HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Cases Nos/ LPA (SW) No. 429/2002;
LPA(SW) 23/ 2003; LPA(SW) 463/2002;
LPA SW) No. 464/2002; LPA(SW) 465/2002;
LPA(SW) 80-A/2003; LPA(SW) 37/2004;
LPA(SW) 51/2004; LPA(SW) 430/2002;
LPA(SW) 52/ 2004.

Date of decision :26-2-2009

1.	State	Vs	A.K. Sadhu and others
2.	State	Vs	Tej Krishan Koul & ors
3.	State	Vs	Chuni Lal Khatri & ors
4.	State	Vs	Dr. Ashok Kumar Pandit& ors
5.	State	Vs	Raj Nath Bhat and others
6.	State	Vs	Veerji Bhat and others
7.	Director, SIKMIS	Vs	Veerji Bhat and others
8.	Director, SIKMIS	Vs	Tej Krishan Koul & others
9.	State	Vs	Gwash Lal Tikoo and others
10.	State	Vs	Bhushan Lal Koul

Coram:

HON'BLE MR. JUSTICE Y.P.NARGOTRA
HON'BLE MR. JUSTICE VINOD KUMAR GUPTA:

Appearing counsel :

For Petitioner(s)/appellants : Mrs. S. Shekhar, AAG,
Mr. A.H. Qazi, AAG
Mrs. S. Hakim, Dy A.G
Mr. A.P. Singh, Advocate
Mr. Z.A. Moughal, Advocate
Mr. K M Bhatti, Advocate

For the respondents. M/s. Sunil Sethi, Veenu Gupta;
Inderjit Gupta, M K Raina,

i) Whether to be reported in Press/Journal/Media: YES/NO
ii) Whether to be reported in Digest/Journal: YES/No

These Letters Patent Appeals arise out of the orders dated 16-7-2002, 29-7-2002, 26-8-2002 and 17-9-2002 passed in a Batch of writ petitions of the respondents-migrant employees of the Government who on account of turmoil have migrated from the valley, by virtue of which they have been held entitled to the payment of House Rent and City Compensatory Allowance. SWPs Nos. 2966/ 2001; 1492/2002; 448/ 2002; 1050/2002 & 3209/2001 have been disposed of vide order dated 16-7-2002; whereas SWPs No. 1971/2002, 2222/2002 and 2390/2002 have also been decided by orders dated 29-7-2002, 26-8-2002 and 17-9-2002 respectively by placing reliance on the same order dated 16-7-2002.

It is not in dispute that during the year 1989 and 1990 due to the on-set of militancy there was turmoil resulting in enmass exodus and migration of a particular community from the valley to the safer havens, which included the Government employees posted therein. The migration of such of the Government employees of various Government Departments resulted in their absentation from their respective offices, not on their own accord but due to the changed circumstances in the valley in which there was threat to their lives and to the lives of their families at the hands of the anti-national elements.

In the ordinary course the absentation from duty would have followed the disciplinary action against such employees which could even lead to their dismissal from service but the State Government being of the social welfare State rose to the occasion and accepting

that their absentation was on account of exceptional situation all pervading in the valley and not because of any official misconduct on their part, came out with rehabilitation policies. For safe-guarding the interests of such migrant employees, the Government passed various orders, one of which was Govt order No. 605-GAD of 1991 dated 26-6-1991 which provided as follows:-

> Government Order No. 605-GAD of 1991
> Dated 26-6-1991.
>
> It is hereby ordered that:-
>
> a/ The period of migration of a State Government employee who has migrated from Kashmir Valley in consequence of the disturbed conditions obtaining therein shall be treated as earned leave to the extent that may have been due to him on the date preceding migration. The amount of earned leave shall thus be allowed to him regardless of the ceiling of 120 days prescribed in sub-rule (2) of rule 26 of J&K Civil Service (Leave) Rules;
>
> b/ After adjustment of the period of migration as per (a) above, the remaining period of absence from duty shall count towards service for purpose of pension;
>
> c/ During the period of absence as per sub-para (b) above, the migrant employee shall be entitled to his pay (excluding special pay and local allowances) dearness allowance and medical allowance which hew would have been otherwise paid from time to time including benefit of increment had he reported for duty immediately after expiry of his earned leave availed as per sub-para (a) above.
>
> d/ The period of absence covered by both sub-paras (a) and (b) above shall not count for earning any kind of leave;
>
> e/ The above arrangement shall remain in force upto 30th Sept 1991 when the position will be reviewed by the Government, provided that if before expiry of this period a migrant employee is ordered by a competent Authority to report for duty at any place within or outside the State and he fails to comply with such orders, he shall not be entitled to any benefits under this arrangement.
>
> By order of the Government of Jammu and Kashmir.
>
> Sd/
> Commissioner/ Secretary to Government,
> General Administration Department.

