

(2007) 05 J&K CK 0006
In the Jammu And Kashmir High Court

Balbir Chand Atri and Others	Vs	APPELLANT
State of Jammu & Kashmir and Others		RESPONDENT

Date of Decision : 09-05-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2008) 2 JKJ 167

Hon'ble Judges : J.P. Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

J.P. Singh, J.—Claiming consideration for selection and appointment as Junior Engineer (Civil) in the Public Works Department of the State,

the petitioners, who are stated to be Degree-holders in Civil Engineering from various recognized Engineering Colleges and belonging to the

Scheduled Caste Category, had approached this Court on an earlier occasion in SWP No. 1800/2004 seeking relief's which reads thus:

(a) Writ of mandamus commanding upon the respondents to fill up all existing and backlog vacancies of junior Engineers (Civil) in addition to the

vacancies advertised vide Notification No. 03 of 2004 dated 14-09-2004 in the same selection process.

(b) Further writ of mandamus commanding upon the respondents to conduct the selection process for all the existing and backlog vacancies for the

posts of Junior Engineer (Civil) in ST and SC;

(c) Further writ of mandamus commanding upon the respondents to select and appoint the petitioners as Junior Engineer (Civil) in view of their

eligibility and merit in their respective categories.

2. During the pendency of this writ petition, the Jammu and Kashmir State Subordinate Services Recruitment Board issued its advertisement notice

No. 03 of 2004 dated 14-09-2004 inviting applications for selection and consequent appointment against 256 posts of Junior Engineers, break-up

whereof indicated, inter alia, twenty one (21) posts against the Scheduled Caste Category. The petitioners, therefore, in view of the issuance of

aforementioned notification, withdrew SWP No. 1800/2004.

3. Yet another notification appears to have been issued by the Board vide its advertisement notice No. 04 of 2005 dated 14-09-2005 inviting

applications from eligible candidates, inter alia, against twenty one (21) reserved posts of Junior Engineers for the Scheduled Caste Category. It

was followed by another advertisement notice No. 08 of 2005 dated 29-11-2005, inviting applications from eligible candidates for twenty (20)

posts of Junior Engineers (Civil) against Scheduled Caste Category. The closing date for filing applications in terms of this last notification of the

Board was 12-12-2005. This notification specifically provided that it had been issued in continuation to earlier notice No. 03 of 2004 dated 14-

09-2004 and 04 of 2005 dated 14-09-2005.

4. It was during the process of finalization of the selection process for the posts of Junior Engineers (Civil) that the petitioners filed this writ petition,

claiming PREFERENCE and WEIGHTAGE in selection against the reserved category posts of Junior Engineer (Civil), urging that delay on the

part of the Board in holding selection, when the first notification had been issued, had expanded the area of competition, which, according to them,

entitled them to Preference and Weightage in selection.

5. The petitioners, therefore, seek a command of the Court to the respondents for providing them PREFERENCE on the basis of batch-seniority

in reference to advertisement notice Nos. 03 of 2004 dated 14-09-2004, 04 of 2005 dated 14-09-2005 and 08 of 2005 dated 29-11-2005.

6. An interim order was issued at the motion hearing stage restraining the Jammu and Kashmir Services Selection Board not to issue the select list.

This interim order was later clarified on April 13, 2007 when while dismissing the applications of the interveners belonging to the categories other

than Scheduled Caste for their impleadment as party respondents, it was provided on the concession of learned Counsel for the petitioners that the

interim direction issued by the Court would apply only to the vacancies reserved for the Scheduled Caste Category. It was noticed in the interim

order that the Jammu and Kashmir Services Selection Board had issued select list of candidates for the posts of Junior Engineers, which was

published in the newspaper on 17-04-2007.

7. Keeping in view the urgency projected by the interveners selected against the Scheduled Caste Category and the respondents to the writ

petition, the whole matter was taken up for motion hearing.

8. Learned Counsel for the parties and those appearing in Civil Miscellaneous Petition Nos. 920/2007, 934/2007, 935/2007, 963/2007,

964/2007, 965/2007 and 968/2007 were heard in detail.

