
(2013) 05 J&K CK 0014

In the Jammu And Kashmir High Court

Case No : OWP No's. 1724 and CMP No. 2752 of 2011

Mohammad Akram Khan

APPELLANT

Vs

State of Jammu and Kashmir and Others

RESPONDENT

Date of Decision : 22-05-2013

Acts Referred:

Citation : (2013) LabIC 3446

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Advocate : Jehangir Iqbal Ganaie, for the Appellant; T.H. Khawja and Shuja-ul-Haq, G.A., for the Respondent

Final Decision : Allowed

Judgement

Hasnain Massodi, J.—Petitioner was working as Sericulture Assistant in Sericulture Department of the State Government and retired on

superannuation some time in 2011. His son namely Mohammad Jassarat Khan a class 8th student, as ill luck would have it, was while the petitioner

was in service, found to be suffering from liver failure- "Fulminant Hepatic Failure". The doctors at Sher-i-Kashmir Institute of Medical Science

(SKIMS) Soura, Srinagar advised liver transplant. Since SKIMS and even All India Institute of Medical Science (AIIMS), New Delhi, did not

have facility for liver transplant. Mohammad Jassarat Khan was airlifted from Srinagar to Delhi and admitted in Medanta Medicity Hospital,

Gurgaon. Petitioner donated a part of his liver to his son and liver transplant procedure was done in the said Private Hospital. Petitioner, after the

live donor liver transplantation" of his son, approached respondents with the medical reimbursement claim. The State Government vide Govt.

Order No. 93-Agri of 2011 dated 17.3.2011 accorded sanction to the reimbursement of medical expenses incurred by the petitioner on the treatment of his son at Medanta Medicity Hospital, Gurgaon in relaxation of Jammu & Kashmir Civil Services (Medical Attendance-cum-Allowance) Rules 1990, subject to the condition laid down in the order.

2. In terms of condition No. 1, the reimbursement of charges was to be made for the "admissible Procedure/items at the rates in vogue at the

AIIMS, New Delhi". Petitioner aggrieved with the condition No. 1, approached the respondents for review of the order dated 17.3.2011.

Petitioner's case was that as AIIMS, New Delhi did not have facility for "Live Donor Liver Transplant" and did not conduct such procedures, the

reimbursement of medical expenses could not be linked with the "rates in vogue at AIIMS, New Delhi." Respondents realizing the error committed

in making rates in vogue in AIIMS applicable to the petitioner's case, reviewed the order and passed a fresh order being Government Order No.

208-Agri of 2011 dated 21.7.2011. The respondents now linked the reimbursement of Medical expenses with the "rates in vogue at the Institute

of Liver & Biliary Sciences, New Delhi, SG, PGI, Lucknow, to the extent of Rs. 12.00 lacs.

3. Petitioner aggrieved that the respondents while making "rates in vogue at Institute of Liver & Biliary Sciences, New Delhi, SG, PGI, Lucknow,

applicable to the reimbursement of medical claim in his favour had unauthorisedly put a cap of Rs. 12.00 lacs on such reimbursement, approached

this Court with a petition being OWP No. 973/2011. Petitioner's case was that he, as evident from the documents submitted to the respondents,

had incurred an expenditure of Rs. 38.00 lacs on treatment of his son and was therefore entitled to reimbursement of whole of amount so spent.

The petition was disposed of on 24.8.2011 with the following direction:

this petition is disposed of and respondents are directed to consider the claim of the petitioner in accordance with law for reimbursement of the

medical expenses which he has spent on performing Live Liver Transplantation of his son. Respondents to consider the said claim of the petitioner

and pass appropriate orders within a period of eight weeks from the date copy of this order is served on them.

4. Petitioner's claim, in compliance of writ Court order dated 24.8.2011, was

accorded fresh consideration and rejected vide Govt. Order No.

352-Agri of 2011 dated 17.11.2011. Petitioner through medium of writ petition on hand calls in question the Govt. Order No. 208-Agri of 2011

dated 21.7.2011 as also Govt. Order No. 352-Agri of 2011 dated 17.11.2011.

