

(2004) 11 J&K CK 0014

In the Jammu And Kashmir High Court

Case No : OWP Nos. 509 Of 2004, 589 Of 2004, 587 Of 2004, CMP Nos. 905 Of 2004, 1146 Of 2004, 1060 Of 2004, 1139 Of 2004 and 1058 Of 2004

Abdul Rashid Shah and Others

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 07-11-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2005) JKJ 687 Supp : (2004) SriLJ 711

Hon'ble Judges : Nisar Ahmad Kakru, J

Bench : Single Bench

Advocate : Shabir A.Vakil, Saleem Gupkari, S.R.Hussain, S.A.Qadri, R.Fida, N.A.Kuchai, H.Furrahi, G.A.Lone, Advocates appearing for the Parties

Judgement

1. Nomination of KhudamulHujjaj made vide Government Order No. 178 Rev (Haj & Auqaf) of 2004 dated 10.08.2001 has become subject

matter of three clubbed writ petitions. Regard being had to the sanctity and importance of the Hajj pilgrimage coupled with the contentions issues

raised, it was deemed appropriate to ask the State to relook into the impugned selection/nomination, accordingly, learned counsel was directed to

broach option with the State who responded with inability because as per his perception reexamination would amount to an admission to the effect

that the selection was a pursuit of unfairness. In view of such response, Court is left with no option but to deal with the matter on its merits. To

dwel upon the alleged violation of guidelines it needs to be understood as to which scheme/policy/guidelines envisage appointment of

KhadimulHujrjaj. In this behalf communication of the Government of India, Ministry of External Affairs (Haj Cell) bearing No.

M(Haj)/1183/14/2004 dated April 20 2004, guidelines thereof and format of application (forming pages 48 to 50 & 55 of Government File No.

Rev (Haj) 09/04 may be extracted:

No. M (Haj)/1183/14/2004

Government of India

Ministry of External Affairs

(Haj Cell)

New Delhi, April 20, 2004

OFFICE MEMORANDUM

The undersigned is directed to forward herewith the following updated documents in connection with selection of KhadimulHujjaj for Haj2005:

- * Revised Guidelines for selection of KhadimulHujjaj (Annexure A).

- * Duties of the KhadimulHuiJaj (Annexure (B).

- * Prescribed form for inviting applications (Annexure C).

2. Select list of KhadimulHujjaj may be sent to this Ministry for scrutiny and approval. It may kindly be noted that all nominations should be strictly

in accordance with the guidelines issued by the Ministry. You may send us Panel of names and advise them to attend the Training/Orientation

Camps organized by Central Haj Committee and State Haj Committees. The ministry will subsequently select KhadimulHujjaj from the panel

proposed by you on the basis of 1: 500 after receiving the confirmation from State Haj Committees that the empanelled persons have attended the

Training/Orientation Camps. The Central and State Haj Committees should ensure that KhadimulHujjaj travel along with Hajjis and in no case,

they should travel to Saudi Arabia after the Hajjis and in no case, they should travel to Saudi Arabia after the Hajjis have already reached and

settled down.

3. Last date for receipt of nominations in the Haj Cell, Ministry of External Affairs is Friday 30th July 2004.

Sdl

(P. K. Gautam)

Administrative officer (Haj)

AnnexureA

Haj 2005

Guidelines for Selection of KhuddamulHajjaj

Each State Haj Committee may appoint one KhadimulHujjaj for every 500 pilgrims from the State.

1. The Hajj Committees are requested to keep the following points in mind while nominating KhadimulHujjaj.

(a) Only those persons who have attended orientation/training camps organized by the Central Haj Committee/State Haj Committees will be considered for selection as KhadimulHujjaj.

(b) The individual (mala only) should be between the age of 25 and 50 years. He should be an active person of sound health with experience of dealing with crowds such in Mosques and other religious congregation.

(c) The individual selected should not, repeat not, be a senior official (like Class I and above, or a member of IAS or other Central or State Services, etc) or a political leader (like MLA etc.) or even a member of a State Haj Committee.

(d) The individuals selected should be Government servants, such as B.D.O., Tehsildar or School Teacher, etc. subject to no objection from the respective Departments.

(E) No family member should accompany a KhadimulHujjaj.

(f) He should have no connection with any Saudi Moalim. In addition, he should not accept any financial or other consideration from any pilgrim as the KhadimulHujjaj is expected to render free social service.