9. Learned Counsel appearing for the writ petitioners, Mr. Sethi submitted that the vacancies notified by the Jammu and Kashmir Subordinate

Services Recruitment Board were ""Backlog"" vacancies of various years starting from 2001 the right of consideration against these Backlog

vacancies would thus be available only to those Scheduled Caste Category candidates who were eligible at the time when these vacancies had

became so available.

10. Elaborating his submission, learned Counsel submits that competition against the vacancies which had been notified in the first notification could

only be amongst those who were eligible at the time of the notification and like wise only those who were eligible in terms of the subsequent

notifications would alone be eligible to compete for the posts of Junior Engineers, so notified. Learned Counsel, therefore, in short, submits that all

the vacancies notified in the three notifications could not be clubbed by the Board, seeking competition amongst those who were eligible in terms of

the third notification. Reliance has been placed on the latest judgment of Hon'ble Supreme Court of India reported as Vijay Singh Charak v. Union

of India and Ors. 2007 (1) SC 19 : AIR 2007 SC 15021

11. Mr. S.K. Shukla, learned Counsel for the Board, submits that the petitioners, having competed in the selection process and taken chance of

being selected against all the vacancies reserved for Scheduled Caste Category candidates, have no right to stall the selection process mid-way to

seek Preference, which, according to the learned Counsel, was neither contemplated by the Recruitment Rules nor by the Advertisement Notices

issued by the Board in this behalf. Omission of the petitioners to question the notifications, estops them to maintain the writ petition, which,

according to the learned Counsel, was even otherwise premature at the time when it was filed and had by efflux of time become infructuous with

the issuance of the select list by the Board.

12. Mr. S.C. Gupta, learned Additional Advocate General, reiterating the submissions made by Mr. Shukla, opposed the maintainability of the writ

petition, saying additionally that Preference cannot be claimed as of right and delay on the part of an employer to fill-up the existing vacancies,

cannot create any preferential much less an enforceable right in a candidate to seek a command against the employer to fill up the vacancies as and

when those had arisen regardless of the constraints because of which the employer may not, in the exigencies of administration, elect so to do.

13. Mr. U.K. Jalali, learned Sr. Advocate and M/S K.S. Johal and Shahzad Azeem, Advocates, appearing for the petitioners in applications

seeking impleadment of those who had been selected by the Board against Scheduled Caste Category posts of Junior Engineers, and vacation of

interim order issued by this Court, pursuant where to, the Board had put the selection process to hold, while adopting the submissions made by

learned Counsel for the Board and State, additionally urged that the vacancies advertised by the Jammu and Kashmir Subordinate Services

Recruitment Board were not Backlog vacancies strict-o-senso in terms of the Jammu and Kashmir Reservation Rules, 1994 and neither the

Recruitment Rules nor the Reservation Rules notified vide SRO126 of 1994 support the plea of the writ petitioners that the vacancies arising in a

particular year were required to be filled-up only from amongst those candidates who had become eligible in the year/s when the vacancies had

become available.

14. Learned Counsel for the respondents and petitioners in the CMPs have placed reliance on J and K. Public Service Commission, etc. Vs. Dr.

Narinder Mohan and others etc. etc., and Sanjay Kumar and Others Vs. Narinder Verma and Others, .

15. I have considered the submissions of learned Counsel for the parties to the writ petition as also those appearing in the Civil Miscellaneous

petitions, seeking impleadment and vacation of interim order.

16. Writ Petitioners' plea that recruitment to the existing Scheduled Caste Category vacancies was available only to those candidates who had become eligible in the year when the vacancies became so available, and, the Recruitment Board could not club all the vacancies which had arisen in the subsequent years with the existing vacancies and thereafter go in for selection, providing chance of competition to all those candidates who were eligible at the time of issuance of the last Notification, appears to be misconceived. This is so because neither the Recruitment Rules nor the Rules framed by the Jammu and Kashmir Subordinate Services Recruitment Board for selection of candidates envisage such a mode of selection as is projected on behalf of the writ petitioners. The reservation rules too do not contemplate any such restriction, still less preference in selection. In the absence of any Statutory Rule or, for that matter, any administrative instruction or guidelines on the subject, no restriction on the power and authority of an employer to extend the area of competition by clubbing the vacancies for the purpose of selection and appointment may be justifiablal.

