

(1999) 10 J&K CK 0024

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 887A Of 1997

Ab.Hamid Bhat

APPELLANT

Vs

State of J&K and Others

RESPONDENT

Date of Decision : 14-10-1999

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 5
Constitution of India, 1950 — Article 226
Jammu and Kashmir General Clauses Act, 1977 — Section 21
Jammu and Kashmir Industries Gazetted Service Rules — Rule 9

Citation : (1999) SriLJ 511 : (1999) 2 SriLJ 511

Hon'ble Judges : G.L.Raina, J

Bench : Single Bench

Advocate : Z.A.Qureshi, H.I.Hussain , A.Haqani, Advocates appearing for the Parties

Judgement

1. While working as the Deputy General Manager in the J and K Handicrafts (S and E) Corporation, Shri Shahid Hussain, Respondent NO.2,(

herein after referred to as ""the Respondent""), was in terms of Government order No.171 Ind. (DOH) of 1987 dated 23/7/1987 deputed to the

Industries and Commerce Department of the Government of J and K, I hereinafter referred to as ""the Department"" and posted as the General

Manager in the District Industries Centre. He came to be absorbed in relaxation of the prescribed qualifications as such General Manager in the

Department. This was effected vide Government order No. 265Ind. of 1993 dated 6/10/1993.

2. His permanent absorption in the category of General Managers is assailed in this petition, wherein the petitioners are the persons who have been

substantively appointed as Managers in the Department. It is claimed that the

petitioners were as such Managers eligible to be promoted to the post of General Manager but the Respondent's absorption on the post of the General Manager has effected their chances of promotion. It is complained that the representations made by the petitioners against the impugned absorption yielded no results

3. The respondent's absorption in the Department is challenged on the ground that it is violative of the memorandum issued by the Government

under No. GAD (SER)Gen35/ 1991 dated 23121991 in that the absorption of employees of the Corporations deputed to the Government

Departments came to be deprecated on the ground that such absorptions set in unhealthy trends which create not only the administrative problems

but also disturb the cadre management. It is further pleaded that the rules governing the service conditions of Gazetted Officers in the Department

do not provide for filling up of a post of the General Manager through the mode of absorption of deputationist. The impugned absorption is said to

violate the J and K Industries and Commerce Department (Gazetted) Service Recruitment Rules, 1980. (hereinafter referred to as the Rules) in

that the Respondent lacked the basic educational qualifications required for a person to hold the post of a General Manager in the Department.

The petitioners claim that they are duly qualified and possessed of the educational qualifications but have been deprived by the impugned

absorption, of the post to which any one of them could have been promoted.

4. It is on the aforesaid averments that the repatriation of the Respondent to his parent organization is sought, with the writ of certiorari quashing his order of absorption in the Department.

5. Replies have been filed for respondents Nos. 2 and 3.

6. In the reply the Respondent has set out, in the opening paragraphs, the commendatory remarks and appreciations which he claims to have

earned after his deputation to the Department. It is pleaded that his absorption as General Manager in the Department having taken effect on

6101993, the present writ filed in the year 1995 suffers thus from the malice of laches more so when not even a small finger had at any stage been

raised about his deputation from the Handicrafts Corporation to the Department. In the intervening period he has, it is averred, ceased to be the

member of the Service as he has been inducted into the Kashmir Administrative

Service. Setting the clock back after these developments, will deprive him of whatever he has earned by dint of his merit. It is on this plank that dismissal of the writ petition is sought.

7. The other contesting respondent has in its reply taken moreorless the identical plea to resist the petition. It is stoutly denied by the respondent

that any representation, against the Respondent's absorption, had at any stage been submitted by any of the petitioners. Having indicated the

modes of appointment to the post of the General Manager in the Department, the respondentState has projected its power under the J and K Civil

Services (Classification, Control and Appeal) Rules, (hereinafter the CCA) to make recruitment through transfer whereby the Respondent is said

to have been appointed as General Manager, on his transfer from the Handicrafts Corporation, a State instrumentality. It is pleaded that the

Respondent's absorption in the cadre of General Managers has been ordered in relaxation of the required minimum educational qualification

prescribed for that post.

