme Court in the case of Federal Steam Navigation Co. v.

Department of Trade and Industry, (1974) 2 All E.R 97 100, Jit Ram Shiv Kumar v. State of Haryana, AIR 1980 (SC) 1285, Shri

Gurbaksh Singh Sibbia etc v. State of U.P., (1980) 3 SCR 383 and Delhi Transport Corporation v. DTC Mazdoor Congress, (1991)

AIR 101.

7. I have considered the rival submissions made at the bar and have perused the record. The object and purpose of issuance of SRO 81 dated

07.03.2006 was to bring all the Medical Assistants at par i.e. in one pay scale. Admittedly, all the Medical Assistants who were appointed prior to

or after 01.4.2005 hold the same post and performing the same duties, therefore, they are entitled to the same salary and pay scale on the principle

of equal pay for equal work. However, the moot question which arises for consideration is whether any relief can be granted to the petitioners in

absence of any challenge to proviso to Rule 15 (c) of SRO 81 dated 07.03.2006

on the ground that the same is ultra vires Articles 14 & 16 of the Constitution of India and whether relief as prayed for by the petitioners can be granted to them by applying the principle of reading down SRO 81 dated 07.03.2006.

8. It is well settled rule of statutory interpretation that if on one construction a given statute will become ultra vires the power of legislature whereas, on the another construction, which may be open, statute remains effective and operative, the Court will prefer latter on the ground that legislature is presumed not to have intended and excess on its jurisdiction, but the Rule applies only where two views are available as to the meaning of statutory language. The principle of reading down is the Rule of harmonious construction. (See Union of India v. Elphinstone Spinning and Weaving Co. Ltd. AIR 2001 SC 724, Uttar Pradesh Power Corporation Ltd. v. Ayodhya Prasad Misra, AIR 2009 SC 296 and M.

Rathinaswami v. State of Tamil Nadu (2009) 5 SCC 625) (Also see principle of statutory interpretation by justice G. P. Singh 13th Edition).

9. The principle of 'reading down' means that general words may be construed in a limited sense to avoid the statute becoming unconstitutional. So also, words may be construed in a wider sense, if narrower construction rendered the law unconstitutional and that result in avoiding the words

giving a wider meaning. (See Express Newspaper limited v. Union of India, AIR 1985, SC 587).

10. It is clear well settled law proposition that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. (See Union of India v. Ind-Swift Laboratories Ltd. (2011) 4 SCC 635). In

the instant case opportunity to the learned counsel for the petitioners was granted on 28.09.2006 to seek relief in respect of SRO 81 dated

07.03.2006. However, instead of seeking relief of quashment of proviso to Rule 15 (c) of aforesaid SRO as ultra vires, the petitioners have sought

relief of reading down the proviso. At the cost of repetition, proviso to Rule 15 (c) is reproduced below:

Provided that all the Medical Assistants (Pharmacist) carrying the revised pay scale of Rs. 3050-4910/- shall be w.e.f. 1st April, 2005 placed in

the pay scale of Rs. 4000-6000/-. Future recruitment to the post of Medical

Assistant (Pharmacist) will be made in the pay scale of Rs. 4000-6000/-

11. The words '1st April, 2005' which are clear and unambiguous cannot be read as 30.03.1992. The proviso is not capable of two interpretations

and in any uncertain terms, it seeks to confer the benefit of revised pay scale of Rs. 3050-4910 with effect from 01.04.2005, therefore, in the

statutory opinion of this Court and in the fact situation of the case, the principle of reading down cannot be made applicable to the instant case.

12. So far as reliance placed by the learned counsel for the petitioners in the case of State of Kerala and others v. Uni and ors (supra), it is

pertinent to mention that in paragraph 44 of the aforesaid decision, which has been relied upon by the learned counsel for the petitioners reads as

under:

Interpreting a rent control legislation, Lahoti.J. (as His Lordship then was) in Rakesh Wadhawan v. Jagdmba Industrial Corpon. Opined

(SCC 455 para 19).

