

(2008) 07 J&K CK 0023
In the Jammu And Kashmir High Court

Dr. Parvez Koul

APPELLANT

Vs

SKIMS

RESPONDENT

Date of Decision : 14-07-2008

Acts Referred:

Citation : (2008) 3 JKJ 196

Hon'ble Judges : K.S. Radhakrishnan, C.J.; Mohammad Yaqoob Mir, J

Bench : Division Bench

Judgement

M. Yaqoob Mir, J.—By medium of this appeal, judgment passed in-SWP No. 1135/05 is assailed, whereunder petition challenging

promotion of respondent No. 5 to the grade of Professor in the discipline of Medicine has been dismissed.

2. Appearing counsel were heard and were also given liberty to file their argument notes with citation. Appearing counsel for the petitioner and

respondent No. 5 has filed detailed written arguments with citations. Appearing counsel for the respondents 1 to 4 & 6 did not choose to file.

3. Thoughtfully considered the submissions as were made and also considered written argument notes alongwith citations.

4. For appreciating the matter in its right perspective, it shall be quite advantageous to precisely notice the factual aspect of the case.

5. Pursuant to advertisement notice No. 1/2004 dated 31.12.2004, applications were invited for filling up various posts in SKIMS on

regular/temporary basis which include post of Professor in General Medicine. The faculty members of the SKIMS were also to apply for

consideration in accordance with the ""Assessment, merit, promotion scheme"" hereinafter referred as (AMPS) Rule 5 of AMPS prescribes the

eligibility, which is reproduced herein:

5) ELIGIBILITY

I) Assistant Professor/Associate Professor with 4 years and Addl. Professor with 7 years of regular service in the respective grades in SKIMS will

be eligible for promotion as Associate Professor, Addl. Professor and Professor respectively,

II) No candidate should be considered in absentia for APS.

III) The candidate should have at least 4 scientific publications in the indexed national/international medical journal(s) at his/her credit during the

period of service which makes him/her eligible for the APS to the next higher position out of which at least for one publication should be as author

or first co-author.

It is clear that the Additional Professor is eligible to apply on fulfillment of three conditions;

i) must have seven years regular service in respective grade in SKIMS,

ii) cannot be considered in absentia for APS,

iii) must have at least four scientific publications in the national/International Medical Journals at his credit during the period of service, which makes

eligible for the APS to the next higher position. Further more out of four publications at least for one publication should be as first co-author.

6. The petitioner admittedly has number of scientific publications at his credit but had only three years regular service in the grade on the relevant

date of advertisement, so did not apply as being ineligible.

7. Respondent No. 5 has applied but he too was ineligible as he did not have any scientific publication at his credit, though he had more than seven

years regular service, but his application had been entertained. He had been called for interview, finally 'Apical Selection Committee' ignoring the

ineligibility recommended his promotion to the post of Professor in the discipline of Genera 1 Medicines. On approval pursuant to Government

Order No. 42 SKIMS of 2005 dated 17.10.2005, respondent No. 5 has been promoted to the grade of Professor in the discipline of Medicine.

8. Petitioner feeling aggrieved preferred the writ petition bearing SWP No. 1135/05, challenging the promotion of respondent No. 5 on the count

of being ineligible. Learned writ court while referring to Government Order No.

362-GAD of 1992 dated 29.4.1992, which deal with the

promotion of such Government employees who have migrated from Kashmir division, has opined that this order has not been challenged/therefore,

respondents 1 to 4 & 6 were justified in considering respondent No. 5 for promotion to the higher post.

9. The appearing counsel for the petitioner contended that respondent No. 5 was ineligible, even Government Order No. 362-GAD of 1992

dated 29.4.1992 was not of any help to him, so there was no requirement of challenging the said order. Submission is plausible, as such acceptable

for the following reasons.

10. Respondent No. 5 admittedly is a 'migrant', has been drawing the salary without actually performing the duties, same was permissible in view

of his migrant status. In the peculiar situation, for protecting promotional avenues of migrant State employees, Government Order No. 362-GAD

dated 29.4.1992 has been issued, which deal with the 'Migrant Employees of Kashmir Division, same is reproduced herein:

The matter of promotion of such of the Government employees who have migrated from Kashmir Division has been examined under the relevant

rules. It is hereby ordered that;

a) the employees who have migrated from Valley in the wake of the present situation and are getting leave salary, shall be considered for

promotion by the respective DPC's on the basis of their merit and seniority under the rules, 'if they are eligible for promotion and the posts are

available and are to be filled up. The requirement of APR's for the period of migration shall be dispensed with in their cases. The APR's prior to

migration would, however, be duly considered.

b) Such of the migrant employees who are cleared by the DPC for such promotion shall be entitled to the benefit of promotion only after joining

their new place of posting against the posts on which they have been promoted.

11. The plain reading of the order reveals that the migrants on the basis of merit and seniority are to be considered for promotion under rules, but

this position is controlled by the condition i.e. they must be eligible for promotion. Respondent No. 5 no doubt has seniority must be possessing the

merit but is not eligible as per Rule-5 of the AMPS, which provides for having at least four scientific publications at his credit, which admittedly he

does not have, so this Government order could be helpful to him, if he would have been eligible for promotion. Thus opinion framed by the writ

court is not correct.

