

**HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

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SWP no.626/2016

MP no.01/2018

Date of order: 29.09.2018

Dr Sheikh Hilal Ahmad

v.

State of J&K and another

Coram:

Hon'ble Mr. Justice M. K. Hanjura, Judge

Appearing Counsel:

For Petitioner(s): Mr. Salih Pirzada, Advocate

For Respondent(s): Mr. Shah Amir, AAG

Whether approved for reporting?

Yes

1. The fascicule of the facts, necessitous and apropos to fathom the background of the present writ petition, based whereupon a case has been set in motion and the present controversy built, has its genesis and origin to the envisioning of the claim of the petitioner since treating him not with similarly situated person, namely, Dr Mohammad Younis, has put him in uncertainty and melancholy. It is the inertia of the respondents in treating the petitioner dissimilar and not vouchsafing him the akin benefits bestowed upon the above Dr Mohammad Younis by Government Order no.812-HME of 2015 dated 18th December 2015 (*Annexure G to writ petition*), that has forced him to knock at the portals of this Court with the writ petition on hand.
2. The petitioner pleads that he is working as a Consultant Neurology and is posted in the Government Medical College, Srinagar. In the year 2010, he was selected for the super-

specialty training course in the discipline of Neurology at Sir Ganga Ram Hospital, New Delhi. For undergoing the said course, he implored for grant of study leave before the respondent no.2, who forwarded petitioner's application to the respondent no.1 vide no.Est/3/1-133/2169 dated 28th May 2010. The departure report was left before the respondent no.2 on 29th May 2010 to join DNB Course in time, lest to forfeit the seat in the eventuality of the delayed reporting. It is maintained by the petitioner that the DNB Course was undergone and successfully completed within the stipulated period. For resumption of the duties, the petitioner submitted the joining report on 5th May 2014. The respondent no.2 vide letter dated 29th May 2014, forwarded the case of the petitioner to respondent no.1 for grant of the approval. Regardless of the actual date of joining corresponding to 5th May 2014, the respondent no.1 allowed the formal joining from 22nd July 2014 as per the instructions conveyed vide communication dated 22nd July 2014. The petitioner also maintains that since the intervening period from the date of leave till the resumption of the duties was left undecided together with assigning arbitrary date of joining, the petitioner filed a detailed representation dated 30th September 2015, through proper channel and by the communication dated 23rd February 2017, addressed to the respondent no.2, it has been resolved to treat the intervening period as dies non in furtherance to the decision taken previously vide order dated 23rd May 2015, governing the case of a batch of seven doctors including the

petitioner, who were found to have undertaken super-specialisation course unauthorisedly. The petitioner claims that he has been requesting the respondents to treat the period as on deputation as has been done in the similar cases where the training period has been treated as on deputation, but no action is being taken to decide the intervening period, during which the petitioner underwent the training as on deputation/study leave as has been done in case of aforesaid Dr. Mohamamd Younis.

3. Counter, though ample opportunities granted, has not been filed by the respondents.
4. I have heard the learned counsel for the parties and considered the matter.
5. Learned counsel for the petitioner, to bolster the case set up by the petitioner, sturdily states that it is not in dispute that the petitioner joined the respondent department as the Medical Officer on 28th March 2007 and given the length of service and the nature of the training undergone, after due process of selection, the petitioner does not incur any disability for seeking study leave. He also states that sanction of the study leave was retained unreasonably and it is only in lieu of the advanced and the specialised training that the petitioner is reckoned as a Super-Specialist and his proficiency is utilised for the greatest advantage of the patient care. His further submission is that the petitioner has been discriminated as being denied the benefit of the deputation granted to afore-named similarly situated person, namely, Dr Mohammad

Younis, who had also been relieved to join DNB Course, inasmuch as prior to joining the course, the leave was applied for before the competent authority. Moreover, in the context of the case of Dr Afaq Ahmad Khan, decided by the Government for treating the period of DNB Course as on the study leave whatever kind due, the case of the petitioner is of improved form as having more than three years of service as compared to the said doctor, who was deficient of requisite three years' service as observed in the Government order for treating the period as on leave without allowances. In comparison to the said illustration, the petitioner has requisite service and did not suffer any disability for availing study leave with pay and allowance as admissible under the study leave rules.

