
(2001) 05 J&K CK 0023

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2039 of 2000

Brinder Singh Pawar

APPELLANT

Vs

State of Jammu and Kashmir

RESPONDENT

Date of Decision : 15-05-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2002) 4 SCT 528

Hon'ble Judges : Arun Kumar Goel, J

Bench : Single Bench

Advocate : H. Rehman, Advocates appearing for the Parties

Judgement

Arun Kumar Goel, J.—This writ petition was admitted on 4th of April, 2001.

2. Heard petitioner as well as Sh. Rehman, Government Advocate.

3. It was not disputed at the time of hearing, that for recruitment to the post of Prosecuting Officer in J&K, Police, SRO 126 of 1994 is applicable.

This position is otherwise supported from the list of candidates selected for the said post, copy whereof is attached as AnnexureD with the writ

petition. When a reference is made to it, candidates at S. No. 32 to 46 all belong to different categories as prescribe in SRO 126 of 1994.

4. Sh. Rehman, Government Advocate has produced the original record relating to the selection in question as was ordered on 4th of April, 2001.

5. After having perused the record, Sh. Rehman fairly stated that in all there were five candidates who had applied for the post of Prosecuting

Officers in the J&K Police in the category of Children of Defence Personal/ Exservicemen. Person mentioned at S. No. 29 in AnnexureD, Anil

Mangotra is one of those five. His case was considered and in fact he has been

appointed in open merit category and not as a child of Defence

Personnel/ExServicemen. He further stated on the basis of the record as well as communication addressed to him by the D.D.P. for Director

General of Police, J&K, Srinagar, dated 9th of May, 2000, out of five candidates, said Sh. Anil Mangotra obtained 43 marks, as such, he has

been appointed as a child of Defence Personnel. Petitioner Brinder Singh Pawar and one Sh. Virendar Sharma obtained 30 marks each. One

candidate Rajesh Kumar appeared in written test but did not come forth for his vivavoce, whereas fifth candidate Vijay Sudan was absent.

6. In the aforesaid circumstances, core question that needs consideration that needs consideration is whether any child of Defence Personnel has in

fact been selected or not. Answer on the basis of the original record produced by Sh. Rehman relating to the selection in question is, No. Another

reason to take this view is that when a candidate in a reserve category is able to make a mark on merit in the open merit category and is in a

position to be considered alongwith the candidates in the latter category, such a candidate is to be considered there and not in the reserve category

wherein he had applied. Such vacancy available in the reserve category is to go to the next person on merit in that particular reserve category. This

is the legal position and is clear from the discussion hereinafter.

7. Now, coming to the stand of the respondents while contesting the claim of the writ petitioner in this writ petition. According to them, he had

obtained 30 marks in all, 28 in written test and 02 marks in interview. His case was considered as a child of defence personnel in terms of SRO

No. 126 of 1994. Since, petitioner has failed to make the mark on merit, therefore, he could not be considered for selection. This is a stand which

on the basis of the facts of this case cannot be accepted. How the matter in such a situation has to be dealt with, stands already set at rest by two

decisions of this Court being :

(a) Raj Singh v. State of J&K and others, 2000(2) SCT 888 (J&K) : 2000 K.L.J. 86 . What is relevant from this judgment for the present case is

extracted hereinbelow :

1. The Jammu and Kashmir Public Service Commission (hereinafter the Commission) vide Notification No. 8.5 of 1996 dated 25.1.1996, invited

applications for 54 posts of Agriculture Extension Officers/Agriculture Assistants

etc. The minimum qualification prescribed was B.Sc. Agriculture from the recognised institute. The petitioner being an Agriculture Graduate had applied for the post and appeared in the screening test also but he was not invited for vivavoce test. He approached the Commission with the representation that he being son of an exservicemen is entitled to be considered under Rule 11 of the Reservation Rules, 1994. Since the representation has not been decided, he has moved this petition for a direction to the respondents to implement Rule 11 of SRO 126 of 1994 considering him under the category of Exservicemen. Rule 11 of the Reservation Rules, 1994 notified vide SRO 126 of 1994 dated 28.6.1994 read as under :

` 11. Concessions (1) Notwithstanding anything in rule 10 and subject to the provisions of subrule (2) of this rule, out of the total number of available vacancies (reserved as well as unreserved), handicapped persons to the extent of 2% and exservicemen and children of defence personnel to the extent of 5% shall get preferential treatment for selection in each service class, category and grade.

(2) If a candidate belongs to reserved category, he will be placed in that quota by making necessary adjustment and if he belongs to open category he will be placed in that category by making necessary adjustment. This shall not affect the percentage of reservation provided under rule 10.'