5. Petitioner's case is that in terms of Rule-5 Jammu & Kashmir Civil Services (Medical Attendance-cum-Allowance) Rules 1990, he is entitled to

reimbursement of expenditure incurred by him on treatment of his son along with travelling expenses from Srinagar to Gurgaon and return to

Srinagar. It is reiterated that the petitioner was constrained to get his son treated at Medanta Medicity Hospital Gurgaon, as the required facility

was not available either at SKIMS Srinagar or at AIIMS, New Delhi.

6. Petitioner on the strength of the averments made in the petition, seeks a writ of certiorari quashing Govt. order No. 208-Agri dated 21.7.2011

to the extent it fixes a cap of Rs. 12.00 lacs on petitioner's reimbursement claim and the Govt. order No. 352-Agri of 2011 dated 17.11.2011

whereby petitioner's claim for full reimbursement has been rejected. Petitioner also prays for a writ of mandamus commanding respondents to

reimburse the expenditure incurred by the petitioner on medical treatment of his ailing son. Petitioner in the supplementary affidavit dated 3.7.2012,

alleging discrimination, states that in case of medical reimbursement claim of one Bashir Ahmad Sheikh, an advance amount of Rs. 18.75 lacs was

sanctioned vide Govt. order No. Home-300 of 2011 dated 23.3.2011 reflecting 75% of the expenditure to be incurred on treatment of his son

without any upper limit and that the petitioner was singled out for hostile treatment.

7. Respondents in their reply reiterate the reasons detailed in consideration order dated 17.11.2011 for rejecting the petitioner's claim. It is

pleaded that relaxation in rules has been allowed in case of petitioner on three occasions and no further relaxation is called for as regards upper

limit fixed in impugned order dated 17.11.2011. It is pleaded that as per the enquiries made by the Director SKIMS, Soura, ""Live Donor Liver

Transplantation"" involves Rs. 11 to 12 lacs in all Public and Private Hospitals including ""Institute of Liver and Biliary Sciences New Delhi and SG,

PG Institute Lucknow"" and that Director SKIMS has informed the respondents accordingly.

8. The respondents in their reply to the supplementary affidavit by the petitioner have admitted that an amount of Rs. 18.75 lacs was sanctioned as

advance drawal in favour of one Bashir Ahmad Sheikh an employee of Home Department, to enable him to get liver transplant of his son done at

Medanta Medicity Hospital, Gurgaon.

9. I have gone through the pleadings and heard Ld. Counsel for the parties.

10. The Jammu & Kashmir Civil Service (Medical Attendance-cum-Allowance) Rules 1990, provide for reimbursement of the amount, if any,

charged by the hospital authorities, including cost of drugs purchased from market during the period of hospitalisation in any Govt. or private

hospital within or outside the State, of the employee himself or a member of his family wholly dependable on him. Rule 6 of the Rules is relevant to

the present controversy and needs to be noticed. It reads:

'Treatment outside the State

(1) Treatment outside the State may be authorised in respect of beneficiary by the Administrative Department concerned on production of a

certificate on the prescribed proforma (Annexure') by the Head of Speciality not below the rank of Associate Professor. Where a Professor is not

available it should be counter-signed by the concerned Principal of Medical College in the State (Director SKIMS shall also be Competent

Authority for certification.)

(2) Cost incurred on treatment may be reimbursable as under regardless of any pay ceiling--

(a) Actual expenses incurred on Road/Railway fare of the patient and the attendant (up to one) if any accompanying him by the class of which he is

entitled for journey on tour.

(b) Air fare of the patient only if in case of ailment of a serious nature, the Principal, Medical College or the Director Health Services (Director

SKIMS) justifies for reasons recorded that the patient cannot travel by rail/road in such cases the fare of the attendant will be reimbursable on

road/rail basis.

(c) Expenditure incurred on Pathological, Bacteriological, Radiological and other methods of examination/investigation or treatment like electric

therapy etc.

(d) Charges including cost of blood and blood transfusion if any levied by hospital authorities.

(e) Operation charges paid to Hospital.,

(f) Consultation fees if any paid under hospital rules and cost of medicines purchased from market on the advice of hospital authorities.

(g).....

