

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU
LPA(SW) No.96/2010
CMP No. 136/2010

Date of Decision:24.11.2010

Zahoor Hussain Zargar Vs State & Ors.

Coram:

Hon'ble Mr. Justice J.P.Singh, Judge.
Hon'ble Mr. Justice Hasnain Massodi, Judge.

Appearing Counsel:

For the Appellant(s) : Mr. R.A.Jan, Advocate.

For the Respondent(s) : Mrs. Neeru Goswami, Dy.A.G.

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| i) | Whether approved for reporting
in Press/Journal/Media | : | Yes |
| ii) | Whether to be reported in
Digest/Journal | : | Yes |

J.P.Singh-J :

The appellant-Zahoor Hussain Zargar, working as Assistant Engineer (Mechanical) in the Public Works Department of the State Government, was granted two years' Extra Ordinary Leave with effect from 25.05.81 to 24.05.83. He, however, did not join duty on expiry of the period of Leave. He submitted his Joining Report on 09.06.92, i.e., after a period of more than nine years. The respondents did not accept the Joining Report, aggrieved whereby, he approached this Court by his Writ Petition SWP No. 1138/93. A learned Single Judge of this Court, allowed the Writ Petition on 15.07.1994, directing as follows:-

“By a Writ of Certiorari, I hereby quash the impugned Communication No. EC-1-5/10218 dated 14 Sep. 1992, which is held as illegal, unconstitutional and bad in law. Consequently, by a Writ of Mandamus, I command the respondents to accept the joining report of the petitioner with effect from 9th of June, 1992 and direct them to suitably post him as Asstt. Executive Engineer and pay him all the dues and other allowances as

admissible under rules. He is also held entitled to all the consequential benefits. However, the Government shall be at liberty to institute any enquiry into the matter of alleged unauthorized absence of the petitioner from duty, if any, if it so chooses. The said enquiry, if made, shall be strictly in accordance with law, keeping in view the mandate of Article 311 (2) of the Constitution of India corresponding to Section 126 (2) of the Constitution of Jammu and Kashmir as also the provisions of Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, on the subject.

The petitioner is also held entitled to cost assessed at Rs.2000/-."

Pursuant to the liberty allowed by the Court, the State-respondents, held an enquiry into the matter, And after hearing the appellant therein, treated his "unauthorized absence" from 25.05.83 to 08.06.92 as "Dies-non" vide Government Order No. 91-PW of 2000 dated 28.03.2000, which, is reproduced hereunder, for facility of reference:-

" Government of Jammu and Kashmir
Civil Sectt. Public Works Deptt.

Subject:-Unauthorized absence of Shri Zahoor Hussain Zargar
Assistant Executive Engineer (Mechanical).

Government Order No. 91-PW of 2000
Dated : 28.03.2000

1. Whereas, extra-ordinary leave, without allowances, for two years was sanctioned in favour of Shri Zahoor Hussain Zargar the then Assistant Engineer Mechanical (now A.E.E) vide Govt. order no. 250-PW of 1981 dated 25.05.1981;
2. Whereas said Zahoor Hussain Zargar had to resume his duties on 25.05.1983 after the expiry of two years leave sanctioned in his favour vide aforesaid Govt. order;
3. Whereas the officer submitted his joining report on 09.06.1992 which was not accepted by the Chief Engineer, I& FC Deptt. Vide his letter no. EC-1-5/10218 dated 14.09.1992;
4. Whereas the said officer approached the Hon'ble High Court in SWP No. 1138/93;
5. Whereas the Hon'ble High Court disposed of the writ petition on 15.07.1994 with following directions:

"The result is that the petition is allowed. By a writ of certiorari I hereby quash the impugned communications no. EC-1-5/10218 dated 14.09.1992 which is held as

illegal, unconstitutional and bad in law. Consequently, by a Writ of Mandamus, I command the respondents to accept the joining report of the petitioner with effect from 9th of June, 1992 and direct them to suitably post him as Asstt. Executive Engineer and pay him all the dues and other allowances as admissible under rules. He is also held entitled to all the consequential benefits. However, the Government shall be at liberty to institute any enquiry into the matter of alleged unauthorized absence of the petitioner from duty, if any, if it so chooses. Such enquiry, if made, shall be strictly in accordance with law, keeping in view the mandate of Article 311 (2) of the Constitution of India corresponding to Article 126 (2) of the Constitution of Jammu and Kashmir as also the provisions of Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, on the subject.”

