

(2019) 12 J&K CK 0025

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 900 Of 2019

Farah Yousuf

APPELLANT

Vs

State Of Jammu And Kashmir And Others

RESPONDENT

Date of Decision : 10-12-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 16

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

Citation : (2019) 12 J&K CK 0025

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Firdous Ahmad, Shah Amir, Azhar ul Amin, M.M.Amin, R.A.Bhat

Final Decision : Dismissed

Judgement

Sanjeev Kumar, J

J&K Public Service Commission - respondent no.2 herein, vide its Notification no.04-PSC (DR-P) of 2018 dated 13th March 2018, invited application for the posts of Medical Officer (Unani) of Indian System of Medicines in Health & medical Education Department as per the category- wise breakup as under:

Open Merit

: 22

RBA

: 08

SC

: 04

ST

: 04

ALC

: 01

SLC

: 00

Total

: 39

2. Para 03 of the Notification lays down the scheme of selection in the following manner:

"3- Scheme of Selection

All applicants must fulfill the essential requirements of the post and other conditions stipulated in the advertisement. They are advised to satisfy themselves before applying that they possess the qualifications prescribed for the post. No enquiry for advice as to the eligibility will be entertained.

(i) The prescribed qualifications are the minimum and mere possession of the same does not entitle candidates to be called for interview. Further, the summoning of candidates for interview shall convey no assurance, whatsoever, that they will be selected. Appointment order of the selected candidates will be issued by the Govt., in accordance with the availability of vacancies.

(ii) A written test shall be conducted and the marks/points obtained by the participating shall be apportioned proportionately against the marks earmarked for written test in the selection criteria. On the basis of merit obtained by the candidates in the written Examination an oral test will be conducted which may be restricted as under:-

i

For 1-5 post

Five times the number of posts

ii

For 6-10 posts

Four times the number of posts subject to a minimum of 25.

iii

For exceeding 10 posts

Three times subject to a minimum of 50.

Thereafter, merit list will be prepared on the basis of merit obtained in the

written and oral test in conformity with the criteria laid down under Rule 51 of J&K Public Service Commission (Business & Procedure) Rules, 1980."

3. Rule 51 of J&K Public Service Commissioner (Business & Procedure) Rules, 1980, as it stood at the time of issuance of Notification, inter alia, in clause (vi) thereof provided as under:

"51.....The assessment at a selection which is solely by means of an interview.....

.....

vi) For determination of the suitability of candidates for appointment, the candidates from open category shall be required to obtain a minimum of 55% marks and those belonging to Reserved Categories and Physically Challenged Persons shall have to obtain a minimum of 45% marks out of total weightage points."

4. The petitioner responded to the Notification and submitted his candidature for selection under Scheduled Tribe Category. The petitioner along with other eligible candidates participated in the selection process, which culminated into issuance of the Select List, which was notified by respondent no.2 vide Notification no.13-PSC (DR-S) of 2019 dated 16th January 2019. Out of notified posts, 04 posts under ST category and 01 post under ALC category could not be filled up as no candidate from the said categories could achieve the benchmark of 45% as fixed by Rule 51 of the Rules of 1980. However, 04 posts under SC category remained vacant due to non-availability of candidates. The merit of petitioner as indicated in Annexure-A to the Notification dated 16th January 2019, was shown as 37.50 points out of 100 points and, therefore, far below the benchmark. No other candidate in ST category could achieve the benchmark of 45% and, therefore, all the 04 posts notified under ST category remained unfilled. The Select List issued was indicated to be provisional and subject to variation if the objections to the same were received by respondent no.2 within 05 days. Admittedly, no claim was received by respondent no.2 within the stipulated period. The Select List aforesaid appears to have been forwarded to respondent no.1 for further necessary action. As is pleaded by the petitioner and is otherwise borne out from the record, respondent no.2 vide its Notification no.01-PSC (DR) of 2019 dated 5th April 2019 amended the clause (vi) of the Rule 51 and substituted it to the following extent:

"the candidates from open category shall be required to score a minimum of 50% and those belonging to Reserved Categories and Physically Challenged Persons shall have to obtain a minimum of 40% out of the total weightage points."

5. This Notification, which is impugned in this petition, lowered down the minimum standards, which were fixed at the time of commencement of selection process and this was done by respondent no.2 on 5th April 2019, i.e. after

almost three months. As a result of this amendment effected to Rule 51, the Select List in the category of ST was revised and it was found that three candidates, i.e. respondents 6 to 8, had the merit points equal to or higher than the benchmark fixed after the amendment of Rule 51. The respondent no.2 vide Notification no.39-PSC (DR-S) of 2019 dated 12th April 2019, published the revised Select List under ST category and made recommendations to the Government for appointment of respondents 6 to 8.