(3) The reimbursement will be admissible only on the production of vouchers duly certified by the concerned medical authorities of the

Hospital/Institutions.

11. Petitioner's son admittedly has undergone 'live donor liver transplant' at Medanta Medicity Hospital Gurgaon. The patient was referred to the

Hospital outside the State by Department of Gastroenterology SKIMS, Soura, observing that he was in need of ""urgent liver transplant"". The

surgical operation was done on 14.9.2010. His treatment outside the State in a private hospital i.e. Medanta Medicity Hospital Gurgaon, was

accorded post-facto sanction by the State Government vide order No. 93-Agri of 2011 dated 17.3.2011. It is pertinent to point out that Medanta

Medicity Hospital does not find place in the list of private Hospitals empanelled under Rule-6-A of the Rules. The State Government therefore vide

aforesaid Govt. order of 2011 did not only accord post-facto sanction to the treatment in a private hospital but also in a hospital not empanelled

u/s 6-A.

12. It is required to be pointed out that Government in terms of Rule-8 of the Rules has reserved to itself the power to dispense with or relax the

requirement of any rule to the extent, the Rule in the opinion of the Government, causes undue hardship in a particular case. The relaxation in

requirements of the rule may be granted subject to such exceptions and conditions as the Government may consider necessary for dealing with the

case in a just and equitable manner. It would be profitable to reproduce Rule-8 for ready reference:

Right of changing or interpretation etc.

(i) The Government reserves to itself the right of changing or cancelling the rules in these regulations from time to time at its discretion and of

interpreting their meaning in case of dispute.

(ii) Power o relax.--Where the Government is satisfied that the operation, if any, of these rules has caused undue hardship in particular case, it may

by order for reasons to be recorded in writing, dispense with or relax the requirements of that rule to such extent and subject to such exception and

conditions as it may consider necessary for dealing with the case in a just and equitable manner:

Provided that no such order shall be made except with the concurrence of the Finance Department.

13. The controversy over relaxation of rules as regards the hospital where the patient has undergone Surgery, is therefore settled and no more alive

or to be raked up by the respondents.

14. The Jammu & Kashmir Civil Services (Medical Attendance-cum-Allowance) Rules 1990, do not put a cap on the expenditure to be incurred

by the ""beneficiary"" under rules on treatment in Government Hospital or a private hospital whether empanelled or not empanelled under Rules.

There is nothing in the Rules to suggest that, relaxation if any allowed, as regards any statutory requirement, disentitles the beneficiary from any

further relaxation in respect of a different requirement. Rule 6-(2) of the rules details the expenses incurred on treatment outside the State that may

qualify for reimbursement. The expenses to be reimbursed include actual expenses incurred on road/railway fare of the patient and the attendant up

to one, if any, accompanying the patient or even air fare where, because of ailment, patient is required to travel by air. The expenses also include

Pathological, Bacteriological, Radiological and other methods of examination/ investigation or treatment like electric therapy, blood transfusion,

operation charge, consultation charges etc. The Rule does not make the expenditure subject to any limit

15. Rule 6-A inserted vide SRO 142 dated 8.5.1998 leaves room for treatment in a private hospital outside the State. It gives a list of 15 private

hospitals outside the State where patient (Government employee or his dependent) may be treated, provided conditions laid down therein are

satisfied. Rule 6-A while providing for reimbursement of expenditure incurred on treatment of patient in a private hospital outside the State, does

not prescribe any upper limit of such expenditure. The rule position would be clear, once a closer look is given to the Rule. It reads-

6-A. Treatment outside the State for heart ailment, kidney transplantation, cancer and other life consuming diseases shall be taken at private

hospitals indicated below and reimbursement of expenditure shall be subject to the conditions that--

(a) There is no arrangement for the treatment/surgery for the said disease in the State Government Hospitals;

(b) A certificate is obtained from the competent medical authority as specified in rule 6 of these rules.

The private hospitals shall include:--

(i) Tata Memorial Hospital Bombay.

(ii) Christian Medical College and Hospital, Vellore/Ludhiana.

(iii) Batra Hospital, Delhi.

(iv) Mool Chand Charitable Hospital Delhi.