6. Whereas, in pursuance of the aforesaid court orders the officer was deemed to have joined his services on 09.06.1992 as Assistant Executive Engineer (mechanical) vide government order no. 549-PW of 1994 dated 06.12.1994;

7. Whereas in accordance with the said court order, departmental enquiry was conducted in the unauthorized absence of the officer from 25.06.1983 dated 08.06.1992;

8. Whereas the Inquiry officer found that absence from duty of the government servant was pre-planned;

9. Whereas the officer was directed to explain the points raised by the Inquiry officer in the enquiry report before further action is taken against him’

10. Whereas the officer totally disagreed with the findings of the inquiry officer on some legal grounds;

11. Whereas the matter was referred to the Finance Department for their opinion who vide their U.O No. FC/Engg-PWD-21/98 dated 12.10.1999 conveyed as under:

“In compliance of Court directions, Finance Department conveys its agreement to the treatment of unauthorized absence of 9 years and 14 days of Shri Zahoor Hussain Zarger AEE as dies-non; in terms of Article 163 read with Government Instruction No.3 under the said Article of (CSR’s).

Now, therefore, consequent upon the above, the period of un-authorized absence of Shri Zahoor Hussain Zargar AEE w.e.f 25.05.1983 to 08.06.1992 is hereby treated as dies-non.

By order of the government of Jammu and Kashmir.

Sd/-

Addition Secy. to Govt.
Public Works Deptt.

No: G-Estt-25-93/W.P/Mech Dated 28.03.2000”

The functionaries of the State Government, however, appear to have granted Service benefits to the appellant for the period, treated as “Dies-non”, *inter alia*, placing him as Incharge Executive Engineer vide Government Order No. 90-Works of 2003 dated 28.02.2003 and Incharge Superintending Engineer vide Government Order No. 378-PW (R&B) of 2006 dated 22.09.2006.

It was in the year 2009 that relying on SRO 514 of 22.11.1999, the Government, vide its Order No. 194-PW (R&B) of 2009 dated 31.08.2009, directed that the appellant’s unauthorized period of absence with effect from 25.02.1983 to 08.06.1992, treated as “Dies-non”, be given effect to as follows:-

- i. It will not qualify for any remuneration (pay and allowance);
- ii. It will not count for pension;
- iii. It will not count for increments;
- iv. The Seniority of Shri Zahoor Hussain Zargar fixed at Serial No. 79 in the Final Seniority List of Assistant Executive Engineers (Mechanical), vide Government Order No. 105-PW (R&B) of 2005 dated 29.03.2005 is re-fixed at Serial No. 101-A i.e. below Shri H.K.Chopra and above Shri Bashir Ahmed, as subsequently the regularization has been made up to Shri H.K.Chopra at the level of Executive Engineers.
- v. Consequent upon (iv) above his seniority amongst the Executive Engineers as fixed at S.No. 20 in the final seniority list of Executive Engineers issued vide Government order no. 39-PW(R&B) of 2006 dated 30.01.2006 is re-fixed at S.No. 37 i.e. below Sh. H.K.Chopra.
- vi. Sh. Zahoor Hussain Zargar be deemed to have been placed as I/C Superintending Engineer (Mechanical) with effect from 31.05.2007 (instead of 22.06.2006) i.e. the date when his juniors were placed as I/C Superintending Engineers (Mech) vide Government Order No. 190-PW(R&B) of 2007 dated 31.05.2007.
- vii. The concerned Drawing & Disbursing Officer shall re-fix the salary of the

officer from 09.06.1992 and recover in lump sum the excess pay drawn by the officer.”

The appellant again approached this Court by Writ Petition SWP No. 1608/09 seeking, *inter alia*, quashing of Government Order No. 194-PW (R&B) of 2009 dated 31.08.2009.

His Writ Petition was dismissed, by a learned Single Judge of this Court vide Judgment dated 03.12.2009. He has filed this Letters Patent Appeal seeking setting aside of the Judgment.

The appellant’s learned counsel submitted that the period of appellant’s “unauthorized absence” treated as “Dies-Non”, was required to be dealt with under the provisions of the Jammu and Kashmir Civil Services (Leave Rules), 1979, and not in terms of the provisions of the Jammu and Kashmir Civil Service Regulations and Amendment introduced thereto vide SRO 514 of 22nd November, 1999, as erroneously done by the State-respondents, whose order was liable to be set aside and quashed because the respondents could not foist that punishment on the appellant, provision wherefor, did not exist when he had incurred the liability of “Dies-non”, and that too without affording him opportunity of hearing before issuance of the order impugned in the Writ Petition.

Learned counsel relies on *Taqadus Gulzar Ali versus State and others*, reported as 2004(I) S.L.J 261 and the judgment delivered in appellant's earlier Writ Petition SWP No. 1138/93, to support his submissions. Referring to the judgment delivered by a Division Bench of this Court in *Dr. Mohammad Afzal Wani versus State of J&K & others*, reported as 2009 (II) S.L.J, 447, he submitted that the judgment was *per-incuriam*, being against the provisions of the Jammu and Kashmir Civil Services (Leave) Rules, 1979 and the reliance placed thereon by the learned Single Judge was unwarranted.

