

(2001) 07 J&K CK 0022

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 883 of 1999

Anita Kaul, at present Assistant Director Litigation,
Directorate of Litigation, Law Department, Jammu

APPELLANT

Vs

State of Jammu and Kashmir and another

RESPONDENT

Date of Decision : 20-07-2001

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Section 123
Jammu and Kashmir Legal (Gazetted) Service Recruitment Rules, 1980 — Rule 5(2)
(a), 5(2)(b), 5(2)(c)

Citation : (2003) 2 SCT 818

Hon'ble Judges : Tejinder Singh Doabia, J

Bench : Single Bench

Advocate : M.K. Bhardwaj, S. Hakim, J.P. Singh, Advocates appearing for the Parties

Judgement

Tejinder Singh Doabia, J.—The petitioner at present is holding the post of Assistant Director, Litigation. This is part of the cadre strength of

the service governed by Jammu and Kashmir Legal (Gazetted) Service Recruitment Rules, 1980. For this reliance has been placed on a

communication of the State Government issued on 09/07/1998. It is the case of the petitioner that she came to be appointed as Assistant Legal

Remembrancer vide order dated 02/09/1994. She was to draw her salary against the post of Assistant Draftsman. This initial appointment was for

a period of six months. This was because the clearance of the Departmental Promotion Committee/Public Service Commission was being awaited.

The petitioner submits that she has continued to work as Assistant Director/ Assistant Legal Remembrancer w.e.f. the issuance of order annexure

'C'. The further fact which is pleaded by the petitioner is that an Assistant Legal

Remembrancer is eligible for promotion as Deputy Legal

Remembrancer/Deputy Director Litigation. The method of recruitment prescribed by the Rules has been indicated in paragraph 2(d) of the petition.

For facility of reference, the criteria indicated in this regard is being reproduced below :

By promotion

(i) 75% from category (a) (Assistant Legal Remembrancer/Assistant Director Litigation/Assistant Legal Draftsman) of class III from out of the

persons having not less than 3 years experience in that class in case of Law Graduates and 10 years for others out of which 3 years should be in

that class;

(ii) 25% from category (b) (Assistant Draftsman Translation) of class III with 3 years experience in that class.

2. It is the case of the petitioner that she has completed three years of service as Assistant Legal Remembrancer and therefore she is eligible for

being appointed as Deputy Director Litigation. The petitioner submits that the post of Deputy Director Litigation became available on account of

transfer of one Sh. M.A. Wani in the Law Department. The petitioner further submits that she became eligible for appointment as Deputy Director

Litigation. Instead of appointing and considering her case, respondent No. 2 has been appointed as Deputy Director Litigation even though he is

not eligible for such an appointment. It is submitted that respondent No. 2 is not a member of Legal (Gazetted) Service. He is working in the Urdu

Translation Coordination Cell. This Cell has nothing to do with Legal Service and therefore respondent No. 2 could not be appointed as Deputy

Director, Litigation. It is submitted that even though order dated 30/04/1999 has been termed as an order of transfer it is in fact a promotion order

in favour of respondent No. 2. The petitioner submits that respondent No. 2 being not eligible cannot be posted as Deputy Director Litigation. On

the other hand she submits that respondents should consider her claims for appointment. The further facts is that the petitioner and counsel for

respondent No. 2 was heard on 31/05/1999. A clear direction was given that respondent No. 2 shall not act as Deputy Director, Litigation. This

order latter stood vacated in terms of directions given in LPA (SW) 230 of 1999 decided on 3.6.1999.

3. The stand taken by respondent No. 2 who is directly affected be examined. It is submitted that the petitioner has no locus standi to file petition.

