

(2021) 10 J&K CK 0049

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 602 Of 2019

Dr. Jahangir Rashid Beigh And Another

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 06-10-2021

Acts Referred:

Citation : (2021) 10 J&K CK 0049

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Jahangir Iqbal Ganai, Murad, Rahat, Shah Aamir

Final Decision : Dismissed

Judgement

Sanjeev Kumar, J

1. Sher-i-Kashmir Institute of Medical Sciences (SKIMS) vide advertisement notice No.04 of 2015 dated 10th July, 2015 invited applications from eligible candidates possessing requisite qualification and experience for filling up of various vacant faculty positions and the posts of Professor and Assistant Professor in different department. By way of addendum to the aforesaid advertisement notification, post of Assistant Professor in the department of Cardiology was also notified on the terms and conditions already notified vide advertisement notice No.04 of 2015. This was followed by Advertisement Notice Nos.01 of 2016 dated 19th March, 2016, 06 of 2016 dated 5th May, 2016 and Advertisement Notice No.07 of 2016 dated 5th September, 2016.

2. In response to the said advertisement notifications, several applications from eligible doctors including petitioners were received for the post of Assistant Professor in Cardiology. The Screening Committee constituted by the Government for screening the applications found eight applicants including the petitioner Nos. 1 and 2 possessing the requisite qualification and experience and eligible for the post. The Apical Selection Committee (ASC), constituted by the Government for recommending suitable candidates, which met under the

Chairmanship of the Chief Secretary of Jammu & Kashmir State, interviewed all the eligible candidates on 19th July, 2017.

3. The ASC, on conclusion of interviews of the eligible candidates, framed a merit list of candidates for appointment. Dr. Aamir Rashid topped the merit list followed by petitioner No.1 and petitioner No.2, who figured at serial Nos. 2 and 3 of the merit list. It appears that the ASC, which is only a recommending body, placed the merit list before the Chairman of the SKIMS governing body. The Chairman of the governing body i.e. His Excellency, the Governor of Jammu & Kashmir State ordered the matter to be placed before Sub-Committee to review the recommendations made by the ASC. Accordingly, vide Government Order No. 64-SKIMS of 2018 dated 28th July, 2018, the matter was placed before the Sub-Committee for scrutinizing the recommendations of the ASC on case to case basis and offer its recommendations.

4. As is gatherable from the reply affidavit filed by the respondents, the appointment order in respect of Dr. Aamir Rashid, who was first in the order of merit, as Assistant Professor, Cardiology was issued. The only post which was notified for selection was, thus, filled up. However, having regard to the recommendations of the ASC and in view of dearth of faculty in the discipline of Cardiology, matter with regard to creation of additional posts of Assistant Professors in Cardiology department was taken up with the competent authority and the finance department.

5. It is the positive case of the petitioners that the proposal submitted to the finance department received the concurrence of the finance department but the competent authority for undisclosed reasons did not formally create posts and adjust the petitioners, though, the SKIMS needed faculty in the department of cardiology and the petitioners were found qualified and meritorious in the selection process conducted by the ASC.

6. The respondents have filed reply affidavit. It is submitted that in terms of Advertisement Notice No.04 of 2015 dated 10th July, 2015 read with addendum dated 10th July, 2015, only one available post of Assistant Professor in the department of Cardiology was notified for selection, which post, on the basis of selection and recommendations made by the ASC, was filled up by appointment of Dr. Aamir Rashid, the candidate, who was on top of the merit list. Petitioner Nos.1 and 2, however were not offered any appointment for the reason that there were no post to accommodate them. It is admitted by the respondents that having regard to the dearth of faculty in the department of cardiology and the eligibility and merit of the petitioners and on the basis of recommendation of the ASC, the matter was taken up with the competent authority and the finance department for creation of additional posts of Assistant Professors in the cardiology department, however, the proposal could not materialize. It is because of this reason, the petitioners, though recommended by the ASC, could not be appointed due to non-availability of posts. The post, which later fell vacant in November, 2017 on superannuation of Dr. Viccar Jan was advertised under direct

recruitment and reserved for Scheduled Caste category (Roster Point No.3). It is in this factual context, the respondents prayed for dismissal of the petition.

7. Heard learned counsel for the parties and perused the record.

8. From a perusal of the record produced by Mr. Shah Aamir, learned AAG, it emerges that after the appointment of Dr. Aamir Rashid against the notified post of Assistant Professor, Cardiology in SKIMS, a proposal was forwarded by the Director, SKIMS to fill up one post that had fallen vacant after the retirement of Dr. Vicar Jan, Asstt. Professor by appointing petitioner-Dr. Jahangir Rashid Beigh, the candidate at serial No.1 in the wait list. With regard to petitioner-Dr. Syed Maqbool Shah and Dr. Asrar Ahmed, who were figuring at serial Nos. 2 and 3 in the waitlist, it was proposed to create two supernumerary posts of Assistant Professor. This proposal of the Director, SKIMS was in tune with the recommendation of the ASC and endorsed by the Sub-Committee constituted vide Government Order No.64-SKIMS of 2018 dated 28th July, 2018. It further transpires that the matter reached the Chairman, governing body SKIMS, who, in view of the involvement of financial implication directed the matter to be taken with the finance department for concurrence. The finance department, to whom the matter was referred, conveyed its concurrence to the proposal of SKIMS for creation of two posts of Assistant Professor on supernumerary basis in the department of cardiology with the rider that the posts so created shall cease to exist immediately after the posts become available in the Institute due to promotion, retirement or death etc of the present incumbents.

