

(2013) 12 J&K CK 0013

In the Jammu And Kashmir High Court

Case No : S.W.P. No. 732/2010 and C.M.P. No. 1148/2010

Abid Hussain Peerzada

APPELLANT

Vs

State of J. and K.

RESPONDENT

Date of Decision : 30-12-2013

Acts Referred:

Citation : (2014) 1 JKJ 305

Hon'ble Judges : Ali Mohd. Magrey, J

Bench : Single Bench

Judgement

Ali Mohd. Magrey, J.—The sole prayer made in this petition filed by the petitioners - Class IV Orderlies and Chowkidars of Ministerial

Cadre of Forest Department - is to command the respondents to promote them to the post of Forest Guard within their ratio of 20% with effect

from the date the Class IV employees from Executive Cadre have been promoted with all consequential benefits. It is averred in the petition that

the petitioners are on the ministerial cadre of the establishment of the Jammu and Kashmir Forest Department, working on Class IV posts as

Orderlies, Chowkidars etc. They are stated to have completed five years of service on their respective posts. It is stated that though the number of

employees in the Ministerial Cadre is lesser than those in the Executive Cadre, but they have more chances of promotion available to them.

However, they have been discriminated against for mala fide reasons and ulterior motives, whereby their rights under Articles 14 and 16 of the

Constitution have been violated. Citing the rules governing the promotion to the post of Forest Guard, it is stated that vide Forest Order Nos. 502

dated 31.12.2009 and 42/2010 dated 23.1.2010, 124 Class IV employees in the

Executive Cadre have been promoted to the post of Forest Guard; while as, in terms of Forest Order Nos. 501 of 2009 and 41 of 2010 dated 23.1.2010 only 9 promotions have been made from amongst the members of Ministerial Cadre. It is stated that the petitioners made representations for redressal of their grievances, but the same were not considered. The petitioners have, accordingly, filed the writ petition on the legal grounds taken in the petition for the relief first above mentioned hereinabove.

2. The respondents have filed their reply. In paragraph 3 of the preliminary objections it is stated that petitioners are junior to the officials who got promoted against the utilized 58 vacancies; therefore, they have no locus standi to claim that discrimination has been meted out to them. It is further stated that the petitioners are even junior to the Helpers whose encadrement/re-designation is under consideration of the Government. One of the petitioners, namely, Muhammad Ashraf Mir, Chowkidar, is stated to be only a Primary Pass and, therefore, not possessing the prescribed qualification for promotion as Forest Guard. It is admitted that the number of employees in the Ministerial Cadre are lesser; however, promotion prospects of each category are well defined in the Rules. It is also submitted that the post of Forest Guard is a District Cadre post and normally the seniority of the employees is required to be maintained at district level, but the department functions through administrative units of Forest Divisions which do not correlate with district boundaries of a particular revenue district. As a result of this, maintaining of seniority at district level is not possible; therefore, the seniority of Class IV employees is being maintained at Circle level. It is stated that the final seniority list of Ministerial/Executive Cadres was issued vide No. CCF (K)/Admn/2009/3628-40 dated 14.11.2009 and that as per the aforesaid final seniority list there were only 09 Class IV employees belonging to Class XII of Schedule II, i.e., Orderlies/Farashes/Chowkidars possessing the prescribed qualification of middle or above. It is further stated that in the Divisional Level Departmental Promotion Committee held on 25.11.2009 as many as 67 Forest Guard vacancies got worked out for promotion of Class IV employees belong to Class XII of Schedule III, but, in view of availability of only 09 candidates, the DPC utilized the remaining 58 vacancies for promotion of

Class IV employees belonging to Class XII Category (A) of Schedule II, i.e., Mali, Cattle Pond Keeper, Boat Mazdoor, Mapper, Watcher and Gardner within the same Circle. As to the representation filed

by the petitioners, it is stated that the same was considered and disposed of.

3. The petitioners have also filed their rejoinder to the reply filed on behalf of the respondents. Therein, it is stated that during the pendency of the

writ petition, the respondents have circulated the final seniority list of the Ministerial Cadre wherein petitioners figure upto serial No. 52. It is also

stated that despite court orders passed from time to time in various applications, mentioned in the rejoinder, to consider the petitioners, the

respondents have not considered them for according of such promotions.

4. I have heard learned counsel for the parties, perused the material on record and considered the matter.

5. It is not in dispute that the petitioners are governed by the Jammu and Kashmir Forest (Subordinate) Service Recruitment Rules, 1991

(Recruitment Rules, for short). In fact, both, the petitioners as well as respondents have quoted a part of the Schedule II appended to the aforesaid

Rules in their respective pleadings, but the real point has been missed inasmuch as Rule 5 of the Recruitment Rules has been omitted by both. Rule

5 of the Recruitment Rules provides the qualifications and method of recruitment. It reads thus:

5. Qualifications and method of recruitment

(1) No person shall be eligible for appointment or promotion to any post in any class, category or grade in the service unless he possesses the

qualifications as laid down in the Schedule II & III and fulfils other requirements of recruitment as provided in the rules and orders for the time

being in force.