19 There are two means of resolving the riddle, firstly, by placing such meaningful interpretation on the provision as would enable the legislative

intention being effectuated; and secondly, by devising such procedure without altering the structure as would enable the substantive law being

meaningfully implemented. Let us see whether the expression assessed by the Controller qualifies only ' the cost of application ' or qualifies the

entire preceding expression i.e. arrears of rent and interest at six percent per annum on such arrears together with the cost of application 'as there is

ambiguity and the provision is susceptible to two meaning, the court should interpret it in the manner which will best serve the object sought to be

achieved.

13. Thus, from the perusal of paragraph 44 of the aforesaid judgment, it is evident that the provision in the aforesaid case was ambiguous and

therefore, doctrine of reading down was invoked. In the instant case, there is no ambiguity, therefore, in absence of any challenge to the vires of

proviso to Rule 15(c) of the SRO 81, no relief as prayed for by the petitioners can be granted. In this connection, reference may be made to the

decision of Hon'ble the Supreme Court in the case of Subramaniam Swamy v. Election Commission of India, (2008) 14 SCC 318. However,

taking into account the fact that the litigants should not suffer on the ground of inadvertence on the part of the counsel, I deem it appropriate to

grant liberty to the petitioners to approach this Court again by challenging the validity of the proviso to Rule 15(c) of SRO 81 dated 07.03.2006.

14. With the aforesaid liberty, the writ petition is disposed of.

SWP No. 2421/2012

In this writ petition under Article 226 of the Constitution of India read with Section 103 of the J&K State Constitution, the petitioners, who are

Medical Assistants, seek quashment of order dated 01.03.2011, by which an amount of Rs. 64,620/- is sought to be recovered from petitioner

No. 3 on the ground that petitioner No. 3 is not entitled for in-situ promotion under SRO 14 of 1996. The petitioners have also prayed for

quashment of recovery proceedings initiated against them as well as writ of prohibition restraining the respondents from making any recovery from

the petitioners. The petitioners have also prayed for a direction to the respondents to accord them all the consequential benefits. The petitioners

have also prayed for grant of pay scale of Rs. 4000-6000/- in favour of the petitioners with effect from their initial appointments as Medical

Assistants. In order to appreciate the petitioners' grievance, few facts need mention, which are stated infra.

15. The petitioners were appointed as Medical Assistants on 05.10.1993, 05.10.1993, 24.02.1994 and 17.01.1997 respectively in the pay scale

of Rs. 950-1500/-. It is pertinent to note that previously the post of Medical Assistant carried the pay scale of Rs. 900-1830/-. However, by SRO

75 dated 30.03.1992 of the Jammu and Kashmir Civil Services (Revised Pay) Rules, 1992, the existing pay scale of the post of Medical Assistant

was upgraded to Rs. 1200-2040/-. However, it was provided that fresh appointments shall be made in the pay scale of Rs. 950-1500/- and

incumbents shall be paid pay scale of Rs. 1200-2040/- after putting in eight years of service in the pay scale of Rs. 950-1500/-. The relevant

extract read as under:

(b) Patwaries:

All the Patwaries in the existing pay scale of Rs. 900-1830/- will be placed in the pay scale of Rs. 1200-2040/- Fresh appointments to the post of

Patwaries will initially be made in the pay scale of Rs. 950-1500/- and they will

be placed in the pay scale of Rs. 1200-2040/- after putting in eight years of service in the scale of Rs. 950-1500/-

(c) Medical Assistants:

The provisions of (b) above will apply in the case of Medical Assistants also mutandis.

16. Thereafter, vide SRO No. 18 dated 19.01.1998 of the Jammu and Kashmir Civil Servicers (Revised Pay) Rules, 1998, which was made

effective retrospectively with effect from 01.01.1996. Under the aforesaid rules, the pay scale of Rs. 1200-2040/- was revised to Rs. 4000-

6000/- and pay scale of Rs. 950-1500/- was revised to Rs. 3050-4910/- and Rule 15 of the Rules provided that all the Medical Assistants

existing in the pay scale of Rs. 1200-2040 would be placed in the pay scale of Rs. 4000-6000/- and fresh appointments to the post of Medical