8. The reliefs sought through the petition are broadly speaking based on the following grounds.

a) permanent absorption of the Corporation employee in the Department has violated the Government memorandum issued thereabout;

b) the impugned order is violative of the Rules, 1980

c) respondent No.2 lacked the basic requirement of educational qualification for holding the post of General Manager and the Government could

not have exercised the prerogative jurisdiction to relax this bar.

9. The matter of the fact is that the Respondent, Shri Shahid Hussain, was initially the member of the Service of the J and K Handicrafts (SandE)

Corporation. The Government vide its order No. 171IND. (DOH) of 1987 posted him, on deputation, as the General Manager at the District

Industries Centre, Srinagar. This posting took effect on 2361987. This deputation has not been, even to date, objected to by any of the members

of the Service not with standing that this deputation swallowed one post of General Manager in the Department that could have been, but for the

deputation, thrown open for appointment through either the mode of promotion or through direct recruitment. It is nearly after eight years of this

deputation that the petitioners have now awoken to the situation that the

deputation has obstructed their chance of promotion. This is one aspect of the matter.

10. The impugned order was issued by the Government on 6101993. This has had the effect of permanently absorbing the respondent on the post of General Manager in the Service. The petitioners who aspire to go up to the post through the ladder of promotion filed this petition in July 1995.

The Respondent has by now been inducted from the Service into the Kashmir Administrative Service. This development cannot be lost sight of.

The matter of the fact again is that two of the petitioners are also said to have been inducted into the Administrative Service. The question thus thrown up, by the changed circumstances, is whether the petition can be successfully resisted on the ground of application of doctrine of laches, a doctrine which of course is not a rule of law but is a rule of procedure. This needs to be considered.

11. Having had the knowledge in the year 1993 itself, when the impugned order was issued, that one of the posts in the Category of General

Managers of the Service was occupied by the Respondent, the petitioners did not move, but lapsed into inaction, only to get activated nearly more

than two years thereafter to complain that the impugned absorption had blocked their chance of promotion to the category of General Managers.

No explanation has been tendered, muchless supported by any material, to show that the petitioners had objected, within the reasonable time, to

the passing of the impugned order, whereby one of the posts of General Manager got filled up by the absorption of the Respondent.

12. To the bald averment that the Respondent's absorption had been objected to by filing of the representation, there is the stout and unambiguous

denial. No objection appears to have been raised at any stage, right from the year 1987, when the deputation was ordered, till the filing of the

petition in the year 1995. Had the Respondent's deputation and his subsequent absorption been challenged in the right earnest, then the absorption

would not have lead to his induction into the Kashmir Administrative Service. Now that the respondent has since become the employee of the

Industries and Commerce Department and has thus been inducted into the Kashmir Administrative Service, the benefits that have thus accrued to

him by efflux of time cannot be snatched away by the quashment of the

challenged order. The obstacle of delayed action, the delay which has occasioned due to inaction on the part of the petitioners resulting in change of circumstances, cannot be overcome to reverse now the situation that has since emerged. (Reliance (1994) 4 SCC 450, para 8).

13. The impugned order was issued in the year 1993. The petitioners had the cause of action against the order from the very date the order came into existence. This order could have been set aside even through the suit which could be instituted within the period of one year from the date of its issuance. Under Article 14 Schedule I of the J and K Limitation Act, the petitioners had one year's time from the date of the impugned order to sue for getting it set aside. The relief to the cause was barred by limitation Act. Even the suit was thus hopelessly barred by limitation in the year 1995 when the writ petition was filed. State claims, related to Service matters, cannot be entertained, more so when subsequent developments have taken place and the circumstances have changed. The writ petition is thus liable to fail on the ground of laches (Reliance AIR 1973 SC 1160).

