
(2018) 04 J&K CK 0017
In the Jammu And Kashmir High Court
Case No : SWP No.69 OF 2009

DR. SHAFIQA BANO

APPELLANT

Vs

STATE OF JAMMU & KASHMIR AND OTHERS

RESPONDENT

Date of Decision : 12-04-2018

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Section 103

Citation : (2018) 04 J&K CK 0017

Hon'ble Judges : M.K.HANJURA

Bench : Single Bench

Final Decision : Disposed Of

Judgement

1. The petitioner, Dr. Shafiq Bano, claims that she belongs to the Scheduled Tribe Category. She also contends that she has a degree of MBBS

to her credit and on the strength of this degree she was appointed as an Assistant Surgeon in the Department of Health and Medical Education

Department in the year 1992. She has proceeded to state that she passed the Post-Graduation Course in the field of Gynaecology and Obstetrics

from the University of Kashmir and in April 2003, she was appointed as Registrar, Government Medical College, Kashmir whereafter she has

been holding the post of a B-Grade Gynaecologist. It is further averred that under the J&K Reservation Act, 2004, as well as the Reservation

Rules, 2005, a provision has been made for the reservation in appointment for the Scheduled Tribe Candidates. The reservation for the Schedule Tribe

has been provided for the first time in the year 1991-1992 in respect of all the services and since the date of this provision, no candidate under the

Scheduled Tribe Category has been appointed as a Lecturer in the Department of Gynaecology and Obstetrics in Govt. Medical College, Jammu.

2. It has further been pleaded in the petition that the J&K Public Service Commission (respondent No.2) issued an Advertisement Notification bearing No.16-PSC of 2005 dated 13.10.2005 whereby applications were invited for five posts of the Lecturers in the Department of Gynaecology and

Obstetrics in the J&K Medical Education Department out of which, two posts had to be filled up under the Open Merit Category and one each under

the RBA, SC and the ALC categories respectively. However, to the utter dismay of the petitioner, no post for the Scheduled Tribe Category was

advertised under and in terms of the aforesaid Notification. The maximum age limit of the candidates, who were eligible for these posts and were

already in the Health and Medical Education Department, was fixed at 45 years.Â

3. Aggrieved by the action of the respondents in not reserving any post under the ST category, the petitioner was constrained to file a petition before

this Court, bearing SWP No. 1610/2005. This Court by an order dated 21.10.2005 passed in the said petition, directed the respondents to file the

objections/affidavit, giving details of the vacancy position particularly in light of the vacancies of the Lecturers in the Discipline of Gynaecology and

Obstetrics for ST Category and the petitioner was also directed to apply under the ST category. The petitioner submitted an application under the said

category on 27.10.2005 and was interviewed for the post.Â

4. However, in the meanwhile, it was decided to issue a fresh Advertisement Notice for the post under the Schedule Tribe Category. The petitioner

responded to the notice and submitted an application and in sequel thereto she was interviewed. This Court vide interim order dated 22.08.2006

directed the respondents to consider the case of the petitioner for selection under the said category as she had already appeared in the interview. The

said order was not implemented. However, the Public Service Commission filed an application for the modification of the said order, permitting it to re-

advertise the post under the ST category in terms of the communication dated 20.07.2006 received from the respondent No.1, i.e., the State.

Thereafter, the writ petition of the petitioner was dismissed vide judgment and order dated 31.12.2007, the relevant portion of which reads as under:-

â?? Once it is admitted that the post falls under Scheduled Tribe Category, the proper course is to advertise it so that all eligible candidates belonging

to the category get a chance to compete for the post. A candidate does not have

a right of appointment. She/he has only a right of consideration. If

the post is advertised the petitioner also would get a chance to apply for it and ask for her consideration against the post. In the circumstances, I find

the respondent State has rightly asked the Public service Commission to make selection against the posts in accordance with the rules. I do not find

any illegality in such an action of the respondents.

In the circumstances, I do not find any merit in the present petition, which is hereby dismissed, along with the connected CMPs. Order accordingly. â?

5. The petitioner challenged the aforesaid order in an Appeal bearing LPASW No. 28/2008, which was disposed of vide order dated 29.05.2008 in the

following terms:-

â??We find no illegality in the direction given by the learned Single judge. Learned counsel for the petitioner wants a positive direction to the

respondents to appoint her under ST category. No post is available under reserved category, so no such direction can be issued. Learned counsel

refers to the judgment of the Supreme Court in Dr. Suresh Bhagat and others v. Competent Authority and others, Civil Appeal No.6332-33 of 1998

which apparently deals with the admission in various colleges.

Considering the facts and circumstances of the case, we are inclined to direct the State Government to take steps to refer the posts in question to the

Public service Commission within a period of four weeks and take further steps to reserve post for ST category.â??