The petitioner is merely performing the duties of Assistant Legal Remembrancer. It is submitted that her case for regular appointment as Assistant

Legal Remembrancer is yet to be considered by the respondent State. She as per the respondents is not eligible for seeking promotion against the

post of Deputy Director Litigation. On the basis of this it is submitted that no writ can be issued in her favour. With regard to his own qualifications,

it is submitted that he is a member of Legal (Gazetted) Service. According to respondent No. 2, the post of Assistant Draftsman is included in the

Schedule I appended to the Recruitment Rules 1980. The method of recruitment to the post of Assistant Legal Remembrancer and Assistant

Draftsman has been elaborated. For this reliance is being placed on Schedule II. This schedule has been reproduced in ground 2(f) internal page of

the reply. For facility of reference this is being reproduced below :

Class Category Designation Qualification Method of recruitment.

III (a) Asstt. Legal Remembrancer/Asstt. Legal Draftsman. A bachelor's degree in law from a University established by Law in India with not less

than 5 years experience on a post of Legal Asstt. or has held any other post in the law Department equivalent in pay to that of Legal Asstt.

requiring special knowledge of law by virtue of which he has gained sufficient knowledge and experience in the application of law. 60% by

promotion from category (a) of class I of J&K Subordinate Legal Service or officials working in the Law Deptt. having required qualification.

A bachelor's degree in law from a University established by Law in India with at least two years continuous actual practice at Bar. 40% by direct

recruitment.

(b) (b) Asstt. Draftsman (Translation). A bachelor degree in Law from a University established by law in India with at least two years continuous

actual practice at bar and not less than three years experience in translation of legal documents besides proficiency in Urdu." By direct recruitment.

4. It is accordingly submitted that qualifications and experience for both categories of the post i.e. Assistant Legal Draftsman and Assistant

Draftsman (Translation) is the same. Respondent No. 2 submits that he came to be appointed as Assistant Draftsman (Translation) in the year

1983. He further submits that he was promoted as Deputy Draftsman in the pay scale of Rs. 10,000 to 15,200/-. As the post of Deputy Director,

Litigation carries the same pay scale as that of Deputy Draftsman, the respondent No. 2 submits that he can be legally appointed as Deputy

Director, Litigation. Reference is also being made to Rule 5 of the Rules 1980. It is stated that appointment in the service can be made by direct

recruitment which includes appointment by transfer, by promotion and partly by direct recruitment and partly by promotion. It is accordingly

submitted that the respondent No. 2 could be appointed by way of transfer. It is further submitted that respondent No. 2 as an Assistant

Draftsman with three years experience as such can be promoted to the post of Deputy Director Litigation as he possesses the requisite

qualifications.

5. The stand taken by respondent No. 1 be examined. It is stated that the appointment of petitioner as Assistant Legal Remembrancer has not

been cleared by the Public Service Commission and therefore the petitioner has no cause of action. It is further submitted that respondent No. 2

has merely been transferred and this could be done. It is stated that an Assistant Draftsman is better qualified than Assistant Legal Remembrancer

and therefore he could be transferred. Again stand is that the respondent No. 2 is enjoying the benefit of pay scale which is the same as that

enjoyed by Deputy Director Litigation, therefore, there is no impediment in the way of the government in passing the order annexure 'A'.

6. From the pleadings of the parties it becomes apparent that :

i) Respondent No. 2 came to be appointed as Assistant Draftsman. At present he is holding the post of Deputy Draftsman;

ii) The Rules of 1980 put at par with Assistant Legal Remembrancer and Assistant Legal Draftsman;

iii) Assistant Draftsman (Translation) figures against category 'B'; and

iv) The Rules which deal with appointment of Deputy Director of Litigation, makes eligible only Assistant legal rememberencer, Assistant Director

Litigation, Assistant Legal Draftsman and also Assistant Draftsman (Translation).