(g) He should have performed Haj before as his past experience and knowledge would enable him to assist and guide the pilgrims properly, Preference should be given to those having knowledge of Arabic.

(h) A person who has once served as a KhadimulHujjaj and against whom there are adverse observations by the Consulate General of India, Jeddah, will not be sent.

(i) He should travel with the pilgrims from your State.

(j) The selected KhadimulHujjaj may also be warned in writing that in case any adverse report on the performance of duties by a KhadimulHujjaj

is received from the Consulate General of India, Jeddah or from this Ministry, he may to refund the entire amount of expenditure incurred by the

State Haj Committee on his journey to Saudi Arabia.

(k) The State Haj Committees should arrange a brief guidance/training course for the KhadimulHujjaj before his departure. He should be issued a certificate to this effect, which should be submitted to our Consulate General on arrival at Jeddah.

2. The enclosed note detailing duties of KhadimulHujjaj may please to got translated in the regional language of your State and a copy given to each of the persons selected to study and guidance.

3. On arrival in Saudi Arabia, each KhadimulHujjaj should discharge his duties under the supervision and direction of the Consul ate General of

India. He should report to them regularly and be generally available when his services are required. Before his return to India, each KhadimulHujjaj

should submit a report along with the Register to the Consulate General of India, Jeddah on the difficulties faced by pilgrims in this charge and the services rendered by him.

4. It may be added that some of the KhadimulHujjaj deputed to Jeddah in the past had complained to the Consulate General of India. Jeddah that

there was disparity in the matter of allowances and other facilities provided by the respective State Haj Committees to the KhadimulHujjaj. This

should be avoided by following a uniform policy. With a view to enabling the KhadimulHujjaj to discharge his duties efficiently, it is also suggested

that his travel expenses from his place of residence to Jeddah and back should be borne by the State Haj Committee and he must be paid

necessary advance to enable him to purchase the full quantum of foreign exchange. A pilgrim for Haj has the option to purchase foreign exchange

for Saudi Riyals 5,500 to 5,000. In addition, KhadimulHujjaj will also be allowed an additional foreign exchange of SRLs 100/ (Saudi Riyals One

Hundred Only) to meet the extra expenditure or transport etc while in Saudi Arabia.

AnnexureC

Prescribed Form for inviting applications for KhuddamulHaiiai HAJ 2005

1. Full Name Attested Photograph

2. Address

3. Age

4. Date of Birth:
5. Are you Govt. Servant? Yes No
6. Profession/Occupation:
7. Languages Known:
8. Educational Qualification:
9. State of Health
10. Have you attended training/orientation Camps organized by CHC/SHC
11. Experience in organizing public congregations and in social work (Please give details):
12. Previous experience as Hajji or as Haj volunteer. Yes No
13. Any other information of interest:

Signature

Place:

Date:

2. To appreciate the averment indicating violation of guidelines it has become necessary to reach at the source of power of selection/appointment

which is traceable to the very first para of guidelines reproduced hereinabove. Its perusal makes it abundantly clear that the power to

select/appoint a KhadimulHujjaj vests in the 'State Haj Committee'. I can it a selection/appointment because Memorandum and Guidelines issued

by the Government of India, Ministry of External Affairs (Haj Cell) define it so, accordingly, referred hereinafter. That appears the reason for the

Government of India, Ministry of External Affairs (Hajj Cell) to have sought the select list from the 'State Haj Committee' and not from the Chief

Secretary or the administrative department of Haj but fact of the matter is that the Chief Minister has not conceded the power to the authority

prescribed under the guidelines and has made the selection/appointment himself authenticated by the Commissioner/Secretary to Government,