Assistant shall be made in the pay scale of Rs. 3050-4910/- and they would be placed in the pay scale of Rs. 4000-6000/- after putting in eight

years of service in the pay scale of Rs. 3050-4910/- The relevant extract of the Rule reads as under:

(b) Patwaries:

All the Patwaries in the existing pay scale of Rs. 1200-2040/- will be placed in the pay scale of Rs. 4000-6000/- Fresh appointments to the post

of Patwaries will initially be made in the pay scale of Rs. 3050-4590/- and they will be placed in the pay scale of Rs. 4000-6000/- after putting in

eight years of service in the scale of Rs. 3050-4590/-

(c) Medical Assistants:

The provisions of (b) above will apply in the case of Medical Assistants also mutandis.

17. On a representation being made by the Medical Assistants, who were appointed after 30.03.1992 seeking release of salary in the pay scale of

Rs. 1200-2040/- with effect from the date of their initial appointments on the ground that the Medical Assistants appointed prior to 30.03.1992

were being paid salary in the higher pay scale, the State Government issued SRO 81 dated 07.03.2006 by which a proviso was inserted after Rule

15 (c) of SRO 18 dated 19.01.1998, which reads as under:

Provided that all the Medical Assistant (Pharmacist) carrying the revised pay

scale of Rs. 3050-4910/- shall be w.e.f. April, 2005 placed in the pay scale of Rs. 4000-6000/-. Future recruitment to the post of Medical Assistant (Pharmacist) will be made in the pay scale of Rs. 4000-6000/-

The petitioners were deprived of the benefit of SRO 81 dated 07.03.2006 and are getting lesser pay.

18. Under the provisions of SRO 18 dated 19.01.1998, the petitioner Nos. 1, 2 & 3 were entitled to pay scale of Rs. 4000-6000/- from

01.01.1996 and petitioner No. 4 from the date of his initial appointment. The petitioner No. 1 was placed in the pay scale of Rs. 4000-6000/-

from his existing pay scale of Rs. 3050-4910/- with effect from the date the petitioner No. 1 completed 8 years regular service as he was not

granted any promotion throughout his career. Similar benefits were granted to the petitioner Nos. 2, 3, & 4. However, by the impugned order

recovery has been sought on the ground that the petitioners fall under a special category in terms of SRO 18. In the aforesaid factual background,

the petitioners have approached this Court.

19. Learned counsel for the petitioners submitted that the petitioners have not been granted benefit of higher pay scale under any special provision

but have been granted benefit of higher pay scale as the petitioners were not granted regular promotion. Therefore, the impugned action of the

respondents in seeking recovery of amount is patently arbitrary as the case of the petitioners is not covered under Rule 3 (ii) (g) of SRO 14 dated

15.01.1996.

20. On the other hand, learned counsel for the respondents submitted that in view of the Jammu and Kashmir Civil Service (Higher Standard Pay

Scale Scheme) Rules, 1996 and in particular, Rule 3 (ii) (g) of the aforesaid Rules, excess payment has been paid to the petitioners, which is liable

to be recovered.

21. I have considered the submissions made by the learned counsel for the parties and have perused the record. For facility of reference, Rule 3

(ii) (g) is reproduced as under:

Such of the categories of posts/employees, for which special treatment is expressly provided or may be provided under any law or Rule or

notification or order for the time being in force.

22. In the instant case, petitioners have been granted benefit of higher pay scale under J&K Civil Services (Revised Rules) 1998 after completion of eight years service. Therefore, the aforesaid benefit of higher pay scale has been granted to the petitioners on ground that they were not granted any promotion. In other words, petitioners were not granted benefit under any special provision, therefore, Rule 3 (ii) (g) has no application to the fact situation of the case. Therefore, the impugned action of respondents in seeking recovery in question from the petitioners in the eyes of law cannot be sustained. It is, accordingly, quashed. The respondents are directed to consider the in-situ promotion case of the petitioner in accordance with law within a period of two months from the date of receipt of a certified copy of order passed today. However, for the reasons assigned in SWP No. 64/2008, benefit of SRO 81 dated 07.03.2006 cannot be granted to the petitioners as the petitioners have not challenged the vires of the same. Accordingly, the writ petition is disposed of.