14. Rule 23 of CCA Rules lays down that recruitment to any service has to be either by direct recruitment or by transfer or by promotion. Rule 52

of the Civil Service Regulations (CSR) provides that the deputation will cover appointment made by transfer. The deputation may be from one

Government Department to another or from the Government Department to any Corporation, Company, Autonomous Body, Public Sector

Undertaking etc. Wholly owned and controlled by the Central Government or by the State Government. It further provides that permanent transfer

from one cadre/department to another will not be treated as deputation and the Government servant who seeks the appointment in a Public Sector

Undertaking, Corporation, Company etc of his own or while on deputation is absorbed permanently in such Undertaking, Corporation or

Company, will not be treated on deputation. Rule 52(C) of the CSR preserves the competence of the State Government or the Central

Government to decide upon the terms and conditions of deputation. Rule 52(E) provides that the deputation of officers to the State Government

from the Central Government or other Governments or from the Corporation or the Local Bodies other than those owned and controlled by the

State Government shall be sanctioned by the prescribed competent authority. It

further provides that in respect of deputation to or from the Corporation, Companies and Autonomous Bodies etc. which are not owned and controlled by the State Government, the terms and conditions of the deputationist shall be settled mutually between the borrowing and the lending authorities.

15. Deputation of a Government employee to a Local Body or Public Sector Undertaking, Corporation, Company etc which are wholly owned

and controlled by the State Government or by the Central Government, is permissible with the sanction of the Government/ the Administrative

Department of the employee as prescribed under the rules. If the Government employee can thus be deputed to any Corporation, Company,

Autonomous Body or Public Sector Undertaking, owned and controlled by the State Government or the Central Government, then there can't be

any hitch in bringing on deputation the employee of a Corporation, a Company, an autonomous Body or a Public Sector Undertaking to the State

Government Service or to the Central Government Service. It does not appeal to reason that the employee of a Corporation, company or a Public

Sector Undertaking, owned and controlled by the State Government, cannot be deputed to a post in any of the Services of the State Government.

If it were otherwise then there was no occasion for the Government to have issued memorandum No. GAD(SER)Gen35 of 1991 dated

23121991, to which reference has been made in the writ petition. Put in other words notwithstanding the Government memorandum deprecating

the trend of permanent absorption of Corporation employees on deputation in the Government Departments, the practice appears to have been to

borrow the employees from the Corporation, owned by the State Government, and then absorb them in the Services. There is no statutory bar to

such a practice nor has any rule been referred to successfully canvass that a deputationist from a Corporation cannot be or could not be

permanently absorbed in any of the Government Departments.

16. The Respondent who was initially the employee of the Handicrafts Corporation, was brought on deputation to the Department in the year

1987. There was no illegality or irregularity in this deputation nor has it been till date challenged. This is one aspect of the matter.

17 Rule 52B subRule (b) of the CSR provides that the Government servant who

seeks appointment in a Public Sector Undertaking, Corporation or a Company etc. or while on deputation gets absorbed permanently in that organisation or institution will not be treated on deputation. It is on this analogy rightly contended that on his deputation to the Service in reference, which was not dehothers the Rules, the respondent's permanent absorption in the Service is not violative of any statutory provision. The Respondent's deputation from the Corporation, wholly owned and controlled by the Government, to the Service was sanctioned by the Government. This deputation, in no way bad in law, was not objected to or challenged by any of the employees in the Service. They cannot now be heard to say that the deputation is it's permanent absorption in the Service is dehothers the Rules. It cannot be said that the appointment to the post of the General Manager, through the mode of deputation, was not covered by the CSR. Had the petitioners challenged the respondent's deputation from the Corporation to the Service, then perhaps it could be considered"" whether the act of deputation was dehothers the rules. This again is an abstract proposition. No occasion has arisen till date to declare the act of the State Government in deputing the respondent from the Corporation to the Service on any count invalid. It cannot also be said that the deputation of the Respondent was arbitrary or beyond the rules or power.

18. The writ petitioners have assailed the impugned absorption on yet another ground. Their case is that but for the impugned absorption they or any one of them, being eligible to be promoted, would have got the post of General Manager that gotoccupied by the Respondent. It is in this context to be seen whether the petitioners were possessed of the requisite qualification for being considered for appointment either by promotion or by direct recruitment to the post of General Manager.