Revenue Department (Haj & Auqaf), so much so the file was never put up before the State Haj Committee. The State Haj Committee did not

have any occasion to consider the names. No meeting of the Committee was ever convened to deliberate upon the application received,

conversely, file was submitted to the Chief Minister who selected twenty four

persons and remitted the file to the Revenue Department (Haj & Auqaf) for issuance of a formal order. Composition of the State Haj Committee has not been made known to the Court. Who heads it and under what nomenclature and who are its members and what is the hierarchy, file does not help out but capacity of the Divisional Commissioner, Kashmir as Convener and Additional Commissioner, Kashmir as Officer In charge of the State Haj Committee respectively is manifest but these officers have neither been consulted nor coopted with the process of selection/appointment and admittedly the selection/appointment is made by the Chief Minister although he is not invested with such power under the guidelines. Contention of Mr. GA Lone, appearing counsel for respondents 8,13 and 22 is that there is no averment in the writ petition on that count. Contention needs to be appreciated in the light of the fact that the main controversy in these petitions arises out of the alleged violation of the policy itself and same forms basis of the challenge, therefore, there is no room for such objection. Otherwise also, argument appears fanciful because while exercising the jurisdiction under article 226 if glaring omissions or commissions of the State come to the notice of the Court, in such eventuality, it cannot afford to be a spectator.

3. When asked in what capacity the Chief Minister has made the selection/appointment, the Learned AAG submitted that it was by dint of his official position besides being the Minister for Haj and Auqaf. Responding to the query whether the Chief Minister could exercise such power when power is with the 'State Haj Committee', he submitted that the Chief Minister has made only a recommendation. Examining the argument in the light of note 39 of the official record and the language, the impugned order is couched in, conclusion that emerges is that argument is imaginary and unrealistic, for, selection/appointment has already been made but could not be acted upon because of ad interim direction to the contrary from the Court. Is such selection/appointment sustainable in law, advantageous here it is to refer to the judgment in Angarki Coop. Housing Socy. Ltd.

v. State of Maharashtra (AIR 1997 SC 764), Paras 10, 11, 12 & 13 may be noticed:

1. Only when there is an isolated plot, the question of following any isolated procedure in disposing of the plot would arise. In the present case,

there was neither an isolated plot nor any isolated procedure was followed. What was done was wholly arbitrary and as such cannot be sustained...

2. So far as the second contention is concerned, the High Court rejected the same on the following reasoning:

Under Rule 11(2), proposal which requires the previous consultation with the Finance Department in subrule (i) but where the Finance

Department has not concurred, cannot be proceeded with unless a decision to that effect has been taken by the Council of Ministers. In the

present case, no such decision to proceed with proposal has been taken by the Council. We must emphasize that what is prohibited is the very

'proceeding with the proposal.' The exercise undertaken in the Department of PWD and Revenue Department, are proceeding which do not have

the prior concurrence of the Finance Department nor the permission of the Council of Ministers. The proceedings were started illegally, continued

illegally and ultimately culminated in an illegal order.

We agree with the, above quoted, reasoning and conclusion reached by the High Court and uphold the same.

3. We also agree with the High Court that the action of the State Government in allotting the plot to the Society, in the facts and circumstances of this case, was arbitrary.

4. An arbitrary action may not always be mala fide. We are of the view that in the facts and circumstances of this case, it would not be appropriate

to return a finding of mala fide on the part of any individual. We, therefore do not wish to go into the question of mala fide.

It is seen from the factual background of the above judgment that a proposal was mooted by the PWD and the Revenue Department without

concurrence of the Finance Department required under Rule 11(1) (a) of the Rules of Business culminating in allotment by an order which became

subject matter of a writ petition. The proceedings as also the allotment was set at naught by the High Court because the process of allotment was

not initiated as per the rules which received concurrence by the apex Court and in absence of rules, guidelines or administrative instructions, as the

case may be, have to rule the field. Admittedly, no rules are framed and it is the memorandum and guidelines which envisage mode of

selection/appointment of KhadimulHujjaj without any provision of sub delegation. It being so, the process has to be initiated and taken to its logical

conclusion by the authority known to the Guidelines viz State Haj Committee and none else. The expression ""Committee"" used in the guidelines

envisages a decision by a body of persons and not by an individual and appointment has to be made by the Committee as a whole. Conferring

power upon the Committee excludes the scope of absolute power in any one individual. There are no two opinions that the Chief Minister figures

at a very high pedestal in the echelons of power in the State but being unknown to the source of power i.e. memorandum and guidelines of the

Government of India, selection/appointment is without jurisdiction.