(v) Sri Ganga Ram Hospital, Delhi.

(vi) N.M. Wadia Institute of Cardiology, Pune.

(vii) Southern Railway Hospital, Parambur, Madras.

(viii) K.E.M. Hospital, Bombay

(ix) Bombay Hospital Bombay.

(x) Sree Chitra Tribunal Institute of Medical Science and Technology, Trivandrum.

(xi) S.S.K.M. Hospital, Calcutta.

(xii) Kasturba Hospital Bhopal.

(xiii) Samaritan Hospital, Always, (sic) Kerala.

(xiv) (***)

(xv) The Heart Centre, New Delhi.

(xvi) Rajiv Gandhi Cancer Institute, New Delhi.

(xvii) Ranbaxy Heart Institute, Chandigarh.

4(***)

5 (Provided that the reimbursement in case of the Institution listed at S. No. (xvi) and (xvii) shall be restricted at the rates applicable in All India

Institute of Medical Sciences, New Delhi and P.G.I. Chandigarh respectively.

Note 1 -- In case treatment is taken in Apollo Group of Hospitals (Delhi, Madras, Hyderabad), Escorts Heart Institute, Delhi and Jaslok Hospital,

Mumbai, the reimbursement for treatment in these institutions shall be restricted to the amount which would be payable for Research procedure

either at AIIMS, New Delhi or any of the private hospitals indicated above.

16. A bare look at Rule 6-A would reveal that out of 15 private hospitals listed/empanelled, only in case of two hospitals i.e. Rajiv Gandhi Cancer

Institute, new Delhi and Ranbaxy Heart Institute Chandigarh, the reimbursement is to be restricted to the rates applicable in AIIMS New Delhi and

P.G Institute Chandigarh respectively. In case of Apollo Group of Hospitals, Escort Institute New Delhi and Jaslok Hospital Bombay,

reimbursement for treatment is restricted to the amount payable for a Research Procedure either at AIIMS New Delhi or in the empanelled private

hospitals.

17. Rule 6-A does not place restriction on reimbursement in case of 13 private empanelled hospitals i.e. hospitals other than Rajiv Gandhi Cancer

Institute, New Delhi and Ranbaxy Heart Institute Chandigarh. The Jammu & Kashmir Civil Services (Medical Attendance-cum-Allowance) Rules

1990, therefore do not permit any cap or upper limit in case of reimbursement for medical treatment in a private hospital outside the State. The

actual expenditure incurred is to be paid, of course, subject to fulfillment of the conditions like non-availability of the medical treatment in a

Government Hospital in the State or a Government Hospital outside the State, certificate of competent authority that such treatment is not so

available and is available in a private hospital outside State, the genuineness and verification of bills/vouchers/receipts.

18. Ld. Counsel for the respondents insists that it is within powers of the Government to change the policy and restrict or limit reimbursement of

expenditure incurred by a Government employee or any of his dependents on medical treatment. Mr. Khawaja, argues that provision for medical

reimbursement is a welfare measure and subject to financial constraint faced by the State. Mr. Khawaja seeks to draw support from law laid down

from State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., . He in particular relies on the following observations.

(D) Now we revert to the last submission, whether the new State policy is justified in not reimbursing an employee, his full medical expenses

incurred on such treatment, if incurred in any hospital in India not being a

Government hospital in Punjab. Question is whether the new policy which is restricted by the financial constraints of the State to the rates in AIMS would be in violation of Article 21 of the Constitution of India. So far as questioning the validity of Governmental policy is concerned in our view it is not normally within the domain of any Court, to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except whether it is arbitrary or violative of any constitutional statutory or any other provisions of law. When Government forms its policy, it is based on number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. It would be dangerous if Court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The Court would dissuade itself from entering into this realm which belongs to the executive. It is within this matrix that it is to be seen whether the new policy violates Article 21 when it restricts reimbursement on account of its financial constraints.

(E) No State of any country can have unlimited resources to spend on any of its project. That is why it only approves its projects to the extent it is feasible. The same holds good for providing medical facilities to its citizen including its employees. Provision of facilities cannot be unlimited. It has to be to the extent finance permit. If no scale of rate is fixed then in case private clinics or hospitals increase their rate to exorbitant scales, the State would be bound to reimburse the same. Hence we come to the conclusion that principle of fixation of rate and scale under this new policy is justified and cannot be held to be violative of Article 21 or Article 47 of the Constitution of India.

