
(2013) 05 J&K CK 0013

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 888 of 2012

Anand Swaroop and Others

APPELLANT

Vs

State of J. and K. and Others

RESPONDENT

Date of Decision : 07-05-2013

Acts Referred:

Citation : (2013) LabIC 3891

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Advocate : Sunil Sethi, for the Appellant; Sudarshan Sharma and G.S. Thakur, G.A., for the Respondent

Judgement

Hasnain Massodi, J.—Petitioners and private respondents responded to the Advertisement notice issued by the Jammu & Kashmir Service

Selection Board (hereinafter the Board) in 1997-98 inviting applications from eligible candidates for available vacancies of Foresters/Forest

Inspector, Divisional cadre Jammu. They participated in the selection process and, on the strength of their merit, found place in the select list

published by the Board on May, 16th 1998. Petitioners applied under reserve categories, were selected under OBC category (petitioner No. 1)

and Resident of Backward Area category (petitioners 2 to 7). The private respondents (respondent 4 to 7) appeared in the select list in Open

Merit category at Sr. Nos. 21, 27, 30 and 32. The Board on completion of selection process, made recommendation for appointment of selected

candidates, to the indenting department. The Government forwarded the list to the concerned agency for verification of antecedents of the selected

candidates. As the candidates belonged to different districts of Jammu Division, verification reports were received on different dates. The

Government issued appointment order in favour of a selected candidate on receipt of his verification report. This led to issuance of appointment

orders in favour of some of the selected candidates on the date(s) earlier to the date(s) such orders were issued in favour of other candidates.

2. Be that as it may, all the selected candidates were appointed and in the tentative seniority list issued vide circular dated 10.2.2009, seniority of

the appointees was fixed as per their position in the merit list i.e. in order of merit reflected in the select list. This was followed by a final seniority

list issued vide FPF order No. 816 DFPF of 2009 dated 18-12-2009. In the final seniority list, seniority of the appointees was fixed as per the

date of appointment order and the date of their joining pursuant to such orders. The final seniority list obviously made a departure from the

Tentative Seniority List"" and was not based on the merit position of the appointees.

3. Shri Aijaz Rasool Wani and ten other appointees questioned the Final Seniority List in SWP No. 2006/2009. The writ petition was allowed on

22.12.2010; the final seniority list issued vide No. 816 of 2009 dated 18.12.2009 was quashed and the official respondents directed to maintain

the inter se seniority of petitioners and respondents in the petition, in accordance with the Rule 24(b) of J & K Civil Service (Classification, Control

and Appeal) Rules 1956. The writ court relying on the Division Bench judgment in L.K. Mengi v. State and others LPA No. 741/1999 held that

the inter se seniority of the direct recruits is to be based on merit position in the select list and not on the date of appointment order or the date an

appointee joins the post. The writ court in this regard referred to following observations of the Division Bench:

The above reproduced proviso makes it clear that in case of candidates directly recruited, their inter se seniority has reference to the select list and

not to the different dates on which they joined the post, specially when posts are offered to them on different dates. Once the Government operates

upon the select list, it has to be done in accordance with the positions the candidates enjoy in that list. An indefeasible right accrues to the

candidates ranking higher over those who rank below them.

4. The writ court while referring to Rule 24(b) Jammu and Kashmir Civil Service (Classification, Control and Appeal) Rules 1956 observed:

.....However, in the present case the issue is not as to whether seniority has to be fixed from the date of first appointment or from the date of

qualifying the competitive examination but is an issue where the date of first appointment is determined on the basis of merit obtained in the

competitive examination and not from the date of actual appointment. Therefore, the above judgment has no relevance in the present case.

In the case in hand, as indicated above, the petitioners as also the private respondents are the direct recruits and their selection has been held by a

common selection process. Their inter-se seniority, thus, has to be maintained in terms of the merit obtained by them in the selection process.

Merely because some of the petitioners were issued the appointment orders after the private respondents and this resulted in delay of their joining

against the post in question, would not change their seniority which has to be fixed in terms of the merit obtained by them in the selection process in

terms of provisions of Rule 24(b)...

5. The Writ Court judgment dated 22.12.2010 was questioned in LPA titled Siraj-ud-Din Shah v. Aijaz Rasool Wani. The Letters Patent Appeal

was dismissed on 23.3.2011 and the judgment of Ld. single Judge dated 22.12.2010 in SWP No. 2006/2009 with other three clubbed matters

upheld.

6. The Writ Court judgment lead to order No. 1 DFPF of 2012 dated 2.1.2012 wherein the seniority of the petitioners and private respondents,

was fixed in accordance with mandate of Rule 24(b) of J. & K. Civil Service (Classification, Control and Appeal) Rules 1956 as directed by the

Writ Court while rendering judgment dated 21.12.2011 in SWP Nos. 263/2010, 2358/2009, 2355/2009. This should have clinched the matter,

given respite to the petitioners and private respondents and allowed them to perform the duties for which they were being paid. The official

respondents, however, sparked the controversy, afresh by issuing order No. 297 DFPF of 2012 dated 22.3.2012 re-fixing seniority of private

respondents in reserved categories. This helped the private respondents to go up the ladder in the seniority list and brightened up their chances of

promotion ahead of the petitioners.