The above order through was subject to review by the Government after 30th Sept 1991 but undisputedly the same has not been revoked so far and continues to be in operation till date. From the bare perusal of the order it is manifest that absentation from duty of such employees stands condoned by the Government and their service conditions protected in relaxation of the relevant service rules. In terms of para (a) of the order the period of absence of a migrant employee is to be treated as Earned Leave that may have been due to him in relaxation of the bar of 120 days prescribed in terms of sub-rule (2) of Rule 26 of the Jammu and Kashmir Civil Service (Leave) Rules 1979. After adjustment of the period of absence/ migration as Earned Leave due, the remaining period of absence if any until he retires from service is to be counted towards service in terms of para (b) of the order, meaning thereby that such an employee who is absent from duty till date his initial period of absence has to be adjusted towards his earned leave whatever due to him at the time of his migration and for his remaining period of absence he would be treated to be in service for being counted for the purpose of pension. Therefore, firstly, he shall be entitled to all the service benefits in terms of rules during the period he has to be treated on earned leave as a necessary consequence of para (a) of the order and then for the remaining period of absence/ migration he is not to be deemed to be absent from duty.

In terms of para (c) for the remaining period of absence/ migration covered by para (b) such an employee has been made

entitled to his pay (excluding special pay and local allowances), dearness allowance and medical allowance which he would have been otherwise paid from time to time, including the benefit of increment, had he reported for duty after the expiry of earned leave availed as per para (a). Thus para (c) protects all monetary benefits which may have accrued to such an employee on account of his service under the Government irrespective of and inspite of his absence from duty excepting the benefit of Special pay and local allowances otherwise admissible under the rules.

In terms of para (d) the period of absence is not to count for earning any kind of leave. Para (e) enjoins upon such an employee with an obligation to report for duty at any place within or outside the State on the direction of the Competent Authority.

From the above order, it is also apparent that an employee who has absented from duty, for all practical purposes continues to be an employee in the service of the Government entitled as such to all the material benefits which may have accrued to him on account of such Govt Service, excepting the benefit of special pay and local allowances- Local allowances would mean House Rent Allowance and City Compensatory Allowance.

It is also not in dispute that despite the provision of exclusion of granting of the benefit of local allowances in para (c) of the order some departments of Government paid House Rent Allowance and City Compensatory allowance to their migrant employees while some

departments of the Govt like the ones of which the respondents/ writ petitioners are the employees did not pay the same.

Being aggrieved of the denial of the benefit, the respondents filed number of writ petitions for claiming the benefits on the analogy of their counterparts in other departments who were being paid the said allowances.

The writ petitions of the respondents were contested by the State on the ground that in terms of SRO 76 of 1992 and Regulation 41 (1) of CSR the allowances claimed could be allowed for a period of four months only which is the period available to an employee as Leave so beyond that period the writ petitioners were not legally entitled to the payment of such allowances.

Learned writ Court dis-allowing the defence set up by the State has allowed the writ petitions by virtue of the impugned order in the following manner:

> "After having gone through the pleadings of the parties, I am of the opinion that SRO 76 would apply to that Government servant who applies for leave and he continues to be on leave beyond the period of four months. The petitioners do not belong to this category, and therefore, SRO 76/92 would not apply to them. They never applied for leave and the question of putting a ceiling of four months in their case would not arise. Petitioners migrated from Kashmir valley in Jammu on account of the circumstances which need not to be elaborated here again. These factors are well known to the State administration. With a view to avoid extraordinary situation which had arisen, the State took a

decision and created a category of employees known as "migrant employees". These migrant employees are entitled to pay. This is not being disputed. The term "pay" would include other emoluments such as Dearness Allowance and other allowances. Hence Rent Allowance and City Compensatory Allowance is also an allowance. This is part and parcel of pay.

