

**IN THE HIGH COURT OF JAMMU & KASHMIR AND  
LADAKH  
AT SRINAGAR**

**LPASW No. 19/2019 c/w  
LPASW No. 149/2018**

Reserved on: 06.11.2024  
Announced on: 29.11.2024

**State of JK and others**

...Petitioner(s)/Appellant(s)

Through: Mr. Ilyas Nazir Laway, Government Advocate with  
Mr. Mohd Younis, Assisting Counsel

**Vs.**

**Faisal Mushfeen Qureshi**

...Respondent(s)

Through: Mr. Z.A. Qureshi, Sr. Advocate with  
Ms. Monsia Manzoor, Advocate in LPASW No. 19/2019  
Mr. M.Y. Bhat, Sr. Advocate with  
Mr. Sajid, Advocate in LPASW No. 149/2018

**CORAM:**

**HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE  
HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE**

**JUDGMENT**

**LPASW No. 149/2018**

1. The present appeal has been filed by the appellants who are aggrieved by the order dated 28.03.2018 passed in SWP No. 807/2013 and SWP No. 427/2012.
2. The brief facts necessary to appreciate the present case are as follows.
3. The National Board of Examination, New Delhi, held an examination for the DNB Course in Cardiology at Fortis Hospital, Mohali. The respondent participated in the same and was declared qualified and in terms of the order dated 24.02.2012, he was required to join the said course by 9<sup>th</sup> March 2012, failing which, his seat would have been forfeited. The respondent applied for grant of study leave before the appellants where he was working as an Assistant Surgeon and the

failure on the part of the appellants to take a decision on the said application compelled the respondent herein to approach this Court by way of SWP No. 427/2012. This Court, vide order dated 08.03.2012 passed in the said petition, issued notice to the appellants herein. It was also the case of the respondent herein that the appellants had verbally assured him that his case would be considered and study leave was formally granted in his favour and that he could join the course at Fortis Hospital, Mohali. On the said assurance of the appellants, the respondent left the Department of Health and joined the DNB Course at Mohali. Thereafter, the appellants herein issued a Government order dated 25.04.2013 directing the termination of the respondent from the services of the Department which was impugned before the learned Single Judge by way of SWP No. 807/2013.

4. Before the learned Single Judge, the respondent challenged the order of termination on the grounds that similarly situated Assistant Surgeons who are working with the petitioner/respondent herein in the Department of Health were granted study leave for pursuing the DNB course and other courses both within and outside the State and that the order of his termination was an arbitrary exercise of jurisdiction by the appellants herein. It was further averred before the learned Single Judge that the respondent was not provided an opportunity of being heard before passing the order of termination.
5. Before the learned Single Judge, the respondents have resisted and controverted the petition filed by the respondent herein on the grounds that the respondent was appointed as an Assistant Surgeon on 17.06.2010 and that he proceeded on unauthorized absence from his

duties w.e.f 02.03.2012, when he was still on probation and that, as the respondent failed to report for his duties, the Directorate of Health Services, Kashmir, served a show cause notice on him dated 26.07.2012 and as the respondent did not file any response to the said notice, the case was forwarded to the Administrative Department, where a final opportunity was given to the respondent and other similarly situated like him on 10.10.2012 to report back to the Directorate of Health Services, Kashmir, within 15 days, failing which, it would be presumed that the noticed persons had nothing to say in their defence and disciplinary proceedings as envisaged under Article 128 of CSR Vol-II shall be initiated against him. The respondent once again chose not to respond to the said notice. As the respondent absented unauthorizedly from service, with the aid of Rule 21(1) of the J&K Civil Services (Classification, Control & Appeal) Rules -1956, his service was terminated.

6. The Learned Single Judge was influenced by the fact that several others who were similarly situated like the respondent herein, who had gone for higher education while still being on probation were allegedly accommodated by the appellants herein, and that the case of the respondent was not dealt at parity with them. In other words, the Learned Single Judge was of the opinion that others so similarly situated as the respondent were not terminated from service and were allowed to complete their post-graduation even though they had availed of the same during the period they were in probation. The Learned Single Judge has also referred and relied upon the judgment passed by Learned Single Judge in *Syed Asim Razvi (SWP No. 862/2007)*, which was decided vide judgment dated 26/05/2011, by which the termination

orders were quashed by this Court by directing the petitioners therein to be given the benefit of Government order dated 25.04.2008. The said order has been reproduced in the impugned order itself and having gone through the same, this Court is of the opinion and that the Learned Single Judge had misconstrued the Government order dated 25.04.2008, which was applicable and provided for the seniority of those Assistant Surgeons to be maintained while they were undergoing post-graduation education as in-service candidates.