19. The Rules prescribe the quota for General Managers, as fifty percent for direct recruitment and fifty percent posts for promotees. Petitioners being the inservice employees could at best come up to the post of General Manager through the promotional quota provided they were eligible on the eligibility criteria provided for such promotion. The Respondent's absorption has at best eaten up one post that could be filled by direct recruitment. It is not a sustainable argument that by the impugned absorption the petitioner's promotional chances have been affected. The

petitioners have thus no locus to challenge the Respondent's absorption which has under the rules, to be treated as his direct appointment to the

post None of the promotional rights of the petitioners have been impinged upon by the impugned order of absorption.

20. Direct recruitment to the post of General Manager could not be challenged by the petitioners who are inservice employees. The Respondent

has to be treated, for all practical purposes and intents, to be a direct recruit to the post in reference. It cannot be visualised thus as to what are

those rights of the petitioners that have been infringed by the respondent's absorption, from the direct recruitment quota, on the post of General

Manager nor can it be sustained that by the impugned act of the Government the chances/avenues of promotion to the post from amongst the

petitioners has in any manner been affected. The impugned order has at best eaten up the post that could be filled up by direct recruitment, without

of course effecting in any way the rights of promotion of the inservice eligible candidates. The petitioners have thus no locus to challenge the

impugned order.

21. There is yet another aspect of the matter. Rule 6 of the Service Rules in reference permits a person, already in Government Service, to apply,

through proper channel, for direct recruitment to a vacant post in the Service provided he possesses the educational and other qualifications

prescribed for such post and is also within the prescribed age limit. Even if this Rule is interpreted in favour of the petitioners to the extent that they

could have applied for the post of General Manager through the quota of direct recruitment, had it be thrown open, yet it was in that context, for

them to show that they did possess the requisite educational and other qualifications prescribed by the Schedule attached to the Service

Recruitment Rules, which provides that the educational qualification for direct recruitment to the post of General Manager is the postgraduate

Degree in Economic, Commerce Business, Industrial, Chemical, Textile or Metallurgical Engineering. An inservice person could and can apply for

direct recruitment to the post of General Manager in the Service only if he has the requisite educational qualifications as provided under column 5

of the Schedule in reference. The petitioners have not pleaded, muchless supported by any material, that they or any one of them was a

PostGraduate Degree holder in Economic, Commerce or Business Management or had the degree in Mechanical Industrial, Electrical, Chemical,

Textile or Metallurgical Engineering. In the absence of these required educational qualifications, the petitioners could not, even if they had applied

under Rule 6 for direct recruitment to the post, have been considered for such appointment.

22. There is no express provision in the Rules for relaxation of the prescribed educational and other qualifications for appointment to the posts in

the Service. Rule 9 of the Service Rules in reference provides that in regard to the matters not specifically covered by these Rules the members of

the Service shall be governed by the rules, the regulations and the orders applicable to the Civil Service in general. Now that the Service Rules of

the Department do not provide for relaxation of educational and other qualifications for recruitment, reliance has to be placed, on the basis of Rule

9 of the Rules, on the Civil Services Rules which are applicable to Civil Services in general.

23. Rule 5 of the CCA Rules empowers the Government to relax the rigidity of the Rules in individual cases if it is satisfied to hold that the strict

application of the Rules would cause hardship to the individual concerned. Under Rule 5 of the CCA Rules the power vests with the Government

to relax, in individual cases, the strict application of the rules governing appointment/recruitment to any post in any service of the State Government.

Reference in this context to Rule 2(i) of the CCA Rules becomes relevant. It provides that a candidate, recruited otherwise than by promotion or

by transfer, will be treated to be recruited directly. Respondent No. 2 was not recruited by promotion to the post of General Manager. He has

therefore to be treated as the direct recruit. It is in this situation that Rule 5 gets attracted which preserved the power of the Government to relax, in

this case, the strict application of the required educational qualification as laid down under the Schedule of the Service Recruitment Rules. The

Rules applicable to the Service in reference are silent as to the power of relaxation of the required qualification or other qualifications for

appointment to any post in the Service. Rule 5 of the CCA Rules read with Rule 9 of the Service Rules in reference saved the power of the

Government to relax in favour of the Respondent the strict application of the required qualifications for appointment on the post of General

Manager.