9. The Chief Secretary, after having been conveyed the concurrence of the finance department, called upon the Director, SKIMS to revise his proposal earlier submitted by him. The proposal was revised and forwarded to the Chairman, Governing Body through Chief Secretary. The Chairman, Governing Body SKIMS directed to get clarification on the legality of such proposal. This is how the matter ultimately landed before the department of law for opinion. As per the opinion conveyed by the Law Secretary on 12th February, 2019, the legal position on the issue was clarified to the respondents. It was opined that with the appointment of Dr. Aamir Rashid on the lone post of Assistant Professor in Cardiology notified for selection, the panel got exhausted and the wait-list, if prepared, lost its life and that the waitlist cannot serve as a reservoir to fill up vacancies which come into existence after the issuance of advertisement notification. The Law Secretary, however, further indicated that there was an exception to this Rule as carved out in *Prem Singh v. Haryana State Electricity Board and others*, (1996) 4 SCC 319 and opined that in case of rare and exceptional circumstances and in emergent situation, the respondents may, by a policy decision, fill up even the vacancies which were not earlier notified. The Law Secretary also opined that the exigency pointed out by the Director, SKIMS on account of non-availability of Cardiologists in SKIMS, would fall within the purview of an emergent situation and exceptional circumstances and, therefore, the respondents may take a policy decision in this regard.

10. The matter once again landed before the Chairman of the Governing Body, Hon'ble the Governor through Chief Secretary. The Chairman, however, directed to close the matter, meaning thereby the competent authority declined to take any policy decision. This is how the proposal mooted by the Director, SKIMS could not get through.

11. When the case set up by the petitioners is examined and analyzed in the light of settled legal position and the record produced by Mr. Shah Aamir, learned AAG, one would find no justification to interfere with the decision taken by the competent authority.

12. Indisputably, the advertisement notification was for filling up one post of Assistant Professor in the department of Cardiology, SKIMS. It is also not in dispute that on the date of issuance of advertisement notification and even after conclusion of the selection process, only one post of Assistant Professor, Cardiology was available in SKIMS. The petitioners along with other candidates participated in the selection process for the said post. On the basis of overall merit, it was Dr. Aamir Rashid, who got selected and subsequently appointed. As rightly opined by the Law Secretary and which opinion of the Law Secretary is in consonance with the settled legal position that if a selection process is initiated to fill up a solitary post in a cadre, the moment said post is filled up by appointing the selected candidate, the select panel gets exhausted and the persons in the panel cannot be appointed against the post(s) that become subsequently available for any reason whatsoever.

13. It is equally true that a selection process can be initiated for clear as well as anticipated vacancies but not for the future vacancies and in doing so, the selection authority is obliged to indicate that the selection is not only for clear vacancies but also for future vacancies, so that the candidates applying have a fair idea of vacancies they are competing for. In the instant case, the post that fell vacant due to superannuation of Dr. Vicar Jan was perhaps an anticipated vacancy but that was not made part of the advertisement and, therefore, was not put to selection. Two supernumerary posts of Assistant professor, which were proposed to be created, and if created by the orders of the competent authority would have been the posts that would come in existence after the selection process was over. In any case, these could only be termed as future vacancies.

14. The judgment in Prem Singh's case (supra) does not permit filling up such future vacancies by operating the wait panel prepared in relation to a selection of a post and which panel stands exhausted and there is rationale in this proposition of law. There could be many more candidates, who may have acquired eligibility after the closing date of filling application in reference to the earlier advertisement notification and have thus, acquired a right to seek consideration against such future vacancies. True it is that by way of an exception carved out by the Supreme Court in Prem Singh (supra) and Rakhi Ray and others v. High Court of Delhi and others, (2010) 2 SCC 637, such Rule can be deviated, if there are rare and exceptional circumstances or an emergent

situation. However, such deviation is permissible only after a policy decision is taken by the employer based on some rationale. The competent authority appears to have considered the detailed opinion rendered by the Law Secretary and has, instead of taking a policy decision, directed the matter to be closed. It is in these circumstances, the proposal, which was mooted by the Director, SKIMS and which had the approval of ASC and the Sub-Committee and the concurrence from the finance department, did not get through. Consequently, no formal order of creation was issued by the competent authority. Besides, a writ of mandamus cannot be issued unless the petitioners have a vested right of appointment. As is held in *Punjab State Electricity Board and others v. Malkiat Singh*, (2005) 9 SCC 22, mere inclusion of candidate in a select panel does not confer upon him/her a vested right to appointment.

15. That being so, the clear position that emerges is that the respondents have not created any post on supernumerary basis or otherwise nor the petitioners acquire any right of appointment against non-existent posts. They cannot, in law, seek a mandamus to the respondents to create supernumerary posts and adjust them on the ground that they are next in merit to the candidate selected and appointed. The only post that became available on superannuation of Dr. Vicar Jan, too, was subsequently notified for selection, thereby creating third party right of consideration against the said post.

16. Viewed from any angle, I find no merit in this petition. The same is, accordingly, dismissed.

Record produced by Mr. Shah Aamir, learned AAG be returned back.