4. Adverting to the mode of selection/appointment reference to the affidavit filed by the respondents is necessitated wherein it is averred that the

record relating to twenty four selectees has been forwarded to the Government of India, Ministry of External Affairs, (Haj Cell), and is presently

lying with them but there is nothing on the official record which would suggest so. It is true of every functionary of the State that when any

communication is forwarded to any department or when the record is transmitted to any other functionary at least a copy of forwarding letter is

retained but it is a unique case where the official record does not contain any such proof. Believing what is urged by the respondents the difficulty

for them is that the record does not substantiate their stand as is evident from notes 34 to 38 which spell out the particulars at S. Nos. 1 to 207 of

those whose applications were actually before them. To put the record straight it needs to be clarified that at S. No.74 five persons have been

bracketed together because they figure in one letter. Reckoned as such, only 211 applications were available with the Revenue Department (Haj &

Auqaf) seeking nominating in all the categories namely Assistant Haj Officers/Haj Assistants/KhadimulHujjaj, Doctors and Para Medical Staff,

which came to be submitted to the Chief Minister for perusal/orders, but amazingly appointment in all the categories is made mostly of those whose

names do not figure at all in the relevant official file. However, no challenge is thrown to the appointments in respect of categories other than

KhudamulHujjaj, therefore, I choose, to skip over. Reverting to the appointment of KhudamulHujjaj, record reveals that out of 24

selectees/appointees only six persons had applied. One is at a loss to understand as to how appointments of those could be made who do not

figure among those whose cases were processed and recommended, nothing comes from the file. In this behalf it is pertinent to refer to the

judgment of the apex Court in *State of Bihar v. Kumar Promod Narian Singh* [(2997) 5 SCC 298]. Relevant para may be noticed:

Since the Government has not satisfied us as to how it has adopted this rationale, the appointment of selected candidates by pick and choose is an

arbitrary exercise of the power. Under these circumstances, the arbitrariness is writ large.

The mandate of the judgment makes it obligatory upon the respondents to satisfy the Court that the appointment was made by a fair mode which

obligation could be discharged by them through reply but it does not deal specifically with the issues raised. It is a cryptic one. Its reading makes

one to believe that the memorandum and guidelines have been strictly adhered to but ground reality shows Otherwise. Selection/appointment is

offered to those who do not figure in the official file forwarded for consideration but in the reply, they have pleaded otherwise which shatters the

veracity of the affidavit filed by the Commissioner/Secretary, Revenue Department, in support of reply. Coming to the official record, it indicates

that the memorandum/guidelines are the basis for selection/appointment, yet there is total departure.

5. This brings me to the argument of Learned AAG that the guidelines are not binding on them and cannot be enforced. To bring home the point,

reliance is placed on the observations of the Division Bench made in (COD) Application No.33/2004 on 24.05.2004 that deputation to Saudi

Arabia is a policy matter not calling for interference by the Court. Perusal of the judgment reveals that the policy of the Government provided

deputation of Allopathic doctors/Specialists only to Haj pilgrimage to the exclusion of Homeopathy, Unani and Ayurvedic doctors, therefore, a

writ was sought to command the State to depute the doctors of other systems of medicine. That was a case between unequals and challenge was

thrown to the policy, whereas it is a case seeking enforcement of policy. Facts being totally dissimilar, judgment has no application. Reference is

also made to *Mohammad Umar Sidiqi v. A.P. State and others* (AIR 1998 AP190). In that case selection was made on the basis of interview. Let

us hope State follows the suit. Reliance is also placed on Art.52B of the Jammu and Kashmir Civil Service Regulations and T.R. Sadotra v. State

of J&K and Others (SLJ 1984 J&K 40) contending that the Government has the power to make deputation, therefore, no requirement to invite

applications. The authority of an employer in respect of deputations within the country being well defined in rules as also terms and conditions

thereto, there is no need to embark upon the area. The controversy herein relates to the appointment of KhadimulHujjaj outside the country which

is something beyond usual functions of a Government employee. The amplitude of the selection/appointment has to be examined within the purview

of the memorandum and the guidelines for which a particular method is prescribed by the Government of India with a condition precedent for

inviting applications. More so, if guidelines are not enforceable, then how come appointment/selection in absence of memorandum and guidelines,

respondents have no answer and there can't be one because memorandum/guidelines is the only source from which power flows and the power

has to be exercised by the authority to which it is delegated which is the State Haj Committee. The argument also needs consideration in the light of

the reply filed by the State, wherein it is pleaded that there is no violation of the guidelines, submitting further that the process of selection owes its

origin to the communication of the Government of India, Ministry of External Affairs (Haj Cell), The stand represents a true factual position

discernable from the file No. Rev (Haj) 09/04, a Xerox set whereof is kept in a sealed cover to avoid reproduction of the notes with access to

none excepting with the permission of the Court. Since the stand taken by learned counsel runs contrary to the pleadings of the State therefore,

beyond his brief. Objections raised by the State are not tenable on facts and law. The judgments referred do not deal with the issues involved in

the case, obviously, same do not help the respondents.