12. The appearing counsel for the petitioner next contended that as per advertisement notice respondent No. 5 was required to possess seven

years experience as Additional Professor at SKIMS. Respondent No. 5 admittedly was a migrant, so was not having actual experience of seven

years on the post at SKIMS This contention is to be repelled on two counts;

13. Firstly, as per AMPS rules requirement is seven years regular service and it is this position which has been safeguarded by the Government

Order No. 362-GAD dated 29.4.1992, pertaining to the promotion of migrant employees, therefore first condition of seven years regular service

is satisfied as per AMPS.

14. The appearing counsel for the respondents 1 to 4 & 6 contended that the writ petition has been rightly dismissed as the petitioner has no locus

standi for invoking the writ jurisdiction, the petitioner must have some legal right, this contention was also supported by appearing counsel for the

respondent No. 5. The submission at the first instance appeared to be attractive but on scrutiny is found to be devoid of any force. It is true that

the person must have same right, infringement of which gives right to a cause for challenge. Petitioner no doubt was ineligible as he was not

possessing seven years regular service, though he had more than required scientific publications at his credit, which means he was also satisfying

one of the eligibility criteria i.e. he was having 1 publications, not regular service of seven years on the post of Additional Professor, whereas

respondent No. 5 did not have required publications at his credit, but had seven years regular service on the post, means both were similarly

situated, viz-a-viz eligibility. If the advertisement notice would have carried a condition of relaxation in qualification/eligibility then petitioner would

also apply and claim relaxation viz-a-viz seven years regular service, therefore in that context he is deprived of a chance to compete. This is how

he has locus standi to challenge the promotion of the respondent No. 5. It is relevant to quote para 6 of the Judgment as relied by appearing

counsel for petitioner reported in (1990) 3 SCC page 655:

It must further be realized by all concerned that when an advertisement

mentions a particular qualification and an appointment is made in this regard to the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualification than the appointed or appointees but who had not applied for the post because he/they did not possess the qualifications mentioned in the Advertisement. It amounts to a fraud on public, to appoint persons with inferior qualification in such qualifications are relaxable, No court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact.

15. The ratio of the Judgment is applicable to the present case, as in the advertisement it was nowhere mentioned that the qualifications are relaxable. If it would have been so then petitioner without applying for the post could have no right whatsoever. In this view of the matter petitioner has every right to challenge the promotion of the respondent No. 5.

16. The appearing counsel for the respondent No. 5 contended that to have at least four scientific publications at the credit is directory not mandatory. The submission is fallacious. The eligibility prescribed as per Rule-5 of AMPS, is with the definite purpose. The eligibility criteria as fixed if termed to be directory in nature will open flood gate in almost all the selection and recruitment system, then every ineligible person will apply and will claim eligibility criteria prescribing any qualification to be directory, then the whole process will get hijacked and the object prescribing eligibility criteria will be illusory, which cannot be so. That apart if the rules prescribe for any relaxation, then that has to be made mention of in the advertisement notice. In the AMPS neither any such rule is prescribed nor anything of the sort has been mentioned in the advertisement notice, therefore until AMPS is in force in its present form, it shall be strictly adhered to.

17. The appearing counsel next contended that AMPS in fact are the rules which were applicable to AIIMS, have been adopted by SKIMS but in AIIMS the requirement of having publications at credit has been done away with. In this connection invited the attention to the communication shown to have been addressed by Registrar AIIMS to the SKIMS. This communication dated 16.5.2005 has not been adopted by the SKIMS by any proposal and approval thereof. This communication cannot be acted upon

until it is on proper approval adopted by the SKIMS, this contention accordingly fails.

18. It may not be out of place to mention, that during the pendency of the appeal repeatedly otherside has been asked to produce the record, pursuant to order dated 22.8.2006 appearing counsellor the respondent No. 5 was given chance of filing the record, to show that he has requisite publications and possessed the requisite merit for being selected. Official record was also ordered to be produced, which has now been produced but it is amply clear and now admitted by the appearing counsel for the respondents that respondent No. 5 did not have requisite publications at his credit. It is also clear from the order dated 27.12.2006 that respondent No. 5 has been restrained from performing any function attached to the post of HOD in SKIMS or exercising any administrative control on appellant. This order has been complied as charge has been taken over by the Director, SKIMS.

19. Perusal of the official record as produced by Mr. Magray reveals that in the year 1978 governing body in its meeting had taken the decision that the Senior Consultant Professor/Additional Professor can head a unit/department. That is a separate issue to be dealt with by the authorities of the SKIMS.

20. It also surfaces from the perusal of the record that for relaxation of the requirement of publication retrospectively had been initiated during the pendency of the petition, which has not materialized, rightly so, otherwise that could be termed to be colourable exercise of the power.

21. In the final analysis the Judgment impugned cannot sustain, as such is set-aside. The selection followed by promotion pursuant to Government Order No. 42 SKIMS 2005 dated 17.10.2005 of respondent No. 5 is found to be illegal, therefore is quashed. The post of Professor in the discipline of General Medicine shall be re-advertised strictly in accordance with the AMPS in-vogue or any other scheme as may have been or hereinafter may be adopted after proper approval. The official record as produced by the appearing counsel for the respondent 1 to 4 & 6 (Mr. Magray) be returned to him.

22. Disposed of as above along with connected CMP(s).