As per subrule 1 of this rule, five percent out of the total number of the available vacancies both under the open merit and reserved categories have been reserved for exservicemen and children of defence personnel. Sub Rule 2 of the Rule prescribed the procedure for giving preferential treatment. This ought to be indicated in the advertisement notice after working out the vacancies for them under each category on the basis of percentage. Once the vacancies available for the exservicemen and children of defence personnel are identified, there will be no difficulty to decide their inter se merit because they have to compete only with those eligible for concession or preference because competition is always with the equals. So the contention of Mr. Raina that petitioner could be preferred only if he had obtained 79 marks which was the cut off point for open merit candidate, is not tenable and against the principle of preferential reservation as against proper reservations. The plea of the commission is also against the mandate of sub rule (2) Rule 11 of the Reservation Rules, which is an

illustration, how such reservations i.e. concessions are to be worked out. So, while advertising the post, the Commission is required to invite applications for filling up the number of vacancies available for

those entitled to concession under Rule 11 on the basis of percentage and decide their inter se merit within the category to which he/she belongs.

Preference and concession though not proper reservation, but they are entitled to it within the category to which they belong and, therefore, an

exservicemen will only compete with the ex servicemen and children of the defence personnel only with each other.

2. The next question is, whether the petitioner who is a child of an ex servicemen is also covered under Rule 11 of the Reservations Rules. Subrule

(i) of Rule 11 provides reservation to the extent of 5% in favour of ex servicemen and children of defence personnel only. So the concession or

preference is available to the exserviceman and not to his child. The object appears to be to rehabilitate the exservicemen as they retire at a very

young age. But exserviceman does not include his child. Children of defence personnel is a separate class because they are children of defence

personnels who are in service so while a defence personnel is in service his child can claim concession. But after he retires he alone is entitled to it

as Ex serviceman. So on the plain reading of the said rule, the petitioner who is a child of an exserviceman, as admitted by him, is not entitled to the

concession claimed by him. He was rightly not considered, though the ground of his rejection is erroneous.

(b) Decision in SWP No. 374/97, Narinder Kumar Sharma v. State of Jammu and Kashmir and others, decided on 30th of August, 2000. Sh.

Rehman, Government Advocate stated that this judgment is under appeal. Admittedly, there is no stay of the operation of the judgment. Even if

there was a stay, it would be only applicable inter parties and not so far principle of law enunciated by that judgment is concerned. In my

considered view, unless law declared by the said judgment was also stayed, operation of the said judgment only enures for the benefit of the

parties to it and not beyond that.

8. At this stage to be fair to of Mr. Rehman a plea which he seriously urged needs to be noted. Accordingly to him, Anil Mangotra was considered

on the basis of his being son of a defence personnel, therefore, petitioner's merit

was to be compared with him because he had obtained lessee

marks than Anil Mangotra, therefore, this writ petition is liable to be dismissed. This plea cannot hold the ground for the reasons set out hereinafter.

9. As already observed, may be that Sh. Anil Mangotra applied in reserved category as a child of defence personnel. When a reference is made to

the merit list, he has been clearly selected against open merit category. In view of the decision of the Hon'ble Supreme Court of India in case Inder

Sawhney v. Union of India, AIR 1993 SC 447 and what was held on this aspect of the case is as under :

94A..... In this connection it is well to remember that reservation under Article 16(4) do not operate like a communal reservation. It may well

happen that some members belonging to say, Scheduled Caste get selected in the open competition filed on the basis of their own merit; they will

not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.

Plea urged by Sh. Rehman is devoid of merit.

10. Besides this, Sh. Anil Mangotra has rightly been selected in open merit category because he was able to make a mark in the said category. At

the risk of repetition, it may be noted that as per their own showing, vide annexureD, respondents themselves have treated Anil Mangotra as a

candidate having been selected in open merit. Now they cannot approbate and reprobate as it will cut at the very root of submission of Sh.

Rehman, Government Advocate.

11. No other point is urged.

12. In view of the aforesaid discussion, there is no way out but for allowing this writ petition and the same is allowed accordingly. Consequently,

respondents are directed to consider the case of the petitioner as a child of the defence personnel and thereafter, subject to his fulfilment of other

requirements under law, issue appointment letter to him as Prosecuting Officer in J&K Police, on or before 30th of June, 2001, without waiting for

the certified copy of the judgment since it has been pronounced in presence of learned Government Advocate. In this behalf, it may also be

appropriate to observe that against 49 notified posts of Prosecuting Officers, 05% quota is reserved for the Children of defence

personnel/Exservicemen. Therefore, it is left to the respondents to decide

whether they would like to appoint another candidate also in the said category whosoever is entitled to it on the basis of making a mark on merit. This will save them from another round of litigation at the instance of such candidate.

13. With this direction, this writ petition is allowed with no order as to costs.