6. He also contends that in order to capitalise overmuch coveted opportunity, the petitioner undertook the training course and after its completion, he joined the services. As a result of the training, the petitioner has gained the proficiency in the discipline of the Neurology to be garnered in the relevant sphere of activity and therefore, there is no question of unauthorised absence as the period is utilised to train and equip in Neurology which is the related sphere of professional activity and comprehensive with study leave rules. After earning such training, the services of the petitioner are being harnessed for specialised treatment of patients as a Specialised Neurologist inasmuch as the petitioner as on date has been posted in GMC, Srinagar. The learned counsel for the petitioner, to buttress his arguments, has placed reliance on

Central Inland Water Transport Corporation Ltd and another v. Brojo Nath and another AIR 1986 SC 1571. The learned counsel has also referred to the judgement dated 26th June 2018, passed by this Court in SWP no.502/2016 titled *Dr Syed Javid Farooq Qadri v. State of J&K and another*, to contend that the case in hand is squarely covered by the said judgement.

7. The petitioner way back in the year 2007, came to be appointed as the Assistant Surgeon vide Government Order no.212-HME of 2007 dated 28th March 2007. While in service, he was selected for DNB Course in Sir Ganga Ram Hospital, New Delhi, after undergoing extensive competition for Super Speciality in the discipline of Neurology. He sought study leave and submitted his departure report on 29th May 2010. On completion of the DNB Course, he joined the services. The respondents by the Government Order no.108-HME of 2016 dated 23rd February 2016 and no.812-HME of 2015 dated 18th December 2015 (*Annexure E&G to writ petition*) have treated the period of DNB Course spent by Dr Afaq Ahmad Khan and Dr Mohammad Younis – a similarly situated persons, as the present petitioner – as ‘on leave’ and ‘on deputation’, respectively.
8. What principally emerges from the Government Order no.108-HME of 2016 dated 23rd February 2016 and no.812-HME of 2015 dated 18th December 2015 (*Annexure E&G to writ petition*), is that similarly situated persons as the petitioner, namely, Dr Afaq Ahmad Khan and Dr Mohammad Younis, had undergone DNB

Course. Thus, the present petitioner cannot be treated in a different way.

9. The matter for settlement of the period spent for undergoing the DNB Course qua Dr Afaq Ahmad Khan and Dr Mohammad Younis was initiated and processed, which culminated in issuance of aforesaid two Government orders, bearing no.108-HME of 2016 dated 23rd February 2016 and no.812-HME of 2015 dated 18th December 2015 (*Annexure E&G to writ petition*), treating the period spent for undergoing the DNB Course as '*on leave*' and '*on deputation*' respectively. Worth to be seen is that the respondents in the aforesaid Government Orders indubitably admit and accept that approval has been conveyed for treating the period of PG/Super Specialist Medical Courses as '*on leave*' and '*on deputation*' in favour of inservice doctors including some petitioners who have undergone and/or are undergoing such studies in various colleges. It was in view of the said policy decision that the period spent by similarly situated persons, namely, Dr Afaq Ahmad Khan and Dr Mohammad Younis, has been treated as '*on leave*' and '*on deputation*'. Having said so, the present petitioner, therefore, cannot be discriminated and denied the benefit vouchsafed to similarly situated persons. In that view of matter, treating the period spent by the petitioner for undergoing the DNB Course as '*dies non*', could not withstand the test of fairness and therefore is pregnant with arbitrariness.