6. Now I would like to address to the contentions issue in the light of law laid down by this apex Court. There is no dearth of decisions of the

Apex Court which have dealt with the issues of the like nature but then why to swell the number of citations, for, a single judgment will suffice

unless it is over ruled and in my opinion, near to similarity is the case 'Common Cause a Registered Society v. Union of India (AIR 1996 SC

3538) paras 19, 21, 22 and 25 may be extracted:

19. The allotments have been made by the Minister either on the ground of poverty or unemployment. Assuming that the allottees belong to either

of these two categories then how the Minister has selected them out of millions of poor and unemployed in this country. As mentioned above no

criterion was fixed, no guidelines were kept in view, none knew how many petrol pumps were available for allotment, applications were not invited

and the allotments of petrol pumps were made in an arbitrary and discriminatory manner.

21. The Government today in a welfare State provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots,

houses, petrol pumps, as agencies, mineral leases,/contracts, quotas and licenses etc. Government distributes largesses in various forms. A Ministry

who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and is elevated to a

position where he holds a trust on behalf of the people. He has to deal with the peoples' property in a fair and just manner. He cannot commit

breach of trust reposed in him by the people. We have no hesitation in holding that Capt. Satish Sharma in his capacity as Minister for Petroleum

and Natural Gas deliberately acted in a wholly arbitrary and unjust manner. We have no doubt in our mind that Capt. Satish Sharma knew that the

allottees were relations of his personal staff, sons of Ministers, Sons/relations of Chairman and members of the Oil Selection Boards and the

members of the Oil Selection Boards themselves. The allotments made by him were wholly mala fide and as such cannot be sustained.

22. We are further of the view that Capt. Satish Sharma acted in a wholly biased manner inasmuch as he unfairly regarded with favour the cases of

fifteen allottees before him. The relevant circumstances are available from record and discussed by us leaving acted in a biased manner to favour

these allottees and as such the allotments orders are wholly vitiated and are liable to be set aside.

25 It is high time that the public servants should be held personally responsible for their mala fide acts in the discharge of their functions as public

servants No public servant can arrogate to himself the power to act in a manner which is arbitrary.

(Emphasis supplied)

It needs to be placed on record that a review was sought against the judgment aforementioned which was heard by three Judges and decided in

Review Petition titled 'Common Cause, a Registered Society v. Union of India (AIR 1999 SC 2979) in the following terms and Para 169 reads as

under:

169. We may say that we maintain the rule of accountability and liability of the executive including public servants in administrative matters and

confirm that there should be transparency in all what they do, specially where grant of largesse is concerned. But, the present case is being decided

on its own peculiar facts and features in which, the finding as to the commission of tort of misfeasance recorded by this Court or the award of

exemplary damages as also directions for investigation by the C.B.I., cannot be sustained on account of errors apparent on the face of the record.

From a plain reading of the aforementioned para of the judgment, it is clear that the judgment witnessed a modification to the extent of damages

and direction for investigation by the C.B.I. It may not be impertinent to mention here that this view of the Review Bench is under consideration

before a larger bench but reference to those details are not relevant and the only aspect that calls for consideration is whether principles of law laid

down in basic judgment have been interfered with, answer is readily available from para 169 of the judgment (AIR 1999 SC 2979) which makes it

very clear that the principles of law have remained unaltered. How far these principles are attracted in the matter, needs to be appreciated in the

light of the fact that the basic judgment (AIR 1996 SC 3538) deals with a situation where allotments were made without following any criteria or

guidelines and the power was arrogated by the public servant to himself in an arbitrary manner. To identify the similarity of facts it needs to be

noticed that in the instant case, the authority assumed the power and made the selection/appointment without following any criteria or guidelines

rendering the action arbitrary, hence liable to be quashed.

7. The learned counsel for the respondents also questioned the scope of judicial review contending that the action of the State is not questionable.

