

(2018) 10 J&K CK 0027

In the Jammu And Kashmir High Court

Case No : Service Writ Petition No. 1755 Of 2005, IA Nos. 2109 Of 2005, 1915 Of 2006

Dr. Sheetal Sharma And Others @APPELLANT@Hash State Of Jammu & Kashmir And Others

Date of Decision : 05-10-2018

Acts Referred:

Constitution Of India, 1950 — Article 226

Jammu And Kashmir Public Service Commission (Business And Procedure) Rules, 1980 — Rule 51

Citation : (2018) 10 J&K CK 0027

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Ajay Vaid, H. A. Siddiqui, F. A. Natnoo, S. K. Anand, Nitin Bhasin, K. L. Pandita, Vipin Gandotra

Final Decision : Dismissed

Judgement

1. The selection of the respondents No. 3 to 30 as Medical Officers, Ayurvedic in the Health and Family Welfare and Medical Education Department made by respondent No. 2 and published vide notice dated 01.12.2005 is under challenge in this petition filed by the petitioners who, too, were candidates in the selection but could not make it to the select list. The selection of the private respondents is assailed inter alia on the ground that out of the total available posts, numbered 34, the respondents No. 1 and 2 could not have reserved 20 posts for different reserved categories, for, that exceeds the prescribed reservation of 50 per cent of the total posts and is, therefore, in violation of the SRO 126 of 1994. The Rule 51 of the Jammu and Kashmir Public Service Commission (Business and Procedure) Rules, 1980, which lays down the selection criteria is also challenged on the plea that allocation of 50 per cent of total marks for viva voce is excessive, exorbitant and gives handle to the respondent No. 2 for converting merit into demerit and vice versa. The selection of respondent No. 29 under the category of ALC is also assailed on the ground that respondent No. 29 is resident of village, Gandi, Post Office Salehar, R. S. Pura, which is on the International

Border and not on the Actual Line of Control (ALC). The respondent No. 29, therefore, was not a candidate belonging to ALC category. Similarly, the selection of other candidates in the category of SC/ST, too, has been called in question by the petitioners on various grounds.

2. The respondent No. 2, who made the selection has filed the counter affidavit. In the counter affidavit filed by the respondent No. 2 the selection made has been sought to be justified on the ground that respondent No. 2 being the selecting body makes the selection strictly as per the requisition made by the concerned Department. It is submitted that Department of Family Welfare and Medical Education referred 34 posts with the breakup as indicated in the Advertisement Notification to respondent No. 2 and it, accordingly, issued the Advertisement Notification. It is, further submitted that in response to the aforesaid Notification, in as many as, 101 applications were received, out of which 90 candidates including the petitioners were found eligible and called for interview. The petitioners participated in the selection process without finding any fault with any terms and conditions of the Notification including the breakup of the posts and took chance in the selection. They, however, could not be selected because of their inferior merit vis a vis the private respondents, therefore, they have turned around and have assailed the Advertisement Notification itself. It is stated that the petitioners by their conduct are estopped from challenging the Advertisement Notice and terms and conditions thereof. With regard to the maintenance of roster, the respondent No. 2 in its counter affidavit has submitted that the same is the job of the Administrative Department and respondent No. 2 being the selecting body has no say in the matter.

3. Regarding the validity of the category certificates submitted by the reserved category candidates, it is the stand of respondent No. 2 that if reserved category candidates come up with the category certificates issued by the competent authority, the same are accepted on their face value. It being a selecting body has no power to enquire into the validity of such certificates. It is further stated that it is the duty of the appointing authority to ensure that all testimonials relied upon by the selected candidates are duly verified before issuing the formal order of appointment. The private respondents have also filed their counter affidavits and have justified the mode and manner in which selection has been conducted by the respondent No. 2.