10. Be that as it may, the petitioner has made out a case for grant of the relief(s) implored for by him in the writ petition on hand. However, the above discourse needs to be overstretched.
11. It may not be out of place to mention here that the men's concept of the State as a polity or a political unit or entity and what the functions of the State are or should be, have changed over the years and particularly in the course of this century. A man cannot tenaciously cling to the same ideas and concepts all his life. As Emerson said in his essay on "Self-Reliance", "*A foolish consistency is the hobgoblin of little minds*". Man is by nature ever restless, ever discontent, ever seeking something new, ever dissatisfied with what he has. This inherent trait in the nature of man is reflected in the society in which he lives for a society is a conglomerate of men who live in it. Just as man by nature is dissatisfied, so is society. Just as man seeks something new, ever hoping that a change will bring about something better, so does society. Old values, old ideologies and old systems are thus replaced by new ideologies, a new set of values and a new system; they in their turn to be replaced by different ideologies, different values and a different system. The ideas that seem revolutionary become outmoded with the passage of time and the heresies of today become the dogmas of tomorrow. What proves to be adequate and suited to the needs of a society at a given time and in particular circumstances turns out to be wholly unsuited and inadequate in different times and under different circumstances.

12. The story of mankind is punctuated by progress and retrogression. Empires have risen and crashed into the dust of history. Civilizations have flourished, reached their peak and passed away. In the year 1625, *Carew, C.J.*, while delivering the opinion of the House of Lords in *Re the Earldom of Oxford, (1625) W. Jo. 96, 101 SC (1626) 82 E.R. 50, 53*, in a dispute relating to the descent of that *Earldom*, said:

"...and yet time hath his revolution, there must be a period and an end of all temporal things, *finis rerum*, an end of names and dignities, and whatsoever is terrene...."

13. The cycle of change and experiment, rise and fall, growth and decay, and of progress and retrogression recurs endlessly in the history of man and the history of civilization. T.S. Eliot in the First Chorus from "The Rock" said:

"O Perpetual revolution of configured stars,
O Perpetual recurrence of determined seasons,
O world of spring and autumn, birth and dying!
The endless cycle of idea and action, endless invention,
endless experiment".

14. The law exists to serve the needs of the society, which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, *Sydney Smith*, said, "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologies. Legislatures are, however, not

best fitted for the role of adapting the law to the necessities of the time, for the legislative process is too slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad other legislative activities. A constitutional document is even less suited to this task, for the philosophy and the ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending a Constitution is too cumbersome and time-consuming to meet the immediate needs. This task must, therefore, of necessity fall upon the courts because the courts can by the process of judicial interpretation adapt the law to suit the needs of the society.

15. I would like to quote the following passage, which has become a classic, from the opening paragraph of *Justice Oliver Wendell Holmes's "The Common Law"*, which contains the lectures delivered by him while teaching law at *Harvard* and which book was published in 1881 just one year before he was appointed an *Associate Justice of the Massachusetts Supreme Judicial Court*:

“It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic : it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to

understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.”

16. This Court has in detail and comprehensively discussed all the issues in the case of *Dr Syed Javid Farooq Qadri v. State of J&K and another*, (supra), which also relate to and set at rest the controversy emanating from the case in hand and need not be iterated.
17. Taking the foregoing discussion, observations and reasons together, the writ petition is allowed. The communications bearing no.HME/HRM/55/2011-Part file dated 23rd February 2017 (*Annexure C to writ petition*) and no.HME/HRM/55/2011 (Kashmir) dated 23rd February 2013 (*Annexure D to writ petition*), qua petitioner are quashed. The respondents are directed to treat the period spent by the petitioner for undergoing the training as on deputation/ study leave as has been done in case of Dr Mohammad Younis vide Government Order no.812-HME of 2015 dated 18th December 2015 and Dr Afaq Ahmad Khan vide Government Order no.108-HME of 2016 dated 23rd February 2016, and give the petitioner all the service benefits for the said period, to which he is entitled to.
18. **Disposed of.**

(**M. K. Hanjura**)
Judge

Srinagar
29.09.2018
Ajaz Ahmad