It is accordingly held:

i) That SRO 76/92 which prescribes that an employee who has remained on leave beyond 120 days would not be allowed House Rent Allowance and City Compensatory Allowance, would not be applicable to petitioners who are not availing of leave of their own;

ii) That the migrant employees is a different category of employees and different notifications for them have been issued by the State Government from time to time. They have been held entitled to pay. This would include all the allowance which are normally payable to a civil servant;

iii) That so far as Regulation 41 of the Jammu and Kashmir Civil Services House Rent Allowance and the City Compensatory Allowances Rules of 1992 is concerned that would apply to that employee who takes leave voluntarily of his own. Petitioners have never applied for leave. It is on account of the decision taken by the State Government, they are being treated as migrant employees and for the purpose of paying salary, a new nomenclature has been evolved. This has been termed as "leave salary". This leave salary which as indicated above is being paid to the migrants not on account of the situation which has arisen by Regulation 41 but on account of a situation which has arisen on account of peculiar and extra-ordinary circumstances.

> In view of the above, I am of the opinion that petitioners are entitled to all the benefits including House Rent Allowance and City Compensatory Allowance. Let this amount be calculated and paid to them within a period of four months from the date, a copy of this order is made available to respondents by the petitioners. The said allowance would be continuously paid to the petitioners in future also. It is clarified that wherever these allowances were with-held these would be calculated and the amount in arrears due would be released in favour of the petitioners within the period above mentioned.め

The State is in appeal against the above directions.

We have heard Mrs. Shekhar, learned counsel for the appellant and Mr. Sethi, learned counsel for the respondents and perused the record.

Mrs. Seema Shekhar, learned counsel for the appellant firstly submits that the writ petitioners had claimed payment of House Rent and CCA on the analogy of certain Government employees of other departments, who though similarly situated were being paid these allowances. According to her the payment of the allowances to those employees was illegal, hence on noticing the same the Finance Department had issued an order for stopping the payment of those allowances to them. Such of the employees to whom payment of the allowances was stopped by the order of the Finance Department bearing No. A-72(92)-11-359 dated 14-6-2001, filed writ petition No. 997/ 2001 in the Srinagar Wing of this High Court and the Hon'ble

Court by its order passed on 17-8-2001 stayed operation of said order in the following terms:

> "In the meanwhile operation of order bearing No. A-72(92)-11-359 dated 14-6-2001 is stayed till the next date of hearing before the Bench."

She submits that said writ petition has not been disposed of so far as per her information and in consequence of the said Court order, those employees who were being paid the HRA and CCA continue to be paid the same till date. She submits that in view of the said fact the petitioners are not legally entitled to seek any parity with the writ petitioners of that writ petition. She submits that as the petitioners had not claimed the benefit of HRA and CCA in their own individual right on merits as such, the learned writ Court was not justified in allowing the writ petitions of the writ petitioners/ respondents.

Being not in agreement with the learned counsel for the appellant that the writ petitioners were not entitled to claim the benefit of the payment of the HRA and CCA in their own right in view of the pleadings, We called upon the learned counsel for the appellant to obtain instructions from the Government in this behalf. Mrs Shekhar has filed the report after obtaining such instructions in which it has been submitted as follows:-

> "6. That it is respectfully submitted that the afore-said factual position would demonstrate that the migrant employees including the petitioners are getting leave salary as a special departure from the rules because of the prevailing situation. The rules in clear terms otherwise

provide that an employee is not entitled to draw leave salary beyond 120 days.

7. That it is respectfully submitted that a section of migrant employees working in different departments are performing duties in various offices at Jammu like migrant schools, hospitals etc. These employees are performing thus duties and are being paid HRA and CCA as per rules. However, these employees who are getting leave salary and are not performing any duties, are thus not entitled to any such allowance. The measures taken by the Government from 1991 in respect of migrant employees clearly indicate that because of an unforeseen situation, the rights of these employees had to be protected so far as their service conditions are concerned, as such, a conscious decision was taken to allow salary in their favour without special allowance and local allowances in order to avoid starvation as these employees are not discharging duties. They a are not entitled to these allowance as aforesaid because they are not performing the duties. The decision of the Government still holds good.

8. That it is respectfully submitted that the Government is taking every step to ensure return of migrant employees to their respective places in the valley so that they are in a position to resume their duties. It is further submitted that even otherwise, the HRA and CCA as admissible to Government employees in normal Course varies on the basis of nature of duties and place of posting. CCA and HRA is not being paid to the Government employees at random but is subject to place of posting.