7. The further fact which is pleaded by the respondents is that the post of Deputy Draftsman and Deputy Legal Remembrancer is part of Schedule I

attached to the Rules of 1980. It is submitted that they carry the same pay

scale, therefore the Respondent No. 2 could be appointed as Deputy

Director Litigation by way of transfer. Before proceeding to take notice of the various submissions made by both the sides, it would be apt to

notice that the counsel appearing for the State conceded that the case of the respondent No. 2 did not fall within Rule 5(2)(b)(c) and that is why he

was appointed as Deputy Director Litigation under Rule 5(2)(a) of the Rules. With regard to the status of petitioner it is submitted that she is

merely performing the duties of an Assistant Legal Remembrancer, her case as per the respondents has not been cleared by the Public Service

Commission.

8. The petitioner who appeared on 18/07/2001 submitted that the public Service Commission has cleared her case regarding giving her regular

appointment. It is also stated by her that another vacancy has also come into existence. It is accordingly submitted that the argument put across by

the State that the petitioner is not eligible no longer survives. She appeared again on 19.7.2001 and brought to the notice of the Court that an order

has been issued by respondents by which the petitioner has been given officiating promotion. This order is being retained on the file as C1. For

facility of reference this is being reproduced below :

Government of Jammu and Kashmir

Civil Secretariat

Law Department.

Subject : Promotions in the J&K Legal (Gazetted) Service.

Government Order No. 1821LD (Estt) of 2001.

Dated : 18072001.

Pending clearance by the public Service Commission/Departmental Promotion Committee, sanction is accorded to officiating promotion of the

following Assistant Draftsman/Assistant Legal rememberencers of the Law Department as Deputy Legal Remembrancers/Deputy Legal Draftsmen

in the pay scale of Rs. 100015200 for a period of six months :

1. Shri Ghulam Nabi Wani.

2. Smt. Anita Koul.

3. Shri Ghulam Ahmad Mir.

4. Shri Mohammad Sayed Shah.

Consequent upon above Smt. Anita Koul is posted as Deputy Director Litigation, Jammu. A post of Deputy Draftsman Urdu Coordination Cell is

transferred to the Law Department for purposes of drawal of salary of Deputy Legal Remembrancer.

By order of the Government of Jammu and Kashmir.

Sd/

Commr/Secretary to Govt. Law Department.

Independently of the above, she submits that even at the time when order was passed in favour of respondent No. 2, she was eligible. She submits

that respondent No. 2 was not eligible to be assigned the duties of Deputy Director Litigation. Thus notwithstanding the order passed on

18/7/2001, whereby officiating promotion has been given to her, she is challenging the initial order passed by favour of Respondent No. 2 by

which she submits her rights were wrongly ignored.

9. Even if the argument raised by the respondent that the petitioner is not a regular appointee as Assistant Legal Remembrancer is considered, the

question would still arise, as to whether order annexure `A' by which respondent No. 2 who has been shown as Deputy Draftsman, Urdu

Coordination Cell can be appointed as Deputy Director Litigation in place of Sh. M.A. Wani. The basic plea of the respondents is that in terms of

power vested in the State Government, a person could be appointed by way of transfer also. For this reliance is being placed on Rule 5 of the

Rules of 1980. For facility of reference this Rule is reproduced below :

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 Schedule II and fulfills 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 in the ratio and the manner mentioned against each post in Schedule II.

10. No doubt the State Government has the power to make direct appointment which includes appointment by way of transfer also. Such a power

is reserved under clause 5(2)(a). If a person is to be appointed under this Rule then he should be qualified to hold the post. A person who is

disqualified or does not possess the qualification as indicated in subclauses (b) & (c) cannot be appointed by exercising power under clause 2(a).

If a person is not qualified under subclauses (b) & (c) is appointed under subclause (a) by way of transfer then this would be a colourable exercise

of powers and it would be open to challenge. Therefore, one has to see whether a person who is appointed under clause (2)(a) does not suffer

from any disqualification under the Rules of 1980. Under subclause (b), when case for promotion was to be considered then it has to be

established that a person who is to be promoted fulfills the qualifications indicated in the Rules. Only an Assistant Legal Remembrancer or an

Assistant Legal Draftsman or an Assistant Draftsman (Translation) are the persons who are eligible for appointment as Deputy Director Litigation.

