

(2003) 08 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 730 of 2001

Taqadus Gulzar Ali

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 30-08-2003

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Section 124

Citation : (2010) 3 JKJ 355

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Permod Kohli, J.—Application of SRO No. 321 dated 7.12.1995 or SRO No. 514 dated: 22.11.1999 is the sole question involved in the

present petition. Since the issue is purely a legal one, Mr. Lone, learned counsel appearing for the respondents did not choose to file any reply. The

admitted facts as stated in the petition are that the petitioner who was working as Accounts Assistant with the respondent-University, applied for

study leave with effect from 1.11.1995 for two years. He was asked to resume duty vide letter dated: 17.6.1998. He, however, submitted his

joining report on 22.6.1999. Vide order dated: 25.9.1999 petitioner's joining report was accepted and he was allowed to work pending final

decision regarding his unauthorized absence from duty. Respondent No. 1 passed an order No. 443 (Estt:) of 2000 dated: 21.12.2000 whereby

period of absence with effect from 7.11.1995 to 21.6.1999 is treated as ""Dies-non"". This was said to be in terms of SRO 514 dated 22.11.1999.

Petitioner has called in question this order to the extent it treats the period of absence of the petitioner as ""Dies-non"" and deprives him of all the

benefits available to him in terms of earlier SRO 321. Petitioner has also assailed the constitutional validity of SRO 514. Since the learned counsel

appearing for the parties agreed that the issue can conveniently be resolved by deciding the question of applicability of the relevant SRO, the

controversy regarding constitutional validity of SRO 514 need not to be gone into.

2. Admittedly on the date the petitioner submitted his joining report i.e. on 20.6.1999, it was SRO 321 dated: 7.12.1995 which in operation and

regulated the question of authorized leave or absence. For the purpose of brevity, the said SRO is quoted as under:

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 following recommendations in the Jammu and Kashmir Civil Services Regulations Volume I, namely: -In the said rules:

The existing Government instruction below note 4 to a Article 163 shall be recast as under: -- Government Instruction: No period of un-authorized

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 allowance).

(b) It does not count for pension.

(c) It does not count for increment.

(d) It does not cause any interruption for leave earned up to 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 above it should be made in the order itself. It

does not cause any interruption for the past service qualifying for pension.

By order of the Governor.

3. Despite the joining of the petitioner, the period of his absence was not

decided, it was only on 25.9.1999, the Registrar of the respondent-

University passed an order No.510 (Estt:) of 1999 dated: 25.9.1999 saying that the joining of the petitioner is pending final decision regarding his

unauthorized absence from duty. The fact remains that the petitioner was working with effect from the date of his joining i.e. 20.6.1999. As a

consequence of passing of order, dated: 25.9.1999, the issue appears to have been considered and finally vide impugned order no.433 (Estt.) of

2000 dated: 26.12.2000, the period of absence of the petitioner with effect from 1.11.1995 to 21.6.1999 came to be decided and the same was

treated as dies-non. This decision was taken on the basis of the rules dealing with unauthorized absence as formulated (amended) vide SRO: 514

dated: 22.11.1999. The important stipulation in this order is ""the unauthorized period of absence of Mr. Taqadus Gulzar Ali, Accounts Assistant

with effect from 7.11.1995 to 21.6.1999 is treated as ""Dies-non."" In view of the above stipulation, petitioner's joining was accepted/regulated

with effect from 21.6.1999.

4. The question that falls for consideration is whether the law in operation as on 20/21.6.1999 when the petitioner was allowed to resume his

duties viz: SRO 321 shall apply or SRO 514 which came into operation with effect from 22.11.1999 and was in operation at the time of taking a

decision regarding period of absence in respect to the petitioner. It is not disputed that SRO 514 came into being much after the joining of the

petitioner and even after passing of order dated: 25.9.1999 whereby petitioner's joining was accepted and he allowed to resume duties with effect

from the date of his joining.

5. SRO 514 which came into operation on 22.11.1999 is also reproduced as under:

SRO:514: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 Regulation Volume:I.

In the said Regulations,

The existing Explanation of Government instruction below note 4 to Art. 163 shall be read 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 rights 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 'Dies-non' remain quite in tact, 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 for pension,
- iii. It does not count for increments,
- iv. It does not cause any interruption for leave earned up to the date proceeding 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 Government.

Vide the aforesaid SRO, the existing explanation of Government Instructions below note 4 to Art. 163 has been recast and has been substituted by

an earlier explanation to note 4 to Art. 163 as was introduced vide SRO 321.

6. In terms of SRO 321 the meaning of 'Dies-non' was given to mean: Not

qualifying for any remuneration, however, the same is not to disturb the title of earned leave nor shall it constitute an interruption for service qualifying for pension, leave and increments. As per explanation appended to the said SRO, the same intention was conveyed. The amendment introduced vide SRO 514 brought change in the meaning of word "Dies-non" and in terms of this new meaning 'Dies-non' means it does not qualify any remuneration, it does not count for pension, increments, experience, it also provides that the Government servant shall not be entitled for promotion during the period of 'Dies-non' and also shall lose seniority in his cadre. However it will not cause any interruption in the past service qualifying for pension. Admittedly, the petitioner has been deprived of certain benefits on account of SRO 514, it has adversely affected his rights which were otherwise available to him in terms of SRO 321.