6. The petitioner, however, could not avail of the benefit of lowering down of minimum standards for appointment as his merit was 37.50 points, far below the revised benchmark. Feeling aggrieved of the lowering down of the minimum standards for appointment in terms of impugned Notification dated 5th April 2019 and consequent revised Select List issued under ST category, the petitioner has filed the instant petition. The grounds urged by the petitioner to assail the impugned Notifications, precisely put, are as under:

i. That impugned notification has been issued to accommodate respondents 6 to 8 and, therefore, infected with malice and ulterior considerations.

ii. That impugned notification issued after culmination of selection process could not have been given retrospective effect.

iii. That impugned notification dated 5th April 2019 has effect of changing the rules of game after the game is played and, therefore, impermissible in law.

iv. That the future right of the petitioner to participate in the selection process to be initiated by respondent no.2 for filling up the 04 vacant posts of ST category has been taken away illegally and arbitrarily and, therefore, the action of respondents amending the Rule 51 and applying the same to the concluded selection, has violated the rights of petitioner guaranteed under Article 14 and 16 of the Constitution of India.

7. Respondent no.2 has filed its objections and has vehemently opposed the writ petition. The writ petition has also been contested by respondents 6&7 by filing their separate set of objections. The impugned notification dated 5th April 2019, whereby the amendment to Rule 51 of the Rules of 1980 has been effected, has been justified on the basis of a decision taken by respondent no.2 in its 4th Meeting on Agenda Item no.4.8. The decision has been reproduced in paragraph 5 of the objections and the same is, for facility of reference, reproduced hereunder:

"Reconsideration of Bench Mark from 45 and 55 points to 40 and 50 points in respect of reserved/unreserved categories.

The Commission discussed the matter at length especially in the backdrop of the recent selections wherein a number of posts remained vacant due to the fact that most of the candidates who were interviewed could not achieve the bank - mark fixed by the Commission. Failure to fill up the posts is not beneficial in the larger public interest. The Commission took note of the fact that in recent selections of

Medical Officer most of the posts in reserved categories remained unfilled and in the case of Homeopathy even most of the open merit category posts remained vacant while as in the case of Medical Officer (Allopathy) no waiting list of the reserved category candidates could be prepared because none of the reserved category candidate outside the initial select list has achieved the desired bench mark to make it to the waiting list. Therefore, in the larger interest and the conclusion drawn about the Bench Mark operating harshly especially in case of reserved categories, the Commission decided to lower the bench mark from 45% and 55% to 40% and 50% in respect of reserved and unreserved to ensure that posts in the Health sector do not remain vacant for a prolonged period, this decision will also apply to the recent selection process of Medical Officers in the discipline of Ayurveda, Homeopathy, Unani and Allopathy to the extent of coverage to reserved categories."

8. It is, thus, the unequivocal stand of respondent no.2 that amendment to Rule 51, so as to reduce the minimum standards/benchmarks from existing 55% for Open Merit and 45% for Reserved Categories to 50% for Open Merit and 40% for Reserved Categories, was necessitated on account of various posts including the Medical Officers (Unani) remaining unfilled due to Reserved Category candidates, not achieving the benchmark of 45%. As is noted in the decision of the Commission reproduced above, in the case of Homeopathy even most of the posts in the Open Merit Category remained vacant. It is, thus, submitted that a well informed and conscious decision in the larger public interest was taken by respondent no.2. It is, however, a different matter that despite lowering down the minimum standards/benchmarks, the petitioner with a very low merit of 37.50 points could not make it to the revised Select List.

9. Respondents 6&7, who have filed their separate objections, have echoed the stand taken by respondent no.2.

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

11. The questions, which fall for determination by this Court, can be briefly put as under:

(i) When can the selection process be said to have concluded / finalized making the selection authority functus officio?

(ii) Whether the minimum standards/benchmarks, which were fixed at the time of commencement of selection process could be changed/ lowered down midstream or even after the selection process is over?

(iii) Whether a candidate, who fails to get the benefit of relaxed standards/benchmarks, can have locus to challenge such lowering of minimum standards/benchmarks?