The argument is near claim of immunity which stands settled. See paras 33, 65 & 80 of the judgment supra (AIR 1999 SC 2979).

33. No doubt it was open to the House of the People (Lok Sabha) to take up the issue of the abuse of discretionary quota by the petitioner in his

capacity as the Minister of State for Petroleum, and his conduct could have been debated and scrutinized on the floor of the House, but the mere

fact that this was not done would not mean that the allotments of petroleum outlets by him were immune from judicial scrutiny by this Court under

Art.32 of the Constitution. Therefore, even if the matter was not raised on the floor of the Lok Sabha, it would be amenable to the jurisdiction of

this Court under Art.32 of the Constitution.

65. Mr. Parasaran next contended that allotment of Petrol outlets by the petitioner would, in law, be treated as ""act of the State"" or ""Sovereign

Act"" and, therefore, it would be immune from civil or criminal action including action in Tort. This submission is also liable to be rejected.

80. For the reasons stated above, we are of the view that the allotment of petrol outlets by the petitioner cannot be treated as ""act of the State

and the rule of immunity invoked by Mr. Parasaran cannot be accepted.

It is manifest that the action of the respondents is amenable to the writ jurisdiction and the argument has no substance.

8. Having examined the matter on the touch stone of the law laid down by the apex Court, the order impugned has to go and appropriate

directions to follow but before doing so, I would like to remind the State that while dealing with the matter of the kind, it needs to be kept in mind

that a muslim has to be and is actually and factually desirous to discharge the sacred obligation of Haj because he is mandated by this creator to

perform it once in life time provided he is financially sound, of course, subject to other constraints spelt out in the holy scripture (QuraniKareem).

Those limitations being impertinent to the controversy need not detain me. However, it needs to be noticed that there is no dearth of experienced

persons provided they are given a chance which is only possible if fair mode of consideration is prescribed, be it through written test or interview

or both or through any other mode State feels workable and effective. Needless to say that it is not a direction mode and method should be

adopted for selection within the purview of the guidelines. It goes without saying that the State having pledged to uphold the rule of law, the least

that is expected from it is a just, fair and non arbitrary approach which in the

case on hand is wanting, rendering the order impugned liable to be set aside and I do so accordingly.

9. Regard being had to the fact that the first batch of pilgrims is scheduled to leave on 13.12.2004 as informed by learned AAG a speedy and effective mode which can advance the ends of justice has to be evolved but before dwelling upon it a brief resume of facts which delayed the disposal of these petitions does call for a mention. To identify the cause reference to proceedings of the Court commencing from the very beginning has become imperative. In this behalf, operative part of the order dated 20.09.2004 may be noticed:

In the meantime, operation of the Government Order bearing No.178 Rev (Haj & Auqaf) of 2004 dated 10.08.2004 is stayed till objections are

filed and considered. In view of the nature of controversy, it appears that the matter cannot brook the delay. Be listed on 04.10.2004. Registry to

issue the copy in verbatim." Considering nature of the controversy, inclination to decide the matter at an earliest was explicitly expressed in the

order itself and in this direction matter was directed to be listed on 04.10.2004 but instead of filing objections by the said date, the respondents

sought time as is evidenced by order dated 04.10.2004 which reads:

Objections have not been filed by the respondents/State. One week's time is sought and granted. Be listed thereafter. Interim direction to continue

till the matter is considered.

Week's time sought in terms of aforementioned order was over on 11.10.2004 but petition could not be listed because of failure of the

respondents to file the objections. Although, none appeared on their behalf yet Registry fixed 08.11.2004 for listing of the matter before the Court.

In between a motion was laid on 26.10.2004 by the respondents essentially for enlargement of time for filing the objection which came to be

allowed by the Court on 28.10.2004 and the petitions came up for consideration on 08.11.2004. Upon consideration the official respondents

were directed to reexamine the matter at their level which option was not acceptable to them, consequently, a direction came to be passed to

produce the entire record relating to the selection/appointment of KhudamulHujjaj and case was posted to 10.11.2004. Record was not

produced. Petition was adjourned to 22.11.2004 at the request of learned AAG

and on that date following order was passed:

Record has not been produced Mr. Hussain AAG seeks further time.

In view of urgency involved in the matter, let it come up day after.