4. Having heard learned counsel for the parties and perused the record, I find no merit in the submission made by learned counsel for the petitioners. It is evident that the process of selection in the instant case was initiated vide Advertisement Notification issued on 14.01.2014. The category-wise breakup of the posts of Medical Officer, Ayurvedic to be filled up in the selection was clearly indicated. The petitioners, who belong to the Open merit were well aware that out of the 34 posts notified for selection, only 14 were earmarked for the general category. They did not raise any grievance or protest with regard to any of the terms and conditions of the Notification. They were also aware that the selection would be

made by respondent No. 2 in terms of Rule 51 of Jammu and Kashmir Public Service Commission (Business and Procedure) Rules, 1980. They participated in the selection process with their eyes wide open and took chance in the selection. They would not have any grievance either with regard to the Advertisement Notification and its terms and conditions or the selection criteria adopted, had they been able to make it to the select list. All faults in the Advertisement Notification and the process of selection are being found only after petitioners have failed to make the grade. By their conduct, the petitioners are, therefore, estopped from challenging the selection process after voluntarily participating therein. The law on the point is well settled and requires no reiteration or elucidation. Recently a three-Judge Bench judgment of the Hon'ble Supreme Court in the case of *Ashok Kumar and anr. v State of Bihar* (2016) 7 SCC 408 had the opportunity to once again survey the law on the point. After referring the case law on the point, the Hon'ble Supreme Court in paragraphs 11 and 12 of the judgment held, thus:

"11. The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate.

12. The law on the subject has been crystalized in several decisions of this Court. In *Chandra Prakash Tiwari v. Shakuntala Shukla* (2002) 6 SCC 127, this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In *Union of India v. S. Vinodh Kumar*, (2007) 8 SCC 100, this Court held that:

"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same...

(See also *Munindra Kumar v. Rajiv Govil*, (1991) 3 SCC 368 and *Rashmi Mishra v. M.P. Public Service Commission* (2006) 12 SCC 724."

The same view was reiterated in *Amlan Jyoti Borroah* (supra) where it was held to be well settled that candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful. In *Manish Kumar Shah v. State of Bihar* (2010) 12 SCC 576, the same principle was reiterated in the following observations :

"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the Petitioner is not entitled to challenge the criteria or process of selection. Surely, if the Petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The Petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission.

This conduct of the Petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the Judgments in *MadanLal v. State of J. and K.* MANU/SC/0208/1995 : (1995) 3 SCC 486, *Marripati Nagaraja v. Government of Andhra Pradesh and Ors.* MANU/SC/8040/2007: (2007) 11 SCC 522, *Dhananjay Malik and Ors. v. State of Uttaranchal and Ors.* MANU/SC/7287/2008: (2008) 4 SCC 171, *Amlan Jyoti Borooah v. State of Assam* MANU/SC/0077/2009 : (2009) 3 SCC 227 and *K.A. Nagamani v. Indian Airlines and Ors.* (supra)." In *Vijendra Kumar Verma v. Public Service Commission* (2010) 1 SCC 150, candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations.

The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible. In *Ramesh Chandra Shah v. Anil Joshi* (2013) 11 SCC, candidates who were competing for the post of Physiotherapist in the State of Uttarakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that :

"18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome." In *Chandigarh Administration v. Jasmine Kaur* (2014) 10 SCC 521, it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In *Pradeep Kumar Rai v. Dinesh Kumar Pandey* (2015) 11 SCC 493, this Court held that : "Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants

found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted." This principle has been reiterated in a recent judgment in *Madras Institute of Development v. S.K. Shiva Subaramanyam* (2016) 1SCC 454."

5. In view of the legal position very aptly summed up in the aforesaid decision, I am of the considered opinion that the petitioners by their sheer conduct of participating in the selection process despite being well aware of the terms and conditions of the Advertisement Notification and also the selection criteria to be adopted by the respondent No. 2, cannot be permitted to challenge the selection process and its outcome. The principle of estoppel would operate. The petitioners have no locus to call in question the selection of the candidates made under various reserved categories for the reason that the petitioners are not the candidates belonging to the aforesaid categories. I am in agreement with the learned counsel for the respondents that respondent No. 2 being the selecting body cannot hold roving enquiry into the entitlement of a particular candidate to be declared as a reserved category candidate, more so when certificate in this regard issued by the competent authority under the Rules has been placed on record by such candidate. I have also gone through the selection record and find that even if, the plea of the petitioners that not more than 50 per cent of the available posts could have been earmarked for reserved category is accepted on its face value, and three more posts are added to the kitty of Open Merit candidates, yet none of the petitioners, in view of their merit, would make it to the select list. This is so because there are several candidates intercepting between the candidate last selected in the Open Merit and the candidate having highest merit among the petitioners. On this plea also, the writ petition would fail.

6. In view of the totality of the circumstances and the reasons given hereinabove, this petition is found to be without any merit, and is, accordingly, dismissed.