7. Learned counsel for the respondent has submitted that similarly situated persons were granted the benefit of both, concluding their higher education and also the protection of the seniority by Government order dated 25.04.2008. However, learned counsel for the appellants has pointed out that the said Government order would not apply in the case of the respondent herein as that covered only such persons who were already undergoing the higher education and were thereafter selected to the post of Assistant Surgeons and so were permitted to continue with the post-graduation studies rather than leave their studies midway to join service. He has further submitted that the case of the respondent herein was one where the respondent had first joined service and during his probation applied and secured a seat for post-graduation and then applied for leave which, however, was not granted and thereafter stayed away without leave on account of which he was terminated. Learned counsel for the appellants has drawn the attention of this Court to Rule 61 (4) (i) relating to study leave under the Civil Services (leave) Rules, 1979. He has also referred to Rule 62 (a) of the said Rules. Both these Rules shall be referred to in the course of this order.

8. Heard the learned counsel for the respective parties and perused the record of the learned Single Judge.
9. From the order which is under challenge, it is clear that the Learned Single Judge has firstly proceeded on the premise that identically situated persons were granted the benefit of continuation in service for which the respondent herein was terminated. It is also clear that the Learned Single Judge has misconstrued the Government order dated 25.04.2008. As regards the first premise on which the Learned Single Judge proceeded, this Court is of the opinion that if a previous action of the State is wrong on account of the same being violative of existing law, the same cannot be perpetuated in order to grant relief to other similarly situated persons in violation of the law. In other words, there can be no question of negative parity.
10. The Government order mentioned hereinabove clearly reveals that its application was in those cases where a person was already pursuing post graduation and during that time was selected in service as an Assistant Surgeon. The Government order protects such persons by permitting them to continue with their higher education lest the time that they spent in pursuing the post graduation before entering service, is wasted. The said Government order does not apply in those cases, where the person joins the service as an Assistant Surgeon and while being on probation applies for post graduation and is selected for it in the light of Rule 61 (4) (i), which provides for study leave to be granted for those who are in Government service as per the Civil Services (leave) Rules 1979. The aforementioned provision provides that study leave shall not ordinarily be granted to a Government servant who has

not rendered three year service in the Government or where he continues to be a probationer and has not completed the said period of probation satisfactorily whichever is later. Therefore, it is apparent that the respondent herein who was on probation and while being a probationer was selected for higher studies, was not eligible for the grant of study leave as per 61(4) (i).

11. Under the circumstances, this appeal is allowed and the order passed by the Learned Single Judge is set aside.

12. The appeal stands **disposed of**.

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13. In this case, the respondent herein had joined government service as an Assistant Surgeon and was on probation. During that time, he applied for and was selected for postgraduate studies and so he applied for leave and joined the institution for postgraduate studies. He was finally terminated from service after notice was issued to him to join his place of posting within 15 days and the respondent not having done so, was removed from service. The Learned Single Judge has allowed the writ petition relying upon the judgment of the Coordinate Bench in SWP No. 807/2013 (*Dr Mohammed Iqbal Wani Vs. State of JK and others*). However, the said judgment on the basis of which the Learned Single Judge has relied upon and has granted relief to the respondent herein on the grounds of parity, has been set aside by this Court in LPA No. 149/2018.

14. Under the circumstances, the case is remanded to the Learned Single Judge with a request to decide afresh on the facts and circumstances, which may be peculiar to the case of the respondent uninfluenced by

this order.

15.The appeal stands **disposed of**.

16. A copy of this order/judgment be placed on the record file of each of the appeals.

(PUNEET GUPTA)  
JUDGE

(ATUL SREEDHARAN)  
JUDGE

SRINAGAR:  
29 .11.2024  
ARIF

Whether the order is reportable?      Yes/No