(2) Appointment to the service shall be made -

(a) by direct recruitment which will include appointment by transfer;

(b) by promotion; and

(c) partly by direct recruitment and partly by promotion;

(d) by deputation from other departments in the ratio and in the manner mentioned against each post in the Schedules II & III.

(3) In case suitable candidates are not available for promotion, the post shall be

filled up by direct recruitment and vice versa.

(4) Candidates recruited direct to the post of Junior Assistant...

As seen above, Sub-rule (1) of Rule 5 of the Recruitment Rules begins with the words "No person". It uses the negative language. When a

provision of law begins with a negative language in the manner as it is contained in the aforesaid provision of the Rules, it amounts to a complete

embargo and prohibition on what the Rule relates to. In the instant case, the Rule relates to method of recruitment - both direct as well as

promotions. It, therefore, puts a complete embargo and prohibition on promotion of any member of service not possessing the prescribed

qualifications. In other words, non-possession of the prescribed qualification renders the employee concerned ineligible and creates a prohibition

for promotion.

6. Rule 5 of the Recruitment Rules itself does not lay down the qualifications. The qualifications are laid down in Schedules II & III appended to

the Rules. The post of Forest Guard is shown to be Class X post in Schedule II. In column fourth of the Schedule II, the minimum qualifications for

direct recruitment to the post are shown to be (i) Matric; and (ii) Physical Fitness as prescribed in Class VI. Column fifth of Schedule II prescribes

the method of recruitment. Against the post of Forest Guard, it provides as under:

50% by direct recruitment and 50% by promotion in the following manner/ratio:

(i) 20% from Class XII Category (A) of Schedule II with five years of service in that category;

(ii) 20% from Class XII of Schedule III with five years minimum service in that category;

(iii) 10% from Graduates from Class XII Category (A) of Schedule III and Class XII of Schedule III with five years' service in that category.

As seen above, the qualifications prescribed for the post of Forest Guard in column fourth of Schedule II only relate to direct recruitment. As per

method of recruitment prescribed in the fifth column, 50% posts have to be filled in by promotion of the members of service from amongst the

Class XII Category (A) of Schedule II and Class XII of Schedule III in the ratio of 20% each

7. Class XII Category (A) of Schedule II comprise of Mali, Cattle Pond Keeper,

Boat Mazdoor, Chainman, Water Carrier, Road Mazdoor,

Mapper, Watcher and Gardener. The method of recruitment to the post is shown to be only by direct recruitment and the qualification prescribed

is Middle Pass.

8. Similarly, Class XII of Schedule III comprise of Orderlies, Farashes and Chowkidars. The method of recruitment to the post is again shown to

be only by direct recruitment and the qualification prescribed is Middle Pass.

9. As a necessary corollary, a person belonging either to Class XII Category (A) of Schedule II or Class XII of Schedule III for being eligible to

be promoted as Forest Guard necessarily is required to have the minimum qualification of Middle Pass. It is not the case of the petitioners, barring

one, that they possess the qualifications as are prescribed by the Rules for promotion to the post of Forest Guard. As already mentioned above,

Rule 5 of the Recruitment Rules prescribes promotion of such persons as do not possess the prescribed qualifications and, in fact, creates a

disqualification and ineligibility for promotion of such members of the service. Therefore, being ineligible, the petitioners, except petitioner No. 17,

cannot claim promotion on the post of Forest Guard unless they acquire the requisite qualification. Consequently, it cannot be said that they have

been discriminated against or that any of their rights, muchless the rights of equality guaranteed under Articles 14 and 16 of the Constitution of

India, have been violated by the respondents.

10. Though the above discussion on the rule position should clinch the controversy raised in the petition, but given the fact that the respondents

have stated that the petitioners are junior to those of the employees who have been promoted, it becomes necessary to mention here that the

question of seniority would not come in the way of the petitioners to be considered and promoted to the post of Forest Guard, if they had been

otherwise eligible. Since the two Class/Category of employees have fixed ratio for promotion to the post of Forest Guard, their entitlement to

consideration for promotion to the post of Forest Guard is not dependent upon their inter-class seniority and such seniority has no role to play in

determination of their eligibility or entitlement to promotion to the post. Class XII Category (A) of Schedule II employees (i.e., Malies, Cattle Pond