(F) Learned counsel for the appellant submits that in the writ petition filed, the respondent did not specifically challenge the new policy of 1995. If that was done the State could have placed all such material in detail to show the financial strain. We having considered the submission of both the parties, on the aforesaid facts and circumstances, hold that the appellant's decision to exclude the designated hospital cannot be said to be such to be violative of Article 21 of the Constitution. No right could be absolute in a welfare State. A man is a social animal. He cannot live without the

cooperation of large number of persons. Every article one uses is the contribution of many. Hence every individual right has to give way to the right

of public at large. Not every fundamental right under Part III of the Constitution is not absolute and it is to be within permissible reasonable

restriction. This principle equally applies when there is any constraint on the health budget on account of financial stringencies. But we do hope that

Government will give due consideration and priority to the health budget in future and render what is best possible.

19. To reinforce his stand that even where a Government servant actually incurs a particular expenditure on his medical treatment or that of his

dependent, the Government can irrespective of genuineness of the claim, allow it only to a limited extent, Ld. Counsel for the respondents places

reliance on law laid down in State of Rajasthan Vs. Mahesh Kumar Sharma, It is further contended that a Government servant cannot ask for full

reimbursement of the medical claim, only on the ground that such claim has been allowed in case of a fellow Government servant. Support in this

regard is sought from law laid down in State of Karnataka and Another Vs. Sri R. Vivekananda Swamy, .

20. There is no scope for any disagreement with the Ld. Counsel for the respondents on any of the legal propositions put forward and laid down in

the reported cases referred to at bar. However, the cases law relied upon, do not fit in the facts and circumstances of the case and therefore

cannot extend any support to the stand taken by the respondents in opposition to the writ petition. In State of Punjab and Others Vs. Ram

Lubhaya Bagga Etc. Etc., there was a shift in State Policy. The new policy gave complete choice to the Government employee to undertake

medical treatment in any private hospital of his choice anywhere in the country. However, reimbursement was to be at the level of expenditure as

per rates fixed by Director Health and Family Welfare Punjab, for a similar package treatment or actual expenditure whichever is less. In earlier

policy while such freedom was not given and treatment was to be undertaken in any of the empanelled hospitals, there was no restriction in upper

limit. The change in policy was questioned on the ground that it was violative of right to life and personal liberty guaranteed under Article 21

Constitution of India. Challenge to new policy was dismissed on the ground that the State was within its powers to change policy and that right to

get medical reimbursement was not absolute but to be within reasonable restrictions.

21. In the present case, the question is not one of competence of the State Government to change its policy and put such restrictions as it may

deem proper, on reimbursement of expenditure incurred by a Government servant on his medical treatment. In the case in hand, there is no change

in the policy and resultantly the policy shift is not subject matter of the writ petition. The petitioner is aggrieved that the respondents without any

power or authority have placed upper limit of Rs. 12.00 lacs on the reimbursement of expenditure incurred by him on the medical treatment of his

son and the cap fixed has in effect resulted in denial of reimbursement in his case. The respondents to justify the upper limit fixed in the order dated

17.11.2011 impugned in the petition, are required to locate such power in the Jammu & Kashmir Civil Service (Medical Attendance-cum-

Allowances) Rules 1990. A closer look at Rule-6 and Rule 6-A reproduced hereinabove would reveal that only in case of Rajiv Gandhi Cancer

Institute, New Delhi, Ranbaxy Heart Institute, Chandigarh, the reimbursement for medical treatment is linked With rates applicable in AIIMS New

Delhi and P.G Institute Chandigarh respectively. In case of Apollo Group of Hospitals, Escort Institute New Delhi and Jaslok Hospital Bombay

reimbursement is linked with the amount payable for Research Procedure at AIIMS, or in any of the empanelled private hospital. The

reimbursement of expenditure in case of treatment at Medanta Medicity Hospital, Gurgaon is not linked with the rates applicable in AIIMS, New

Delhi. It is pertinent to point out that the list of empanelled of private hospitals under Rule 6-A is inclusive and not exhaustive. Therefore even if a

private hospitals not empanelled, the State Government may in exercise of power under Rule-8 permit treatment and allow reimbursement for

treatment undertaken at a private hospital other than empanelled - in present case Medanta Medicity Hospital. The rules therefore do not permit or

provide any upper limit on the reimbursement of expenditure incurred by the petitioner on treatment of his son at Medanta Medicity Hospital.