Respondent No. 2 is a Deputy Draftsman, Urdu Coordination Cell. His services might have been transferred to Law Department in pursuance of

the Cabinet decision No. 74 of 1997. This would not in any way mean that the Rules of 1980 laying down the qualifications would also stand

amended and a new category i.e. Deputy Draftsman Urdu Coordination Cell, would also become eligible for appointment as Deputy Legal

Remembrancer. Unless and until there is specific amendment of the rules the qualification as given in the Rules has to be taken note of. The

respondent No. 2 obviously does not possess the qualification as enumerated in Schedules I & II of the Rules. Merely because the post of Deputy

Legal Remembrancer and Deputy Draftsman are carrying the same scale of pay would also not confer any extra advantage to respondent No. 2.

The feeding channel for appointing Deputy Director, Litigation is Assistant Legal Remembrancer, Assistant Legal Draftsman and Assistant

Draftsman (Translation). Post of Deputy Draftsman (Urdu cell) is not the feeding channel, therefore, the plea put forward by the petitioner that

respondent No. 2 is not eligible for being brought and called upon to perform the duties in a service governed by Rules 1980 deserves to be

accepted. With regard to the eligibility of the petitioner to seek promotion as Deputy Legal Remembrancer, the argument put across is that her

position as Assistant Legal Remembrancer had not crystallised and the requisite opinion of the Public Service Commission is yet to be obtained.

This plea be examined.

11. The fact that ad hoc service can be taken into consideration is a matter which is not res integra. This aspect of the matter was considered by a

Division Bench of this Court in LPA (SW) No. 190/99 decided on 03/06/99. In the above case, teachers who were working as Incharge

Lecturers, were seeking benefit of this for getting substantive appointment. The precise argument which was raised and the decision of the

Supreme Court reported as 'Dr Asim Kumar Bose v. Union of India', AIR 1983 SC 509 as was quoted in the aforementioned appeal is being

quoted again :

The basic argument raised by the learned counsel for the appellants is that the experience gained by an inservice candidate, though holding the

post as an Incharge, is an experience of the same standard as is gained by a person who is performing the duties against a regular assignment. It is

submitted that the quality of experience cannot be different whether a person is teaching as Incharge teacher or is holding the post on substantive

basis. It is suggested that there may be some difference in so far as the emoluments and other service conditions are concerned but the quality of

teaching which is imparted by a teacher remains the same. Therefore, it is submitted that there can be no difference in the matter of experience

which is gained by a teacher whether he is teaching as an Incharge Lecturer or is teaching as a Lecturer having been appointed on substantive

basis. For the above proposition, reliance has been placed on a decision of the Supreme Court as Dr. Asim Kumar Bose v. Union of India, AIR

1983 SC 509. In the above case, a doctor working as Specialist Grade II in a teaching hospital belonging to the Central Health Services was

eligible for appointment or promotion as Professor or Associate Professor in the concerned speciality. It was observed that the recruitment rules

did not anywhere provide that the teaching experience gained by a Specialist in an exofficio capacity shall not count towards the requisite teaching

experience. There was no provision in the Rules that the teaching experience

must be gained in a regular appointment. It was observed that there was hardly any difference so far as teaching experience is concerned; whether it is acquired on a regular appointment or as a Specialist in a teaching hospital with the exofficio designation. As the statutory rules did not exclude the teaching experience gained by the appellant before the Supreme Court while holding the post of RadiologistcumAssociate Professor of Radiology, the same was held to be good and it was observed that this cannot be ignored in determining his eligibility for appointment as Professor of Radiology. The relevant rule which was being considered by the Supreme Court is R. 8(3) of the Central Health Services Rules of 1963. For facility of reference, this rule is being reproduced below :

Rule 8(3) provides that 50 per cent of the vacancies in Supertime Grade II to be filled in by promotion of General Duty Officers Grade I and

Specialists Grade II officers in the ratio of 2 : 3

Supertime Gd.II Rs. 13001800. 50 yrs and below relaxable for Govt. servants. For professors/Additional Professors in Medical College/teaching institutions.