Record as also criteria/policy, if any, shall be kept available."" In pursuance of abovementioned order matter came up on 24.11.2004. Parties were

heard and the following order was passed:

Heard learned counsel for the parties. Case for admission is made out. Admit. All the three petitions are clubbed. Notice afresh. Mr. Riaz Hussain

accepts notice. His contention is that due to the restraint placed by dint of interim direction dated 08.11.2004, the respondents, nominees/selectees

cannot be allowed to move therefore, seeks final disposal of the writ petitions at this very stage. Learned counsel for the petitioners are not averse

to the submission but the difficulty is that the respondents, nominees/selectees have not chosen to appear despite service, therefore, a need for a

post admission notice has arisen. Being in agreement with the counsel for the State that the matter cannot brook the delay, a speedy mode has to

be evolved to effect the service on the respondents, nominees/selectees with any delay and as per the submission of the learned for the parties,

there is no other way excepting the mode of publication. Learned counsel for the petitioners are prepared to bear the publication charges. In the

forementioned backdrop, the respondents, nominees/selectees shall be put on notice through publication at the expense of the petitioners to be

deposited during the course of the day. The Registrar Judicial shall take requisite steps to get the notice published in a daily newspaper within two

days requiring the respondents, nominees/selectees to enter appearance and file the counter, if any, by next date i.e. 02.12.2004. The learned

AAG is at liberty to file reply in other petitions also if he so chooses, however, nothing prevents him to adopt the reply already filed in one of the

petitions.

Order dated 08.11.2004 requires the learned counsel for the respondent State to produce the entire record relating to the selection of

KhudamulHujjaj for the year 200405 along with the particulars of the respondents, nominees/selectees. The reasons which prompted the Court to

pass the direction are spelt out in the order aforementioned itself and need not be detailed. Record produced does not contain the modus operand

evolved by the respondents in inviting the applications and the notices if any have also not been produced, applications too have been withheld. I

have heard learned counsel for the parties in part in the main matter as also in the interim but arguments could not be concluded for two folds

reasons one being failure on the part of the respondents to produce the entire record the other necessity to await response of the respondents,

nominees/selectees. Compliance to the direction requiring the respondents to give the details of the expenditure likely to be incurred on a

KhadimulHujjaj is also awaited. Mr. Riaz Hussain submits that record is to be obtained from Jammu and the Government employees are on strike,

therefore, some reasonable time is required. Although he has no cogent reason to justify omission to produce the entire record, yet in the interests

of justice, time is extended by next date. List the matter on 02.12.2004.

On 02.12.2004 petitions were directed to be kept on board in the following terms:

Record has not been produced in terms of order dated 24.11.2004. Matter to remain on board for tomorrow. In the meantime, needful to be done.

On 03.12.2004 following order was passed:

Arguments have been heard. Mr. Hussain, Learned AAG, submits that apart from three files the only record which remains is the application

forms of the respondents/selectees which could not be produced because the same are lying with the Government of India, Ministry of External

Affairs, (Haj Cell). In support of the statement he has filed an affidavit of the Under Secretary. I have perused the record. It does not appear

complete, so much so, copy of communication under which the forms have been forwarded is also not on the file. Be that as it may, let Mr.

Hussain avail another opportunity to file. Be that as it may, let Mr. Hussain avail another opportunity to file the record before the Registrar Judicial

by tomorrow. If no other record relevant to the subject matter remains unfurnished, affidavit shall be filed to that effect. To avoid reiteration of the

notings in the judgment, the Under Secretary present in the Court is directed to furnish a Xerox set of the notings of the file bearing No. Rev (Haj)

09/04 and first page of File No. Rev (Haj) 9/04II to the Registrar Judicial who shall keep it in a sealed cover accessible to none unless directed by

the Court.

As is seen that the record, if any, withheld was to be produced and in the alternative the affidavit was to be filed before the Registrar Judicial but direction was not complied with, resultantly, matter had to be listed under the orders of the Court again on 06.12.2004. On the said date affidavit was filed which was taken on record. Learned counsel for the respondents were heard in the light of the circumstances disclosed by the record and judgment reserved.

The reproduction of aforementioned order goes to show that it is the State alone which is responsible for the delay caused in disposal of the lis.

The State virtually refused to cooperate all though. It refused to examine that matter at its level. It withheld the record. It did not file the affidavit

within the stipulated time giving birth to an extra ordinary situation traceable to the fact that just a few days are left for departure of the pilgrims.