22. In State of Rajasthan Vs. Mahesh Kumar Sharma, controversy related to reimbursement on account of expenditure incurred on medical

treatment while an employee of Rajasthan Government or his dependent is outside the State-say on a private visit to outside State. In such a case

Rule- 6, Rajasthan Civil Service (Medical Attendance-cum-Allowances) Rules 1970 and not Rule-7 would be applicable. However, Ld. single

Judge/Division Bench relying on Rule-7 of the aforesaid Rules held the Government servant entitled to full reimbursement. It is important to note

that Rule 6 put an upper limit on the reimbursement to be made in as case that fell within Rule 6 while no such limit was fixed in a case falling under

Rule-7. It is in the said backdrop that Supreme Court in Mahesh Kumar Sharma's case, upset the High Court judgment opining that Rule-6,

Rajasthan Civil Service (Medical Attendance-cum-Allowances) Rules 1970, was attracted in the matter and that the High Court had erroneously

made Rule 7 applicable and directed full reimbursement.

23. It is well settled law that one wrong cannot justify another wrong and that the claim allowed on erroneous assumptions would not entitle the

similarly circumstanced person to ask for a similar relief. In the present case petitioner does not exclusively rely on treatment given to one Bashir

Ahmad Sheikh an employee of Home Department whose son suffered same ailment and underwent same procedure i.e. "Live Donor Liver

Transplant" at the same Hospital i.e. Medanta Medicity Hospital Gurgaon. Petitioner's case is that his claim has merit within meaning of Jammu &

Kashmir Civil Services (Medical Attendance-cum-Allowance) Rules 1990, even independent of the claim allowed in case of Shri Bashir Ahmad

Sheikh. Shri Sheikh's case is only proposed to be used as one more ground to seek full reimbursement of medical claim. Since the respondents by

not putting any cap or limit on the medical reimbursement claim submitted by Shri Bashir Ahmad Sheikh followed the mandate of Jammu &

Kashmir Civil Services (Medical Attendance-cum-Allowance) Rules 1990, and therefore the Government order No. No. Home-300 of 2011

dated 23.3.2011 whereby said medical claim was allowed is in accordance with rules.

24. Viewed thus the case in hand is not one where relief is sought on the ground that such relief has been granted to a similarly placed employee.

The order made in favour of other Government employee is not illegal or violative of rules governing the matter. The case in hand therefore is

different and distinguishable from State of Karnataka and Another Vs. Sri R. Vivekananda Swamy,

25. The position emerging from above discussion is that the State Government does not have a power under Rules 6 and 6-A to put an upper limit on the reimbursement on expenditure incurred by a Government employee on his medical treatment or that of any of his dependents in a private hospital outside the State as admissible under rules. Conversely once a Government employee is permitted by the competent authority to undertake treatment at a private hospital outside State in relaxation of rules, the Government cannot, after the medical treatment is undergone, deny reimbursement of the expenditure incurred by the Government employee duly verified by the competent authority in accordance with the rules or allow such reimbursement partly or up to a particular limit. The State Government is free to make a shift in its policy, amend the rules and leave room for an upper limit or cap on reimbursement of expenditure incurred within or outside the State in a Government or private hospital. However, as long as there is no change in policy and rules are not amended, the rules occupying the field, as on date, are to be followed and the rules in force, as on date, do not permit such a recourse. For the reasons discussed the petition is allowed and the respondents directed to allow reimbursement of expenditure incurred by the petitioner on medical treatment of his son at Medanta Medicity Hospital, Gurgaon and the connected expenditures permissible under rules of course after proper verification by the competent authority under rules.

Disposed of.