6. The petitioner asserts that when the writ petition was disposed of by the Court she was 42 years of age and when the LPA was disposed of she

was 43 years of age and, as such, she was eligible for the post, being less than 45 years of age as prescribed in the Notification aforesaid. The

petitioner, accordingly, implores for the grant of the following reliefs in her favour:-

(i) Writ of certiorari, quashing communication No.ME/GM-139/2002-II dated 27.05.2008 written by respondent No.1 to respondent No.2 whereby the

direction has been given to re-advertise the post of Lecturer under ALC category instead of Schedule Tribe category.

(ii) Writ of certiorari, quashing Notification No.12PSC/2008 dated 16.12.2008 issued by respondent No.2 insofar as and to the extent the post of

Lecturer in Gynaecology and Obstetrics Department has been advertised under

ALC category instead of Schedule Tribe Category;

(iii) Writ of mandamus, commanding the respondent to advertise the post of Lecturer Gynaecology and Obstetrics discipline / department under

Schedule Tribe category and also allow the petitioner to apply under the said category and consider, select and appoint her under the said category.â??

7. The respondent No.1 â?" the State in its objections, has insisted that the posts are filled up strictly in accordance with the Medical Education

Services (Gazetted) Recruitment Rules and as per the Reservation Rules. If some post is available for a particular community/category then the same

has to be filled up from that community and there is no deliberate denial of participation to any particular community. No post was advertised for the

ST candidate. As perÂ the Reservation Act and the Rules, Roster point 6 has been earmarked for a candidate belonging to the ST category, whileas

the 5th post has to be manned by a candidate belongs to the ALC category. It is also insisted that merely because the petitioner was having the

requisite qualification does not mean that she had to be accommodated in the said discipline. It is also stated that the petitioner has not clarified as to

how two posts in the aforesaid discipline could be manned and held by the candidates belonging to the ST category. The petitioner should be having no

grievance for the reason that she does not have any legal right to lay her claim on the post meant to be filled from amongst the candidates belonging to

the ALC category.Â

8. The respondent No.2, i.e., PSC has resisted and controverted the writ petition of the petitioner chiefly on the grounds that the writ petition filed by

the petitioner deserves an outright dismissal because admittedly the communication dated 20.07.2006 issued by the respondent No. 1 requiring the

answering respondent herein to utilize and advertise the vacancy reserved for ALC category for selection of the candidate under ST category stood

withdrawn by the requisitioning authority i.e. respondent No. 1 vide communication dated 27.05.2008 (annexure M to the writ petition) wherein the

answering respondent has further been requested to restore the post in question to ALC category on which the answering respondent being the

selecting body acted upon and accordingly notified the said post vide Notification impugned dated 16.12.2008, as such no cause accrues to the

petitioner to challenge the notification in question issued by the answering

respondent. The writ petition so far as the same is directed against the answering respondent is not maintainable and deserves an outright dismissal. It has also been contended that the present writ petition filed by the petitioner so far as the same is directed against the answering respondent also deserves an outright dismissal because it is not within the domain of the answering respondent to maintain the roster of any cadre or service, which is the exclusive prerogative of the respondent No. 1. It is submitted that the answering respondent being the selecting body has been entrusted with the task of selecting candidates against various Gazetted services/posts referred to it by the State Government from time to time, that too strictly as per the letter of requisition received in this behalf and thereafter on subjecting the candidates to various tests/examination and finally recommending the meritorious and suitable candidates for being appointed against respective posts. Therefore the relief sought for by the petitioner in this writ petition cannot be granted in her favour and as such the present writ petition deserves an outright dismissal.

9. The respondent No.3 has in his objections contended that none of the fundamental, statutory or legal rights of the petitioner has been violated, which is a sine-qua-non for maintaining a Writ Petition under Article 226 of the Constitution of India read with Section 103 of the Constitution of J&K.

Therefore, the Writ Petition filed by the petitioner merits outright dismissal. The petitioner has no right to seek a mandamus against the official

respondents to convert the post of Lecturer in Gynaecology & Obstetrics from ALC Category to Schedule Tribe Category as advertised by Public

Service Commission under Notification impugned No. 12-PSC of 2008 Dated 16.12.2008. It is further stated that the petitioner appears to have

approached the Department and succeeded in issuance of Communication No. ME-GM-139/2002-II Dated 20.07.2006 addressed by Under Secretary

to Govt., Health and Medical Education Department to Secretary, Public Service Commission, through the medium of which Secretary to Public

Service Commission was requested to convert the unfilled post of Lecturer (Gynae & Obstetrics) under ALC Category into ST Category and after

making selection the candidate from ST Category be recommended for appointment, which Communication is against the mandate of the

Reservation Rules, 2005, in as much as it is no body's case that any post of

ST Category was ever shifted to ALC Category. Apart from that, it is further stated that after coming into force of Reservation Rules of 1994, the post of Lecturer under ALC Category in Gynae & Obstetrics was advertised for the first time in the year 2005.