Per contra, the learned State Counsel submitted that having opted not to question Government Order No. 91-PW of 2000 dated 28.03.2000, treating the period of his "unauthorized absence" as "Dies-non", the appellant could not avoid the resultant consequences of "Dies-non", as it stood explained by SRO 514 of 22nd November, 1999. Referring to the provisions of the Jammu and Kashmir Civil Service Regulations and the Note appearing in its Part III, learned counsel submitted that the provisions of the Jammu and Kashmir Civil Services (Leave) Rules, 1979 did not oust the application of those provisions of the Jammu and Kashmir Civil Service Regulations which dealt with the matters, not specifically dealt with in the Leave Rules. The State action, upheld by the learned Single

Judge, has been supported by the learned counsel relying on Dr. Mohammad Afzal Wani's case (supra).

We have considered the submissions made by the learned counsel at the Bar.

The first question that falls for consideration in the Appeal is as to whether the application of the Jammu and Kashmir Civil Services (Leave) Rules, 1979, the "Leave Rules", for short, to the Government employees, who joined service on or after 01.01.1979, oust the application of the provisions of the Jammu and Kashmir Civil Service Regulations, 1956, "Civil Service Regulations", for short.

To deal with the question, reference needs to be made to the Note appearing in Part III of the Civil Service Regulations, which deals with Leave, And Rules 4(2) & 77 of the Leave Rules, which are reproduced hereunder for reference:-

"Civil Service Regulations :

Note- Rules in this Chapter do not apply to the employees who have joined service on or after 01.01.1979 and those who were in service on 31.12.1978 but opted for the Jammu and Kashmir Civil Services (Leave) Rules, 1979. **Such of the provisions in this Chapter as are of the general nature and are not inconsistent with the Jammu and Kashmir Civil Services (Leave) Rules, 1979, will, however, apply to all employees."**

Leave Rules :

"Rule 4(2)(b) – Words and Expressions used herein and not defined but defined in the Jammu and Kashmir Civil Service Regulations, shall have the meanings respectively assigned to them in the Jammu and Kashmir Civil Service Regulations."

"Rule 77 – Repeal and Saving :-

- (1) on the commencement of these rules, every rule, regulations or order in force immediately before such commencement shall **in so far as it provides for any of the matters**, contained in these rules, cease to operate."

Conjoint reading of the above quoted Note appearing in the Civil Service Regulations, and the Leave Rules, reveals that the provisions of the Civil Service Regulations, continue to govern all the employees of the State Government, save and except, in respect of those matters which were dealt with specifically in the Leave Rules; meaning thereby, that the Civil Service Regulations would operate as general rules whereas the Leave Rules enjoy superiority only in respect of those matters which were dealt with therein specifically.

Therefore, the Words, Expressions and Situations not appearing and referred to in the Leave Rules, when employed, by the State, while dealing with its employees, governed by the Leave Rules, will have to be understood in the light of the meaning ascribed to them in the provisions of the Civil Service Regulations.

Perusal of the Leave Rules reveals that the expressions like “Maximum Period of Extra Ordinary Leave”, “Dies-non”, and “Out of the State employ”, are neither dealt with nor defined in the Leave Rules. There are no substitute rules or expressions either, dealing therewith, in the Leave Rules.

Thus reading the Note appearing in Part III of the Civil Service Regulations and the provisions of Rules 4(2)

& 77 of the Leave Rules, it becomes explicit that while dealing with the employees, governed by the Leave Rules of 1979, in case of their “unauthorized absence”, treated as “Dies-non”, regard needs to be had to the provisions of the Civil Service Regulations, dealing therewith, to appreciate the tenor and contours thereof.

The appellant’s plea that the provisions of the Civil Service Regulations had no application at all to the case of the appellant, who had joined service after 01.01.1979 and the expression “Dies-non”, having not been referred to in the Leave Rules, he could not be saddled with any liability, is thus found untenable, holding that, in the absence of any provision in the Leave Rules, explaining the expression “Dies-non”, the unauthorized absence of the appellant, treated as “Dies-non”, had to be dealt with borrowing the meaning therefor, as it so appears in the Civil Service Regulations.

Having thus answered the first question, the focus shifts to the treatment which the appellant was entitled to after his “unauthorized absence” was treated as “Dies-non” vide Government Order No. 91-PW of 2000 dated 28.03.2000.

To deal with the question, reference needs to be made to the Government Instructions introduced in Article 163 of the Civil Service Regulations from time to time vide

SROs issued in this behalf in exercise of the powers conferred in the Governor by proviso to Section 124 of the Constitution of Jammu and Kashmir. The SROs are reproduced hereunder:-

“SRO 80 dated 10.02.1972 –

Government Instructions:- No period of unauthorized 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**” (non 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 unless it is the intention of the competent authority that a Government Servant shall be penalized effectively to the extent that all leaves at his credit should forfeit or his increment postponed.”