Keepers, Boat Mazdoors, Chainmen, Water Carriers, Road Mazdoors, Mappers,

Watchers and Gardeners), in terms of the rule position, constitute a separate Class and Category for purposes of promotion to the post of Forest Guard to the extent of 20% of available posts; and Class XII of Schedule III (i.e., Orderlies, Farashes and Chowkidars) constitute a separate Class and Category of employees for purposes of promotion to the post of Forest Guard to the extent of 20% of available posts. This is further borne out from Schedule I appended to the Recruitment Rules whereunder Malies, Cattle Pond Keepers, Boat Mazdoors, Chainmen, Water Carriers, Road Mazdoors, Mappers, Watchers and Gardeners are shown to be borne on Class XII Category (A) of on the Executive side of the Cadre of the Service; whereas Orderlies, Farashes and Chowkidars are shown to be borne on Class XII on Ministerial side of the Cadre of the service. It may, however, be mentioned that the Recruitment Rules do not recognize the two groups of employees, namely Ministerial and Executive, as forming two different Cadres, since in terms of Rule 2(b) read with Rule 4 of the Rules the Service as a whole constitutes one Cadre. Nonetheless, the two groups constitute two different Classes and Categories and fall on the two different nature of nomenclatures of the Service. Therefore, they have two separate ladders of promotion. Consequently, the plea of inter-class seniority is inconsequential.

11. That fact that the seniority of the two sets of employees is to be determined separately in their respective Classes/Categories is further fortified by Rule 24 of the Jammu and Kashmir Civil Service (Classification, Control and Appeal) Rules, 1956 (CCA Rules, for short) which are applicable to the service in terms of Rule 10 of the Recruitment Rules. It hardly needs a mention here that in terms of Rule 24 of the CCA Rules, seniority has reference to the service, class, category or grade with respect to which the question has arisen. Here the question of seniority would not arise with respect to service, but would arise with respect to Class and Category in two different wings of the service. Since the petitioners belong to a Class/Category of their own, they would have nothing to do with the seniority of the employees working in the other Class/Category, moreso when the two belong to two different wings of the Service, namely, Ministerial and Executive Wings.

12. However, the petitioners, except petitioner No. 17, did not possess the

requisite qualification and were thus disqualified and ineligible for such promotion, they are not entitled to the relief prayed for by them in this writ petition. The question whether or not the respondents could have filled in the remaining posts of Forest Guard to the extent of the quota of 20% fixed by the Rules for Class XII of Schedule III on the Ministerial side by the employees borne on the Class XII Category (A) of Schedule II on the Executive does not arise here, inasmuch as the petitioners have not challenged the same. They have neither sought writ of certiorari nor impleaded any of such selectees or appointees as respondents in the petition.

13. During the course of these proceedings, the petitioners have filed an application, CMP No. 1582/2011 enclosing therewith photocopies of two certificates issued by the Jammu and Kashmir State Board of School Education. The first certificate bearing serial No. 590580 and Roll No. P

530408 November-December 1995 certifies that Mohd Ashraf Mir son of Habibullah Mir in the faculty of Arts passed the Part Two examination

of the board with 3rd Division. This Mohd Ashraf Mir is said to be the petitioner No. 17 in the present petition. The application, apart from bringing

the aforesaid fact on record, also sought action for perjury against the concerned respondent for filing wrong affidavit. However, such a vital fact

ought to have been pleaded either in the writ petition or the rejoinder affidavit, which has not been done. Nonetheless, there seems to be some

confusion inasmuch as the respondents have in paragraph 3 of the preliminary objections stated that "one of the petitioners, namely, Mohammad

Ashraf Mir, Chowkidar, does not possess the prescribed qualification for promotion as Forest Guard as he as per his appointment order issued

vide Forest Order No. 45 of 1996 dated 11.04.1996 is only Primary Pass". The petitioners, on the other hand, in the aforesaid application, CMP

No. 1582/2011, have stated that petitioner No. 17 was appointed vide order No. 384/97 dated 06.08.1997. A copy of the said order has, in

fact, been placed as annexure to the aforesaid application. Obviously, therefore, the matter needs to be looked into by the respondents insofar as

petitioner No. 17 is concerned.

Resultantly, this petition together with the connected CMPs, is dismissed insofar as petitioners 1 to 16 are concerned. In so far as petitioner No.

17 is concerned, the respondents are commanded to look into the matter and if

it is found that petitioner No. 17 really possesses the 10+2 qualifications, he shall be considered and promoted as Forest Guard retrospectively from the date his equivalents were promoted and he shall be extended all his benefits, including arrears of pay, seniority, increments etc., the same way as he would have earned had he been promoted on the due date alongwith similarly placed persons. The needful shall be done within 15 days from the date of receipt of a copy of this judgment.

No order as to costs.