From the above stand, though it is not denied that migrant employees are a different class of persons who have been allowed the salary etc. despite they being not entitled to payment of the same under rules in view of the fact that they have migrated from the Kashmir Valley on account of the disturbed conditions prevailing therein. Their entitlement to the House Rent Allowances and City Compensatory Allowance is being disputed only on the ground that they are not performing the duties. It has been conceded by the appellant that those allowances are being released in favour of those migrant employees who on the orders of the Government are performing the duties in migrant schools and hospitals etc. The appellant thus, seeks to draw a distinction between migrant employees who are performing their duties on the orders of the Government and the migrant employees who have not so far been assigned any duties, for the purposes of payment of the said allowances.

So the first question arising for consideration would be as to whether such kind of distinction is legally valid ?. In our considered view, the distinction sought to be made on the basis of performance of duty within the employees who have migrated from Kashmir Valley on account of disturbed conditions is legally not permissible. The migrant employees in terms of para (e) of Govt order dated 26-6-1991 are bound to report for duty at any place within or out side the State. Therefore, if the Government has not chosen some of them for performance of duty at any post or place, it is not their fault and therefore, they cannot be penalized for not performing the duties. All

the migrant employees being members of the same category are required to be treated alike being similarly placed, irrespective of the fact that some of them have been chosen for duty because all of them are available for being deputed for duty.

In terms of para (e) of the Government Order No. 605-GAD of 1991 dated 26-6-1991, all the migrant employees are bound to report for duty on the orders of the Competent Authority at any place within or outside the State of Jammu and Kashmir. If some of such employees have been chosen by the Government to perform duties at some places while others have been left out, such chosen employees would not get any preferential right to get HRA and CCA over and above the left out employees, simply on account of the fact that they are performing the duties, because left out employees are not in a position to perform the duties on their own but it being so because the Government has not chosen them for duty. Therefore, Government would not be justified in paying HRA and CCA only to those employees who are performing duties and in not paying the same to those who have been left out for the purposes of performance of duty.

In view of the provisions made in the said Government order all the migrant employees are to be deemed to be employees in the service of the Government notionally engaged in the performance of their official duties being available for and under the obligation to perform duty at any place within or outside the State on the orders of the Government. Therefore, distinction between the two sets of migrant

employees belonging to the same category would be illegal being arbitrary and discriminatory.

Mrs. Shekhar, learned AAG then contends that the migrant employees are being paid salary and other allowances pursuant to a Government policy in relaxation of the Service Rules and such policy itself excludes the benefit of payment of HRA and CCA as such, the migrant employees cannot legally claim something which is beyond the policy and is not permissible under the rules.

It is true that a policy formulated by the Government would not be enforceable in a Court of law being not justiciable but where pursuant to such policy an executive Government order comes to be passed creating some rights or obligations upon its subjects, such Govt order shall become enforceable and justiciable in a Court of law in respect of the rights or obligations created thereby.

In the instant case policy of protecting and safeguarding the service interests of those employees who have been forced to migrate from Kashmir Valley in the face of prevailing disturbed conditions has been taken the shape of a Government order, the rights and obligation created thereby have been thus, rendered justiciable.

The Govt order No. 605-GAD of 1991 dated 26-6-1991 on one hand permits Government employees who have absented and migrated from their places of posting in Kashmir Valley to be deemed to be in Government Service for being entitled to the protection of their Service conditions including payment of salary in relaxation of service rules, on the other hand has dis-allowed the benefit of HRA and CCA

to which un-disputedly they would have been entitled to had they not migrated.

Contention of Mr. Sethi that exclusion of the benefit to the migrant employees is bad in law the same being arbitrary. He agues that these employees have not migrated on their own but were forced to migrate due to the failure of the State to protect the life, property and liberty of its citizens, therefore, it would not be justified to pit rules against them for justifying the said exclusion of the benefit which otherwise is part of their service conditions.

We are in agreement with Mr. Sethi that rules cannot be pitted against the migrant employees for denying the benefit which would have been available to them if they had not migrated and absented from their duties. When the service rules requiring a Govt employee to be present on the post and place of his posting stand relaxed by the Government by regulating the period of absence from duty and he has been made entitled to the payment of salary with dearness allowance, medical allowance and granting of increments etc. there can be no valid reason for not relaxing the same for the purposes of granting the benefit of HRA and CCA also.