7. The official respondents were prompted to issue order No. 297 DFPF dated 22.3.2012, after the private respondent claimed that though they

had applied under ""Reserved Category"" at the time of selection process initiated in the year 1996-97, yet they were selected in ""Open Merit

category on the basis of their higher merit. They pleaded that they even if selected in ""Open Merit"" category because of their superior merit, were

in terms of Jammu & Kashmir Reservation Act, 2004 and the Rules made thereunder, read with circular No. DFPF/Reservation/95/2943-860

dated 23.10.2007, to be given the benefit available under Reservation Act and the Rules at the time of promotion to the next cadre.

8. The petitioners question order No. 297 - DFPF of 2012 dated 22.3.2012 in the writ petition on hand on the grounds set out in the writ petition.

The main ground taken up in the petition is that as the petitioners did not apply for the advertised posts in the ""Reserved category"", they cannot

claim the benefit of ""Reserve Category"" on the strength of the certificates issued and authenticated by the concerned authorities more than a decade

after the petitioners participated in the selection process and were appointed as Forest Protection Inspectors in ""Open Merit"" category. It is further

pleaded that as the impugned order changed seniority position of the petitioners, the official respondents were required to afford petitioners an

opportunity to show-cause against the proposed change in the ""Final Seniority List"" before issuance of Government order No. 297-DFPF of 2012

dated 22.3.2012.

9. The official respondents in their reply have not taken a clear stand as regards case set up in the writ petition. They have not controverted the

petitioners' case that the private respondents applied under ""Open Merit category"" and not under the ""Reserve Category"" as claimed by them in

their representation addressed to official respondents. The official respondents on the other hand in para 5 of their reply, impliedly accepted the

petitioners case by formulating following question for consideration of the court:

Can a person belonging to ""reserved category"" seeking consideration before the Selection Authority in the ""open merit category"" against any post

claim to be belonging to that reserved category after such appointment, in the seniority list for further promotion in the department under the

reserved category"" to which he belongs or ceases his right of belonging to such category for service benefits.

10. However, the communication No. SB/Sel/Secy/783/11 dated 10.2.2011

addressed by Secretary Service Selection Board, Jammu to the Director, J. & K. Forest Protection Force Jammu (Annexure-E to the petition), clinches the matter inasmuch as the Board has categorically stated that the respondents 4 to 8 applied under Open Merit category and were selected under said category.

11. The respondents insist that that "Final Seniority List" dated 2.1.2012 order No. 1 DFPF in para 3 left scope for change in the seniority position

on the basis of the representation made by Forest Protection Force Inspectors for change of Cadre.

12. The question that calls for answer in the present petition is whether a candidate applying for a post under the Government, under "Open Merit

Category" selected and appointed under said category can after joining the service claim benefit of Jammu & Kashmir Reservation Act 2004, and

ask for his placement in the seniority list against the slot meant for such reserved category. It is admitted by the official respondents in their reply to

the writ petition that the private respondents applied under "Open Merit Category" and were selected and appointed under said category. The

private respondents are said to have after the final seniority list was prepared and notified, made a representation that they belonged to OBC and

RBA categories and were to be shown as OBC/RBA category candidates in the service record and the seniority list. The representations were

supported by duly issued category certificates by the Competent authority in their favour and the representations were held to have merit and to be

genuine and accordingly allowed and vide order No. 297-DFPF of 2012 dated 22.3.2012 - impugned in the present petition, the private

respondents shown as OBC and RBA category candidates in the service record and the final seniority list.

13. Article 16 Constitution of India guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office

under the State. It prohibits discrimination in respect of any employment or office under the State on the grounds only of religion, race, caste, sex,

descent, place of birth, residence or any of them. However, the Article does not stand in the way of the State from making any provision for

Reservation" in appointments or posts in favour of any backward class of citizens - Schedule Caste and Schedule Tribe which, in the opinion of

the State, is not adequately represented in services under the State. It is pertinent to point out that State is under a constitutional obligation to secure justice in all its manifestations i.e. social, economical and political to all the citizens. The constitutional obligation enjoins upon the State to take steps for upliftment of such sections of the society that for historical and other reasons have not been able to get a fair share in national wealth including employment under the Government and continue to be disempowered and marginalized. The affirmative action plan formulated/devised by the State may on the first blush look discriminatory but on a closer look would survive challenge on the said ground as the plan is only an effort to provide a level play field to such downtrodden and unattended sections. The plan is not an option available with the State but an obligation on the State to fulfill the constitutional mandate embodied in preamble to the Constitution, fundamental rights and directive principles of State policy.