17. To define the area of competition for selection and appointment is the exclusive province and domain of the employer. Any impediment or restriction on such right of the employer would be fraught with grave consequences, which may not be conducive to the accepted principles of service jurisprudence and concept of master and servant relationship. It is the prerogative of an employer, rather than that of a candidate to prescribe terms and conditions of competition and employment, No candidate, desirous of seeking selection and appointment may be conceived to have any right to compel his perspective employer to devise mode of selection and appointment as suggested by him. Likewise, a candidate desirous of seeking selection for appointment cannot desire, muchless demand a limited area of competition. The employer cannot be denied the discretion to select its own time, method and manner it may chose to go in for selection and fill up the vacancies. No restriction on this right of the, employer may be contemplated.

18. Preference cannot be claimed as of right by a candidate. The only right, which a candidate desirous of seeking selection has is the right of participation and equal consideration in the matter of selection and appointment.

It is the prerogative of the employer to consider grant or otherwise of preference to such eligible candidates, who, in his opinion, may be entitled to such preference. Delay in filling up the vacancies cannot, in any case, vest any right in a candidate to seek preference. Claim of preference, even otherwise, may not be agitated for adjudication before a Court, exercising power and jurisdiction of Judicial Review.

19. In the absence of any right in the petitioners to seek preference or any corresponding obligation on the respondents to provide preference to the petitioners, claim of the petitioners for issuance of a writ of mandamus is wholly misconceived.

20. Plea of the petitioners that clubbing of vacancies was impermissible too appears to be irrational. A candidate cannot compel an employer to go in for selection when the vacancies become so available, denying him his discretion to club vacancies and thereafter seek competition amongst eligible Candidates against the clubbed vacancies in one go or otherwise.

21. In any case/the question raised by the petitioner in the writ petition, is no longer res Integra and stands answered by a judgment of the Hon'ble

Supreme Court of India in Jammu and Kashmir Public Service Commission and Ors. v. Dr. Narinder Mohan and Ors. where, dealing with the

similar question, Hon'ble Supreme Court of India held as follows:

It is difficult to accept the contention of Sh. Rao to adopt the chain system of recruitment by notifying each year's vacancies and for recruitment of

the candidates found eligible for the respective years. It would be fraught with grave consequences. It is settled law that the Government need not

immediately notify vacancies as soon as they arose. It is open, as early as possible; to inform the vacancies existing or anticipated to the PSC for

recruitment and that every eligible person is entitled to apply for and to be considered for his claim for recruitment provided he satisfies the

prescribed requisite qualifications. Pegging the recruitment in chain system would deprive all the eligible candidates as on date of inviting application

for recruitment offending Articles 14 and 16.

22. In view of what has been said above and the law laid down by Hon'ble Supreme Court of India, no right may be said to have accrued to the

petitioners to seek selection in a limited area of competition, or, for that matter, any right to seek preference in selection.

23. I will now deal with the latest judgment of Hon'ble Supreme Court of India, which had been relied upon by the learned Counsel for the petitioners.

24. Perusal of the judgment (supra) reveals that Hon'ble Supreme Court of India had not laid down any rule of General Application that select list

in all cases of selection had to be prepared every year and clubbing of vacancies for different years was impermissible. The law reiterated by

Hon'ble Supreme Court of India that vacancies arising in a particular year for the purpose of drawing the select list was impermissible, was only in

the context of Indian Forest Service (Recruitment) Rules, 1965 and Indian Administrative Service (Appointment by Promotion) Regulations, 1955.