The disentitlement to the grant of HRA & CCA flows from clause (c) of Rule 7 of Jammu and Kashmir Civil Services (House Rent Allowance and City Compensatory Allowance) Rules 1992 formulated by the Government in terms of SRO 76 dated 30-3-1992 read with Article 41-I of Civil Service Regulations.

Article 41 (I) provides:

"Notwithstanding anything contained in Government Instructions below Article 41-G and in Article 41-H the House Rent Allowance and City Compensatory Allowance to all the Government servants shall be regulated as per Jammu and Kashmir Civil Service (House Rent Allowance and City Compensatory Allowance) Rules, 1992 contained in Schedule XXII of these rules."

Clause (c) of Rule 7 provides:-

"(c) Leave:

(i) A Government servant will be entitled to draw City compensatory and house rent allowance during leave at the same rate at which he was drawing these allowances before proceeding on leave. For this purpose leave means total leave of all kinds not exceeding 4 months/ 120 days and the first 4 months/ 120 days of the leave if the actual duration of leave exceeds that period. When vacation or holidays are combined with leave, the entire period of vacation or holidays and leave should be taken as one spell of leave for purpose of these rules;

(ii) House Rent Allowance as well as City Compensatory Allowance will be admissible during Leave preparatory to retirement subject to submission of certificate that the employee concerned and/ or his family continued to reside at the same place/ same station;

(iii) The drawal of this allowance during periods of vacation whether combined with leave or not, shall be regulated in the same way as during leave.

(iv) In case where a Government servant who is sanctioned leave whether on medical grounds or otherwise, does not join duty after availing himself of such leave and resigns, he shall not be eligible for City Compensatory allowance and house rent allowance for the entire period of such leave. The entire amount drawn on this account shall be recoverable before resignation etc. is accepted;

(v) The limit of 4 months/ 120 days prescribed in (i) above shall be extended to 8 months for the purpose of grant of these allowances in the case of Government servants suffering from T.B Cancer or other ailments during the period of their leave taken on medical certificates when such certificates are in the forms prescribed. It is immaterial whether the leave is on medical certificate from the very commencement or is in continuation of other leave as defined in (i) above. In case of employees suffering from T.B Cancer or other ailments, who remains on leave for a period exceeding 8 months the grant of House Rent Allowance and City Compensatory Allowance for the period of leave beyond 8 months may be decided by the

respective Administrative Departments in consultation with Finance Department irrespective of the period of leave involved as long as the medical certificate in the prescribed form is available;

(vi) Drawal of City Compensatory Allowance and House Rent Allowance during the period of leave shall be subject to furnishing of certificate prescribed in Rule 8.め

The rationale for incorporating the above restriction in case of leave appears to be that earned leave is not permissible to an employee beyond a period of 120 days in terms of sub-rule (2) of Rule 26 of Jammu and Kashmir Civil Service (Leave) Rules.

When the Government has relaxed the rigour of sub-rule (2) of Rule 26 of Civil Service (Leave) Rules by providing that period of absence/ migration shall firstly be adjusted against earned leave whatever due regardless of the bar of 120 days in terms of sub-rule (2) of Rule 26, it does not stand to reason as to why the same should have been insisted upon for deciding the entitlement of a migrant employee to the HRA & CCA. For all practical purposes migrant employee despite his having not been posted at any particular position for extracting work after migration has been treated at par with the other regular employees by the Government in relaxation of the rules for payment of salary and other allowances, his right to the payment of HRA and CCA for no valid reasons can be defeated simply because he has been allowed the leave beyond the period permissible under rules and is absent from duty. As such an employee has not applied and availed leave on his own beyond the permissible limit and as the leave has been forced upon him and even his period of absence beyond the period of such leave has been regulated by treating him in service, he

is to be deemed to be under the Service of the Government notionally performing his duties at the place of his settlement after migration, he therefore, would not lose his right to be paid HRA and CCA.

The exclusion clause incorporated in para (c) of the Govt Order No. 605-GAD of 1991 dated 26-6-1991 is therefore, bad in law, being arbitrary and discriminatory in character which being violative of articles 14 and 16 of the Constitution cannot be legally sustained. We therefore, quash the same and hold the writ petitioners/ respondents entitled to the benefit of HRA and CCA.

For the afore-said reasons, we do not find any merit in the instant appeals, justifying interference with the orders impugned; therefore, same shall stand dismissed. There shall be no order as to costs.

(VINOD KUMAR GUPTA) JUDGE **(Y.P. NARGOTRA) JUDGE**

JAMMU
February 26, 2009.
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