7. The question whether SRO 514 has retrospective operation or not, is required to be examined on the basis of plain language which inter-alia says "the following amendment shall be made in the Jammu and Kashmir Civil Services Regulation Volume I" There is no other stipulation in the SRO which makes it retrospective either by any express term or even by implication; rather the language implied in the preface suggests that it will have the prospective operation. The word used is "shall be made".

8. In view of the clear, unambiguous and plain language of the SRO it has prospective operation. Can this SRO be applied to the case of the petitioner who resumed his duties before the SRO came into being? The rights of the petitioner are required to be determined on the date of his resuming the duty. Whatever right is vested on him as on that date is to be recognized and accepted. The question of operations of law came to be considered by the Privy Council in AIR 1927 242 (Privy Council) where the right of appeal was conferred by amendment in the Income Tax Act. Lord Blanesburgh while considering the scope of amendment brought in by the amending Act and relying upon an earlier judgment to Board held: while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment.

9. The Apex Court considered the fundamental rule of interpretation of statute in case of ""Mithilesh Kumari v. Prem Beharim Khare"" resort in AIR

1989 SC 124 and held:

We read in Maxwell that it is a fundamental rule of English Law that no statute shall be construed to have retrospective operation unless such a

construction appears very clearly at the time of the Act, or arises by necessary and distinct implication retrospective operation is, therefore, not to

be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided

without doing violence to the language of the enactment. Before applying a statute retrospective the Court has to be satisfied that the statute is in

fact retrospective. The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively would

prejudicially affect vested rights or the illegality of the past transaction, or impair con- tracts, or impose new duty or attach new disability in respect

of past transactions or consideration already passed. However, a statute is not properly called a retrospective statute because a part of the

requisites for its action is drawn, from a time antecedent to its passing. We must look at the general scope and purview of the statute and at the

remedy sought to be applied, and consider what was the former State of Law and what the legislation contemplated. Every law that takes away or

impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive. But laws made justly and for the

benefit of individuals and the community as a whole, as in this case, may relate to a time antecedent to their commencement. The presumption

against retrospectively may in such cases be rebutted by necessary implications from the language employed in the statute.

10. The question also came to be considered by a constitution Bench of the Apex Court in the case of ""K.C. Arora v. State of Haryana"" reported

in (1984) 3 SCC 282. In the case before the Apex Court certain officers of the Panchayat were treated as Government Servants. By an

amendment, they were deprived of the status as such Government servants. The Court on consideration of the scope of the amendment and its

impact on the existing rights of the officers who were earlier treated as Government Servants and deprived of such a status by the amending Act

held:

The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws

but since the laws are made under a written Constitution, and have no conform to the does and don't of the Constitution, neither retrospective nor

retrospective laws can be made so as to contravene fundamental rights. The laws must satisfy the requirements of the Constitution today taking into

account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the requirements

of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights and not yesterday's. A legislature

cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued

in the course of the 20 years. That would be most arbitrary, unreasonable and a negation of history.....Today's equals cannot be made unequal by

saying that they were unequal 20 years ago and we will restore that position by making a law today and making it retrospective. Constitutional

rights, constitutional obligations and constitutional consequences cannot be tampered with that way. A law which if made today would be plainly

invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective. Past virtue

(constitutional) cannot be made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making

retrospective laws. We are, therefore, firmly of the view that the Gujarat Panchayats (Third Amendment) Act, 1979 is unconstitutional as it offends

Articles 311 and 14 and is arbitrary and unreasonable.

11. Another Constitutional Bench of the Apex Court considered the scope of Hindu Adoption and Maintenance Act (1956) on the rights of a

married woman under Mitakeshara School of Hindu Law (uncodified). The ratio of this judgment is as under:

Now, before the Act came into force, rights of maintenance out of the estate of a Hindu dying before the commencement of the Act were

acquired, and the corresponding liability to pay the maintenance was incurred under the Hindu law in force at the time of his death. It is well

recognized rule that a statute should be interpreted, if possible, so as to respect

vested rights, and such a construction should never be adopted if the words are open to another construction. See Craies on Statute Law, 6th Edn. (1963) P. 397. We think that Ss21 and 22 read with S.4 do not destroy or affect any right of maintenance out of the estate of a deceased Hindu vested on his death before the commencement of the Act under the Hindu Law in force at the time of his death. On the death of Lingayya, the first respondent as his concubine and the second, third and fourth respondents as her illegitimate sons had a vested right of maintenance during their lives out of the estate of Lingayya. This right and the corresponding liability of the appellants to pay maintenance are not affected by Ss 21 and 22 of the Act. The continuity claim of the respondents during their lifetime springs out of the original right vested in them on the death of the Lingayya and is not founded on any right arising after the commencement of the Act.

12. In view of the law laid down by the Apex Court referred to above, I am of the considered opinion that the right of the petitioner is to be considered as on the date of his resuming duty i.e. 20/21,6.1999 and it is the SRO 321 which was in operation as on that date. Petitioner is entitled to all benefits envisaged by this SRO. SRO 514 having no retrospective operation, as there is no such legislative intendment evident from the language of the said SRO or by necessary implication. Hence the same has no application to the case of the petitioner.

In view of the above, this petition is allowed with a direction that period of absence of the petitioner shall be treated in accordance with SRO 321 dated 7th December 1995. Impugned order No.433(Estt.) of 2000 dated 26-12-2000 is quashed to the extent it has treated the period of absence under SRO 514 dated 22-11-1999. Petitioner shall be allowed benefits in accordance with the meaning of the word ""Dies-Non"" as provided under SRO 321.