A postgraduate degree in the concerned speciality mentioned in Part A of Annx. II or equivalent.

For Professor/Additional Professors in Medical Colleges or teaching institutions, at least 6 years experience as Associate Professor/Asstt.

Professor/Reader in a Medical College or teaching institution after the requisite post graduate degree qualification out of the aforesaid 12 years standing. (Qualification relaxable at commission's discretion in the case of candidates otherwise wellqualified).

Specialist Grade (Rs. 6001300) 45 years and below (relaxable for Govt. servants). For Associate Professors/Reader Assistant Professors/Lecturers.

A postgraduate degree in the concerned speciality mentioned in part A of Annexure II or equivalent.

For Associate Professors :

At least 5 years experience as Reader/Assistant Professor in the concerned speciality in a medical college/teaching institution after the requisite postgraduate qualifications.

(Qualifications relaxable at Commission's discretion in the case of candidates otherwise well qualified).

After taking note of the aforementioned Rule, an opinion was expressed that there is hardly any difference insofar as teaching experience is

concerned whether it is acquired on regular appointment or otherwise. The position in this case is similar. The experience which was gained by the

appellants as Incharge Lecturer cannot be said to be different from that of experience which was gained by others who were working in

substantive capacity. Therefore, on this consideration alone, it can safely be concluded that the claims of the appellants were not considered

properly.

Independently of the decision of the Supreme Court noticed above, it be seen that in the Rules there is no stipulation that only that person who is

working against a regular appointment is eligible for being considered. As a matter of fact, the Rule which has been quoted above, does not debar

the appellants from being considered. The method of recruitment is silent as to the feeding cadre. Therefore, any person having teaching experience

of five years at Higher Secondary Level in the subject concerned could have applied for the post. The addition of the words 'having regularised

service as such' is a condition which has materially changed the complexion of the Rule. Something which was not there in the Rule could not be

added with a view to disqualify the appellants.

The aforementioned observations would also apply to the facts of the case. The petitioner had continued to work on ad hoc basis would be

entitled to get this experience counted for the higher assignment.

12. Thus the petitioner is right in her submission that she was eligible for consideration for appointment as Deputy Director of Litigation and her

claims were wrongly ignored. In any case as this has been done now, the petitioner is left free to make representation to the respondent authorities

for getting retrospective benefit of promotion.

13. Before parting with this aspect of the matter it would be apt to mention that requirement of consultation with the commission is provided in

section 123 of the Jammu & Kashmir Constitution. The consultation is not mandatory in the sense that the advice given by the Commission is not

binding on the State Government. See 'State of U.P. v. Manbodhan Lal', AIR

1957 SC 912. Even otherwise for remissness on the part of

Government to send the case to the Commission cannot visit the petitioner with evil consequence.

14. The appointment of respondent No. 2 whether rightly made or not be now examined. With a view to urge that the appointment of respondent

No. 2 was valid, it is urged that once upon a time he was Assistant Draftsman (Translation) and therefore, he could be considered for promotion in

terms of Schedule entry III(b). There can be no dispute with the proposition that an Assistant Draftsman (Translation) is eligible for promotion but

the question as to whether the respondent No. 2 is an Assistant Draftsman (Translation). By no stretch of imagination he can be treated as such.

He is Deputy Draftsman, Urdu Coordination cell, therefore, merely because once upon a time he was Assistant Draftsman (Translation) would not

confer upon him a right to seek promotion under Rule 5. As a matter of fact had he been eligible for promotion then the Government would not

have resorted to Rule 5(2)(a) and brought him as Deputy Director of Litigation and not resorted to clause (a) of Rule 5(1).