24. Attention to Section 21 of the General Clauses Act gets attracted. This Section provides that where, by any Act or Regulation, a power to

issue notifications, orders, rules or byelaws is conferred then that power includes the power, exerciseable in the like manner and subject to like

sanction and conditions, if any, to add to, amend, vary or rescind any notifications, orders, rules or byelaws so issued. This inherent power to add,

to amend, to vary or rescind the order, rules or byelaws has been ex facie exercised by the State Government in favour of the respondent herein.

This power has its source in Section 21 of the General Clauses Act. This appears to be so far the reasons that follow.

25. The impugned order is: "Sanction is accorded to the absorption of Shri Shahid Hussain as General Manager in the Industries and Commerce

Department in relaxation of qualification bar from the date of issue of this order.

26. The Service Recruitment Rules applicable to the Gazetted Officers of the Industries and Commerce Department have been issued by the

Governor in exercise of the powers conferred by the Provision to Section 124 of the Constitution of J and K. The Governor acts, under the

Constitution, on the advice of the Council of Ministers. The State Government has thus the inherent rule making power which is projected and

promulgated through the Governor. The power to relax the educational qualification requirement thus vest with the Government. The power has

been exercised ex facie in the manner and subject to the like conditions which operated for making Service Recruitment Rules. The relaxation of the

educational qualification requirement in the case of respondent, Shri Shahid Hussain, cannot be thus said to be deothers the Rules.

27. It is contended that the required educational qualification for absorption of the Respondent on the post of General Manager in the Service

could not be relaxed by the Government. It is in this context that reliance is sought to be placed on the case AIR 1999 SC 840 to convass that the

educational qualification bar in the case of respondent could not be relaxed on the analogy of said reported case where in the Apex Court held that

the upper age bar could not be relaxed by the State Government under the J and K Civil Service (Judicial Recruitment) Rules 1967.

28. It is in the context of the case at hand to be noticed that the power in

respect of residuary matters are not preserved by the Judicial

Recruitment Rules, whereas Rule 9 of the Industries and Commerce Gazetted Service (Recruitment) Rules preserves the application of general

Rules of Service in the matters that are not covered by the later said Service Recruitment Rules. No analogous power or rule is saved by the Civil

Service (Judicial Recruitment) Rules 1967. The ratio of the case AIR 1999 SC 840 is therefore, not applicable in the facts and circumstances of

this case.

29. To sum up, the permanent absorption of the Respondent through the impugned order in the J and K Industries and Commerce Department

(Gazetted) Service cannot be said to be violative of the said Service Rules. The relaxation of the educational qualification requirement in favour of

the Respondent is not again dehothers the rules. The absorption of the Respondent in contravention of the so-called Government memorandum No.

GAD(SER)Gen35/1991 dated 23/12/1991 is not of any significance in that the memorandum in reference has ex facie no rule basis. Memorandum

cannot in themselves subtract or add any power or requirement to the statutory rules. Even if the Government has treated with disfavour the trend

of absorption of deputees from the Corporation/Companies, yet the memorandum cannot debar absorption of a deputationist in Government

services. The impugned order has not offended any of the Rules of the J and K Industries and Commerce (Gazetted) Recruitment Rules. The

government had under its inherent rulemaking power the competence to relax the required educational qualification in respect of the Respondent.

The impugned order is thus not dehothers any of the rules applicable. The claim projected in the petition is stale and 'belated. The situation and the

circumstances have changed from the date the Respondent was deputed from the Corporation to the Department and after the date the impugned

order was issued. Not only has the Respondent but even two of the petitioners have since got inducted into the Kashmir Administrative Service.

This is so pleaded in para 2 of the objections. The petitioners cannot, in these circumstances be allowed to get the position altered or changed to

the total disadvantage of the Respondent. The doctrine of laches applies with full force to disentitle the petitioners to any relief.

30. None of the statutory or constitutional rights of the petitioners have been

infringed by the impugned order. No writ of mandamus can be issued to alter the position nor can any writ of certiorari be issued to quash the impugned order, which does not suffer from any statutory infirmity or flaw.

The writ petition is, therefore, liable to be dismissed.

31. For the reasons said above, this petition is dismissed at this very stage but without any order as to costs.