10. Heard learned counsel for the parties and perused the record.Â Â

11. It needs to be recapitulated that Vide Notification No.16-PSC of 2005 dated 13.10.2005 on the requisition of the Health and Medical Education

Department, 05 posts of the Lecturers in the discipline of the Gynaecology and Obstetrics were notified for selection. Out of these, two posts had to

be manned by the candidates belonging to the Open Merit Category and one post each had to be filled under the RBA, SC and ALC categories

respectively. Aggrieved by the aforesaid Notification, the petitioner filed SWP No.1610/2005 stating therein that two posts had to be filled up under

the ST category, to which she belongs. The petitioner did not substantiate as to how and in what manner these two slots as alleged by her had to be

earmarked for the candidate belonging to the ST category. During the pendency of the aforesaid writ petition, the Health and Medical Education

Department issued a communication bearing No. ME-GM139/2002/II dated 20.07.2006 addressed to the Secretary, J&K Public Service Commission,

requesting therein that the unfilled vacancy reserved for ALC be advertised for the ST category and the selection of a suitable candidate be made and

communicated to the Department. The petitioner filed a CMP in the said writ petition and urged before the Court that she be considered as against the

said post without advertising the same. The Court directed the authorities to consider her candidature. The Public Service Commission, however,

rejected the request of the petitioner with the observation that the post earlier sent under ALC category for being filled up under ALC category and

now changed into the ST category, has to be re-advertised. SWP No.1610/2005 filed by the petitioner was subsequently dismissed along with

connected CMPs vide an order dated 31.12.2007. After the dismissal of the said writ petition, the Health and Medical Education Department vide

letter No.ME-GM-139/2002/II dated 27.05.2008 while withdrawing the letter of requisition dated 20.07.2006 whereby the unfilled post of ALC

category was required to be shifted to ST category, requested the Commission to restore the post to ALC category. The petitioner filed an LPA

against the order of the dismissal of the SWP, which came to be decided on the terms as stated and detailed hereinabove.

12. The petitioner has taken umbrage under the order passed by this Court in LPASW No. 28/2008 in carving out a case in her favour. The petitioner,

as it appears has completely misunderstood and misconstrued the contents of the order passed in the LPA. The order passed by the Division Bench in

LPASW No.28/2008 does not in any way come to the aid and assistance of the petitioner. Although the order states that the learned counsel for the

petitioner wants that the respondents be expressly directed to appoint the petitioner under the ST category, yet the Court has held that since no such

post is available under the ST category, therefore, no such direction can be issued. It has also been stated in the order passed in the LPA that

considering the facts and circumstances of the case, we are inclined to direct the State Government to take steps to refer the posts in question to the

Public Service Commission within a period of four weeks and take further steps to reserve the post for ST category. In his order, the learned Single

Judge noticed that no post was reserved under the ST category, and therefore, directed the State to take steps to refer the post to the Public Service

Commission and advertise the same so that the petitioner and others can apply and everybody would get a chance to compete for the post.Â The

learned Single Judge also directed that a candidate does not have a right of appointment. She has only a right of consideration. If the post is advertised,

the petitioner would also get a chance to apply for it and ask for consideration against the post. The learned Single Judge further ordered that the

respondent-State has rightly asked the Public Service Commission to make the selection against the posts in accordance with the rules and there is no

illegality in such an action of the respondents. Accordingly, the learned Single Judge dismissed the writ petition of the petitioner.Â

13. The judgment passed by the Division Bench in LPASW No.28/2008 and by the learned Single Judge in SWP No.1610/2005 is binding on this

Court. In the case of *Jai Singh v. M.C.D.* (2010) 9 SCC 385, it was held that, judicial discipline and propriety demands that, there should be

consistency in the views as regards the decisions rendered by co-equal benches on the same issue; however, subsequent bench is to follow the

decision rendered by the earlier co-ordinate bench. It is, thus, luculent that a judicial decorum and discipline is paramount and, therefore, a coordinate

Bench has to respect the judgments and orders passed by another co-ordinate Bench and a pronouncement of law by a Division Bench of the Court is

binding on a Division Bench of the same or a smaller number of Judges as well, and in result such decision is binding. The sequitur of the above is that

the writ petition sans any merit as far as the grant of the first two reliefs are concerned.

14. In view of the preceding analysis and on the face of the judgments rendered and delivered by the learned Single Judge and the Division Bench as

cited hereinbefore, the petition is disposed of with a direction that the respondents shall advertise the post of the Lecturer in the discipline of

Gynaecology and Obstetrics under the Schedule Tribe Category, and the petitioner shall be allowed to participate in the selection process in case she

fulfils the eligibility criteria laid down for the post.Â

15. Disposed of as above along with connected MP(s).