15. The other argument as to whether the respondent No. 2 could be brought by way of transfer be now examined. So far as this aspect of the

matter is concerned, it is the case of the respondents that Deputy Draftsman is one of the post mentioned in Schedule I. If this be the situation and if

the respondent No. 2 is to be treated as falling within Schedule I then the question of his being transferred to a service to which he is already there

would not arise. This shows that some how or the other respondent No. 1 wanted to adjust respondent No. 2 as Deputy Director Litigation. They

could not do so by resorting to the power vested in the respondents in terms of Rule 5(2)(b)(c) that is why they resorted to provisions contained in

Rule 5(2)(a). The respondent No. 2 being already member of the service could not be re inducted into service by way of transfer :

I am accordingly of the view :

(i) that in the matter of making appointment to the service governed by Jammu and Kashmir Legal (Gazetted) Service Recruitment Rules 1980

recruitment is to be made in terms of Rule 5.

(ii) that under Rule 5(2)(a) appointment can be made by direct recruitment (which will include appointment by transfer) and also by promotion

under Rule 5(2)(b);

(iii) that Deputy Legal Remembrancer, Deputy Draftsman cum Deputy Secretary, Officer Incharge Coordination is a post which can be filled from

the category of Assistant Legal Remembrancer/Assistant Legal Draftsman or Assistant Draftsman (Translation) :

(iv) that Assistant Director Litigation and Deputy Director Litigation are the posts which have been encadred in the service governed by Rules

1980

(v) that the respondent No. 2 who was once upon a time Assistant Draftsman (Translation) and who was on 30.4.1999 performing the duty of

Deputy Draftsman Urdu Translator Coordination Cell was not eligible for being appointed by promotion :

(vi) That even if it be presumed that the post which the respondent No. 2 is holding equivalent the post of Deputy Legal Remembrancer that would

not make any difference. As a matter of fact the argument of the respondent State is that the post which respondent No. 2 is holding is part of the

Service governed by Rules of 1980;

(vii) that if above position at serial No. (vi) is taken note of then the question of respondent No. 2 being appointed by transfer would not arise. This

is because only that person who is out side the cadre governed by the Rules of 1980 can be appointed in the service by way of transfer. The

person who is already in service cannot again be reappointed by resorting to appointment by transfer;

(viii) that respondent No. 2 being ineligible for appointment by promotion under rule 5(2)(b) could not be appointed by way of transfer by

exercising powers under Rule 5(2)(a). If such an action is taken then this would amount to colourable exercise of power. A person who is suffering

from disqualification as being ineligible to be brought in the service cannot be made eligible by resorting to another clause. If this is done, this would

amount to a colourable exercise of power.

(ix) that petitioner who was Assistant Director Litigation/Assistant Legal Remembrancer was eligible for promotion and mere fact that he was

appointed on officiating basis would not in any way effect her right to seek further promotion.

In view of the above conclusions it is held that respondent No. 2 who was

ineligible and who could not be promoted under Rule 5(2)(b) could not be brought into the service by way of transfer because he suffered inherent disability under these very Rules.

16. The letter of appointment issues on 30.4.1999 in favour of respondent No. 2 is accordingly liable to be quashed and is accordingly quashed.

17. So far as petitioner is concerned, she is held eligible for being considered on the basis of her officiating tenure. The fact that her services have

been now regularised as Assistant Legal Rememberancer/Assistant Director Litigation and that the Public Service Commissioner has accorded

approval can also be taken note of. The petitioner has already been appointed/promoted on officiating basis vide annexure ""C1"". Her claims for

retrospective promotion be considered.

18. Before parting with this judgment it would be apt to note that the petitioner is not only entitled to a writ of mandamus in her favour but she is

well within her rights to seek a writ of quowarranto. This writ can be invoked by any citizen or State subject, therefore, to say that petitioner has no

locus standi to move this Court is an argument which cannot be accepted.

19. Petition allowed in the manner indicated above.