14. The Jammu & Kashmir Reservation Act 2004, is a legislative effort in above direction. The Act provides for reservations in appointment and admission in professional institutions for the members of Schedule Caste, Schedule Tribe and other socially and educationally backward classes and for matters connected therewith and incidental thereto.

15. Section 3 of the Act provides for reservation in appointment and section 6 for reservation in promotions. It reads as under:

Reservations in promotions Except as otherwise provided in the Act, available vacancies to the extent as may be notified by the Government from

time to time, shall be reserved in any service, class, category or grade carrying a pay scale the maximum of which does not exceed the pay scale of

the post of Deputy Secretary to Government, for promotion from amongst the persons belonging to the Scheduled Castes, Scheduled Tribes and

other socially and educationally backward classes:

Provided that total percentage of reservation shall not exceed 25% of the available vacancies:

Provided further that the Government shall exclude the services and posts, which on account of their nature and skill are such as call for highest

level of intelligence, skill and excellence, from the operation of the Act.

16. Section 11 enjoins upon the appointing authority to maintain a roster in the prescribed manner so as to give effect to the reservation, provided

under the Act. The Jammu & Kashmir Reservations Rules 2005, made in exercise of section 23 of Jammu J & K Reservation Act. 2004 prescribe

percentage of available vacancies for Schedule Caste, Schedule Tribe and other reserved categories. Rule 5 prescribes a 100 point roster to be

adhered to, while filling up the vacancies, by the appointing authority. Rule 9 prescribes percentage for promotion from amongst the persons

belonging to Schedule Caste, Schedule Tribe and other socially and educationally backward classes. Rule 10 prescribes roster to be maintained by

the appointing authority to give effect to the reservations provided under Rule-9. A bare look at section 6 would reveal that the right available to a

reserved category candidate for promotion under reserved category, is not contingent upon his having initially applied under said category and

selected under said category.

17. When promotional avenues open up in a service mentioned in section 6 of the Act, read with Rule 9 or final seniority list is prepared to be

acted upon for making promotions, the appointing authority may confront three situations as regards promotion to the reserved category candidate.

The employee seeking benefit u/s 6 of the Act, may have applied and got selected under a particular reserved category. In that case the authority is

to face no difficulty as the candidate on his selection under a particular reserved category, shall find place in the roster against the position

earmarked for such category. The candidate obviously shall get benefit available u/s 6 read with Rule 9 without much difficulty. In the second

situation, the candidate might have applied under reserved category but because of his superior merit, got selected under the Open Merit category.

Such candidate may be put to a disadvantageous situation because of his higher merit as his colleague in the reserved category may get selected

under the reserved category and find a higher position in the roster maintained by the appointing authority. To illustrate, a Reserved backward

Area candidate may get merit higher than the first reserved category candidate selected under said category. He obviously would be selected

under Open Merit category. While the Reserved Backward Area category candidate shall find place at serial No. 2 in the roster maintained by the

appointing authority, he may be pushed down to a lower position in the roster. Such candidate therefore is to be given choice to claim benefit of his

placement in the roster against the category to which he belongs. The candidate selected under reserved category in said event would have to leave

place for the reserved category candidate selected belonging to his category but selected under Open Merit Category. Third situation that may

arise is one we confront in the present case.

18. The reserved category candidate, if for one or other reason, may not apply under the reserved category. He may participate in the selection

process with other candidates in the Open Merit category and get selected. His right to approach the appointing authority after he is selected under

Open Merit category for his placement against the position earmarked in the roster for his category cannot be held to have got extinguished

because of his participation in the selection process under Open Merit category. His participation in the selection process under Open Merit

category, cannot be taken as acquiescence/waiver or surrender of his right to claim benefit available to him under the Reservation Act and Rules

made thereunder. Having regard to constitutional mandate and object of Reservation Act and Rules his failure to apply and participate in selection

process under reserved category, cannot strip him of his rights as reserved category candidate. The affirmative action scheme is a device to undo

the injustice heaped on a section of the society for no fault of the constituents of such section. The State apparatus in one or other way, is found to

have contributed to such injustice. The marginalized section is pushed to wall deprived of a share in public employment, and left un attended by the

social planners. The Reservation Act re-fleets expression of ""acknowledgement"" on the part of the majority that it has left out and not carried

along, the left out section of the society and that it surrenders the rights that can be available to it on the principle of equality, in favour of such

section to undo the injustice done to it and lift it to the level enjoyed by the majority. The candidate from a reserved category, therefore, has an

option to get the benefit both at the recruitment level as well as promotional level and in case he does not exercise such right at one of the stages,

such right cannot be denied to him at the next stage. For the reasons discussed, I do not find any merit in the writ petition. The petitioner does not

make out a ground to successfully assail the Govt. order No. 297 DFPF dated 22.3.2012 whereby the respondents 4 to 8, though selected under

Open Merit Category, have been placed in their respective reserved categories.
The writ petition is accordingly dismissed.