12. As is well settled, the selection process commences with the issuance of advertisement notification and culminates with the issuance of final select list, but it is equally well settled that a candidate figuring in the select list does not

have indefeasible right to be appointed and the selecting body or the appointing authority, as the case may be, may withdraw the selection process at any time before making the appointments for good and justified reasons. That being the position, it would not be appropriate to hold that respondent no.2 became functus officio after publication of the select list. Indisputably in the instant case the select list initially issued had not been operated as no appointment orders in favour of selected candidates had been issued. True it is, that the decision to amend the Rule 51 was taken on 5th April 2019, i.e. after more than three months, but the fact remains that the select list had not culminated in issuance of appointment orders by the competent authority. If it is held, as is otherwise settled, that select list can be withdrawn at any time by selecting body before the same is acted upon, then by analogy, it can equally be true that the same can also be modified or revised provided the decision to do so, is in consonance with Article 14 and 16 of the Constitution. Although, technically the selection process would culminate with the issuance of select list but in the context of controversy, which has arisen in this case, respondent no.2 could not be said to have become functus officio with the issuance of select list. It was well within its rights to revise the same at any time before it was acted upon by respondent no.1 by issuing appointment orders in favour of selected candidates. Reasons, which necessitated revision of select list have been indicated by respondent no.2 in its decision taken in 4th Meeting of the Commission, held on 5th April 2019. I do not find the reasons given either unreasonable, irrational, arbitrary or infected with any bias or malice.

13. This brings us to second question as to whether lowering down of benchmark in terms of amendment effected to Rule 51 vide impugned Notification dated 5th April 2019, could be made applicable retrospectively to the selection, which has culminated into issuance of select list. Ordinarily, the Executive order has prospective operation and cannot be operated retrospectively as is held by the Supreme Court in the case of Govind Prasad v. R.G. Prasad, 1994 (1) SCC 437, but this is not a thumb rule to be followed in all situations. This rule is subject to well recognised exceptions. If the Government order or the Executive instruction, which operates retrospectively, does not prejudice any one or is beneficial in nature; the same cannot be held to be bad, being an Executive order operating retrospectively. For example, if by way of a Government order, the pensionary benefits of retired government employees are revised from retrospective effect, nobody can raise a grievance with regard to such retrospectivity, for, retrospective operation of the Executive order has inured to the benefit of all covered by the said order. Neither the Executive order nor a statutory provision can be given retrospective operation if the same has the effect of taking away the vested and accrued rights.

14. Applying these well settled principles to the case in hand, there is no scintilla of doubt that Rule 51 was amended by respondent no.2 in terms of impugned Notification for the benefit of candidates belonging to Open as well as Reserved categories. The lowering down of minimum standards/benchmarks by respondent

no.2 cannot be said to have caused any prejudice to the petitioner. It is a different matter that despite lowering down of benchmark from 45% to 40%, the petitioner still could not make it to the select list. The plea of the petitioner that the benchmark was reduced to 40% and not to 37% or 35%, and that renders the whole exercise by respondent no.2 impaired by arbitrariness, cannot be accepted even on its face value. The minimum standards/benchmarks are fixed to maintain efficiency in service while giving benefit of reservation to the marginalised section of the society. These standards cannot be lowered down to such an extent as would compromise with the efficiency in the administration. The petitioner has not been able to demonstrate any prejudice caused to him by issuance of the impugned Notification and lowering down of benchmark from 45% to 40% in the case of Reserved categories including the category under which the petitioner had applied. It is, thus, concluded that the Legislative enactment and the statutory rules can be framed with retrospective effect and the same would be bad only if these have the effect of taking away the vested and accrued rights of the citizens. Similarly, the Executive orders are ordinarily prospective in operation and cannot be applied retrospectively if these have the effect of prejudicing the guaranteed and accrued rights. The plea of the petitioner that respondent no.2 by impugned Notification dated 5th April 2019, has changed the rules of game midstream and thereby rendered the revised select list bad in the eyes of law, is devoid of any merit and, therefore, cannot be accepted. As already held herein above, by mere issuance of the select list, respondent no.2 had not become functus officio and was well within its rights to withdraw, vary or modify the select list for good and justified reasons. Respondent no.2, thus, took conscious decision in its 4th Meeting on held 5th April 2019 and lowered down the benchmark, which was to the benefit of all candidates belonging to the Open as well as Reserved Categories. The decision was taken for good reasons and was beneficial in the larger public interest. It is true and is well settled that the rules of game cannot be changed midstream and in any case after the game is played, but it is also equally true that the change in the rules of game, which is salubrious and to the benefit of players in the game, cannot be assailed on the aforesaid plea. In order to succeed on this plank, an aggrieved person must demonstrate with full clarity that as a result of change of rules in game, he/she has been adversely and prejudicially affected. In the absence of such prejudice having been caused, the challenge to such change of rules of game midstream, cannot be upheld.