A perusal of Regulation 5 of Indian Administrative Service (Appointment by Promotion) Regulations, 1955 (as enforced in 1980), would

demonstrate that what had been held by Hon'ble Supreme Court of India was only referable to those situations where there was a specific rule

provided for drawing of select list in the year in which the vacancies had arisen. This Regulation, for ready reference, is quoted hereunder:

5.(1) Each Committee shall ordinarily meet at intervals not exceeding one year and prepare a list of such members of the State Civil Service as are

held by them to be suitable for promotion to the Service. The number of members of the State Civil Service, include in the list shall not be more

than twice the number of substantive vacancies anticipated in the course of the period of twelve months, commencing from the date of preparation

of the list, in the posts available for them under Rule 9 of the Recruitment Rules, or 10 per cent of the Senior posts shown against Items 1 and 2 of

the cadre schedule of each state or group of States, whichever is greater.

(2) The Committee shall consider for inclusion in the said list, the cases of members of the State Civil Services in the order of a seniority in that

service or a number which is equal to five times the number referred in sub-regulation (1):

Provided that such restriction shall not apply in respect of a State where the total number of eligible officers is less than five times the maximum

permissible size of the Select List and in such a case the Committee shall consider all the eligible officers:

Provided further than in computing the number of inclusion in the field of

consideration, the number of officers referred to in Sub-regulation (3) shall be excluded:

Provided also that the Committee shall not consider the case of a member of a State Civil Service unless, on the first day of January, of the year in which it meets he is substantive in the State Civil service and has completed not less than eight years of continuous service (whether officiating or substantive) in the post of Deputy Collector or in any other post or posts declared equivalent thereto by the State Government: Provided also that in respect of any released Emergency Commissioner or Short Service Commissioner officers appointed to the State Civil service, eight years of continuous service as required under the preceding proviso shall be counted from the deemed date of their appointment to that service, subject to the condition that such officers shall be eligible for consideration if they have completed not less than four years of actual continuous service, on the first day of January of the year in which the committee meets, in the post of Deputy Collector or in any other post or posts declared equivalent thereto by the State Government. Explanation. - The powers of the State Government under the third proviso to this sub-regulation shall be exercised in relation to the members of the State Civil Service of a constituent State, by the Government of that State.

(2-A)

* * *

(3) The Committee shall not consider the cases of the members of the State Civil Service, who have attained the age of 52 years, on the first day of January of the year in which it meets:

Provided that a member of the State Civil Service, whose name appears in the Select List in force immediately before the date of the meeting of the Committee, shall be considered for inclusion in the fresh list, to be prepared by the Committee, even if he has in the meanwhile attained the age of 52 years:

Provided further that a member of the State Civil Service who has attained the age of 54 years on the first day of January of the year in which the Committee meets shall be considered by the Committee, if he was eligible for consideration on the first day of January of the year or of any of the

years immediately preceding the year in which such meeting is held but could not be considered as no meeting of the Committee was held during such preceding year or years.

(4) * * *

(5) * * *

(6) The list so prepared shall be reviewed and revised every year.

(7) * * *

25. I am, therefore, of the view that principle laid down by Hon'ble Supreme Court of India cannot be applied to the facts of the present case

where no rule or regulation, or, for that matter, any administrative instruction issued in this behalf mandates against clubbing of vacancies, or d

rawing up of the select list every year.

26. That apart, the petitioners having chosen not to question notifications issued in the year 2004, when they first came to this Court in SWP No.

1800 / 2004 and the subsequent notifications issued thereafter in which it had been specifically mentioned that the notifications were being issued in

continuation to earlier notifications, and rather seeking consideration after the issuance of notification No. 08 of 2005 dated 29.11.2005, estops

them to question the selection process and seek preference in selection at this belated stage when the selection process had been completed and

select list issued during the pendency of the writ petition. '

27. For all what has been said above, I do not find any merit in the writ petition, which is, accordingly, dismissed.

28. In view of the dismissal of the writ petition, no orders are required to be passed in CMP Nos. 920/2007, 934/2007, 935/2007, 963/2007,

964/2007, 965/2007 and 968/2007 seeking impleadment and vacation of interim order These CMP's are, accordingly, disposed of.

29. With the dismissal of the writ petition, the interim stay issued by this Court on 5th of April, 2007 and modified on 13th of April, 2007 is also

vacated.

30. CMP No. 808/2007 is disposed of accordingly.