Nonetheless, the Court cannot shirk its responsibility and has to play its role and keeping the time constraint in view technicalities have to be

overcome so the pilgrims of the State are not deprived of the assistance/guidance from KhudamulHujjaj. To achieve the objective and to advance

substantial justice, respondents are directed to examine the record and prepare the list of eligible persons who have already applied directly or

through proper channel for selection/appointment in the category of KhudamulHujjaj, and make the selection amongst them through draw of lots

by a transparent mode. At the risk of reiteration it needs a mention that non transparency promotes favouritism, nepotism, arbitrariness and what

not, therefore, absence of such vice shall have to be ensured by the State. No fresh applications shall be received for appointment as

KhudamulHujjaj for Haj 20042005. Arrangement of selection through draw of lots shall hold good for the current year only unless State of its own

opts for such mode in future as well.

CMP No. 1139/2004:

This CMP is filed seeking impleadment on the ground that employees of the judiciary having experience in terms of the guidelines as contended

have not been considered. In support of their claim they have annexed a communication of the administrative department of the High Court which

reads:

HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

To

The Under Secretary to Government, Law Department Civil Sectt., Srinagar.

Kindly refer your letter No. I.D (Estt) 2004/15 dated 14.07.2004 on the subject cited above, In this connection I am to enclose herewith

applications of officers/officials in original for the desired purpose.

S.No. Name of the officer/official Designation

1. Mahmud Anwar Alnasir Judl. Mag. 1st Class
2. Mst. Masarat Roohi Judl. Mag. 1st Class
3. Sonaullah Malik Assistant Registrar
4. Gh. Hassan Malik PA to D&S Judge. Bla
5. Ghulam Nabi Mir Section Officer, (do)
6. Haji Mohd. Ramzan Head Assistant.
7. Iftikhar Ahmad Head Assistant.
8. Muhammad Arif Dar Head Assistant.
9. Bashir Ahmad Pujoo Sr. Assistant.
10. Ishtiyah Ahmad Mohjoo Junior Assistant.
11. Mohd. Akber Lone Process Server.
12. Mohd. Ibrahim Bhat Process Server.

Yours faithfully Sdl

(M.S. Arshad)

Now, what is required to be seen is whether applications were forwarded in time. If answer is in the negative, consideration may not be available,

therefore, last date for submission of applications needs to be identified from the official record of the respondents and the relevant to the area is

the following communication.

Government of Jammu and Kashmir Civil Sectt, Revenue Department

No.: Rev/Haj/09/2004

Dated 29.06.2004

Subject: Nomination of KhadimulHujjaj for Haj 2005. The Ministry of External Affairs, Government of India invites the applications from

Government Employees of the J&K (Muslims) regarding the subject noted above.

The undersigned is therefore, directed to forward the application forms to the Financial Commissioner/Principal Secretary/Commissioner/Secretary to Government, All Concerned, to circulate the said forms among the employees working under their control forward after completing the same to this department through proper channel so that the panel of names would be prepared for its submissions to the Government of India by the State Government for further necessary action.

Sd/

Deputy Secretary to Govt.

Revenue Department.

It transpires from perusal of the aforementioned communication that last date for submission/receipt of applications was not specified giving a chance to the concerned functionaries to send the lists of aspirants at leisure, therefore, in absence of cut of date the applicants can no way be said to have faltered and consideration cannot be denied to them because of omissions and commissions of the State, of course, if they are eligible in terms of guidelines. To avoid likelihood of an attempt of attracting this judgment to the scope of the guidelines, I would like to make it clear that the writ petitions do not call upon the Court to address to that aspect, therefore, any observation made in this writ petition should not be taken as a finding in respect of ambit and amplitude of the guidelines.

CMP Nos: 1146/2004,1150/2004:

Through these CMPs impleadment as petitioners is sought. Having quashed the order, these CMPs have become infructuous and are dismissed.

10. In the aforementioned backdrop writ petitions are allowed. Order impugned bearing No. 178 Rev (Haj & Auqaf) of 2004 dated 10.08.2004

is quashed with further direction to the official respondents to draw the lots forthwith in light of the observations aforementioned and issue appropriate orders.

11. Disposed of along with all connected CMPs. No order as to costs.