“SRO 321 dated the 7th December, 1995 –

In exercise of the powers conferred by proviso to Section 124 of the Constitution of Jammu and Kashmir, the Governor is pleased to make the following amendments in the Jammu and Kashmir Civil Services, Regulations, Volume I, namely:-

In the said rules:

The existing Government Instruction below Note 4 to Article 163 shall be recast as under:-

Government Instruction: No period of unauthorized 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 allowances).
- (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 about it should be made in the order itself.

- (e) It does not cause any interruption for the past service qualifying for pension.

By order of the Governor

Sd/-

M.S.Pandit,

Additional Chief Secretary (Finance)

No: A/72(93)-1009.

Dated 7.12.1995.”

“SRO 514 dated the 22nd November, 1999 –

In exercise of the powers conferred by section 124 of the Constitution of Jammu and Kashmir, the Governor is pleased to direct that the following amendments shall be made in Jammu and Kashmir Civil Service Regulations Volume-I :-

In the said Regulations:

The existing Explanation of Government Instruction below note 4 to Art. 163 shall be recast as under:-

Explanation :- The word ‘Dies-non’, an abbreviated form of ‘Dies-non Juriducus’ 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 intact, 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 circumstance. 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 count for pension,
- (iii) It does not count for increments,
- (iv) It does not cause any interruption for leave earned up to the date preceding 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 Governor.

Sd/-
Ajit Kumar
Principal Secretary to Government,
Finance Department.
No. A/22(93)-941 Dated 22.11.1999"

The Government Instructions introduced to Article 163 of the Civil Service Regulations, vide SRO 80 of February 10, 1972, were in force when the appellant had incurred liability for his “unauthorized absence”. In terms of the Government Instructions, the appellant’s period of “unauthorized absence”, treated as “Dies-non” had not to qualify for any remuneration. It had not, however, to constitute interruption for service **qualifying for** *pension, leave and increment*; meaning thereby that he would not be entitled to rest of the benefits, i.e., promotion, seniority, increment etc., for the period of “unauthorized absence”, which benefits would have been otherwise available to him, had not his absence been treated as “Dies-non”.

We have gone through the amendments introduced to the Government Instructions, referred to above, and find that SROs 321 of 1995 and 514 of 22.11.1999 introduce extended definition of the expression “Dies-non”, than the one the Government had contemplated vide SRO 80 of 1972.

Having incurred liability to punishment for “unauthorized absence”, during the operation of SRO 80 of 1972, the appellant could be deprived of only those Service

benefits which the Government Instructions introduced vide SRO 80 of 1972 had contemplated, and not those which came into force much after the appellant had been deemed to have rejoined the Department on June 09, 1992.

While considering the appellant's case as to whether or not he was entitled to those benefits of promotion, seniority, salary etc., which had been allowed to him and whether the period of his absence was to count for pension and increments, resort was required to be had to the provisions of SRO 80 of 1972 and not to the SROs which came into force subsequent to appellant's rejoining the Department.

The respondents had thus erred in applying the provisions of SRO 514 of 1999 to the appellant's case.

The view taken by the learned Single Judge that SRO 514 of 22nd November, 1999 was in force when the Government Order No. 91-PW of 2000 dated 28.03.2000 was passed and the appellant's case was governed by the conditions contained therein, may not thus be sustainable for the simple reason that penalty greater than that which might have been inflicted under the Statutes in force at the time of incurring the liability, can not be imposed under law.

The appellant is, therefore, found to have been erroneously dealt with by the respondents in terms of SRO 514 of 1999 vide Government Order No. 194-PW (R&B) of 2009 dated 31.08.2009 denying him the benefits available to him regarding the period countable for pension, and increments, as indicated in SRO 80 of 1972.

The order impugned in the appellant's Writ Petition, proceeding on the premise of SRO 514 of 1999, which was not applicable to his case, can not thus be sustained.

In view of what has been said above, the State Government is required to recast the order impugned in the Writ Petition, in terms of the provisions of SRO 80 of 1972.

Accordingly, setting aside the Judgment dated 03.12.2009 of the learned Single Judge and Government Order No. 194-PW (R&B) of 2009 dated 31.08.2009, the State-respondents are directed to pass such appropriate and consequential orders afresh, as warranted under law, keeping in view the provisions of SRO 80 of 1972 and after affording opportunity of hearing to the appellant.

This Appeal, therefore, succeeds and is, accordingly, allowed to the extent indicated above.

(Hasnain Massodi)
Judge

(J.P.Singh)
Judge

Jammu:
24.11.2010
Pawan Chopra