15. I am not in agreement with the learned counsel for petitioner that in the instant case with the issuance of select list, the game was over. There is another aspect, which also needs to be noticed and that is, even if respondent no.2 would have lowered down the benchmark to 37.50 points, which is the merit of petitioner, even in that eventuality the petitioner would not have made it to the select list as there was another candidate by the name of Jabeen Qammer in between him and the candidate last selected in the ST category. The merit of Jabeen Qammer is 38.25 points and that is higher than the merit of the petitioner.

16. The third and last question formulated herein above pertain to locus of the petitioner to file the instant petition. The petitioner claims that respondent no.2 could not have changed the rule of game midstream and 04 posts of ST category, which remained unfilled due to the candidates belonging to the category not attaining the benchmark, should have been re-notified. He submits that in case of fresh notification he would have got another opportunity to participate in the selection and improve his performance. This plea of the petitioner is too remote and far-fetched to be accepted. The right to participate in the selection is subject to availability of vacancies, possession of eligibility by a candidate and the decision of the Government to fill up such vacancies. Once this Court has not found any illegality in the lowering down of benchmark by respondent no.2, the petitioner, who could not avail of even the benefit of lowered benchmark fixed vide impugned Notification, cannot be said to be a person aggrieved and having locus to challenge the impugned notification as also the revised select list, issued in consequence thereof. Since the impugned Notification resulted in the benefit of candidates, including petitioner, who had not made it to select list because of comparatively higher benchmark fixed in Rule 51 as it stood at the commencement of selection process, as such, the petitioner cannot be said to be prejudiced in any manner. That being so, I am of the considered view that the petitioner lacks necessary locus standi to challenge the impugned action of respondent no.2.

17. To be fair to learned counsel, who appeared and argued the matter, it would be appropriate to take note of the case law referred to before me. Learned counsel for petitioner has relied upon *P. Mohanan Pillai v. State of Kerala*, 2007 (9) SCC 497; *N.T. Devin Katti and others v. Karnataka Public Service Commission and others*, 1990 (3) SCC 157; and *CIT v. ESSAR Teleholdings Ltd*, 2018 (3) SCC 253. On behalf of respondents, learned counsel have relied upon the judgements rendered in *University Grants Commission and another v. Neha Anil Bobde (Gadekar)*, 2013 (10) SCC 519; *Food Corporation of India and others v. Bhanu Lodh and others*, 2005 (3) SCC 618; *V. Lavanya and others v. State of T.N.*, 2017 (1) SCC 322.

18. The proposition of law propounded in all these judgements are well known and well established. It is beyond pale of discussion that the procedure and eligibility criteria as provided in the rules prevailing at the time the selection process commences would normally govern the selection and any change or amendment brought about during currency of selection process would be ordinarily prospective in operation. Putting it in other words, the rules of game cannot be changed midstream or after the game is played, but this doctrine of law is not absolute and a thumb rule. It is subject to exceptions well recognised in law. The change in policy decision, if supported by good and sufficient reasons, can be applied to the pending selections. Similarly, even the rules of game can be changed midstream if such change inures to the benefit of participants of the selection and does not prejudice their rights. As discussed herein above, the legislature has plenary power of legislation within the fields assigned to them; it

may legislate prospectively as well as retrospectively but if it legislates retrospectively, it cannot take away vested and accrued rights without providing for compensation in lieu of such rights. Similarly, the statutory provision can also be framed prospectively as well as retrospectively. Ordinarily, a statutory provision is prima facie prospective unless it expressly implies retrospective effect but it needs to be noticed that no statutory provision which operates retrospectively and takes away vested and accrued rights, can stand the test of Article 14 and 16 of the Constitution of India. As is held by the Supreme Court in the case of V. Lavanya (supra) there is no question of estoppel against the Government in exercise of its legislative, sovereign or executive powers. In the same judgement the Hon'ble Supreme Court upheld the altering of selection criteria by relaxing 5% marks in favour of Reserved Category candidates. Noticing the judgement rendered in the case of Tej Prakash Pathak v. Rajasthan High Court, 2013 (4) SCC 540, the Supreme Court observed that in the aforesaid case, the Supreme Court refrained from finding fault with the alteration in the procedure which had led to elimination of selected candidates as the same was found to have been done in public interest. In the present case, the relaxation in the shape of lowering down the benchmark for Open as well as Reserved Category candidates, has inured to the benefit of all including the ST Category candidates and this has been done for good and justified reasons.

19. For all what has been said and discussed herein above, I find no merit in this petition and the same is accordingly, dismissed. Interim direction(s), if any, shall stand vacated.

20. Record be returned to learned counsel for respondents.