
(2016) 02 J&K CK 0024
In the Jammu And Kashmir High Court
Case No : SWP No. 1347 of 2002

Fayaz Ahmed

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 04-02-2016

Acts Referred:

Citation : (2016) 2 JKJ 380

Hon'ble Judges : Mr. Mohammad Yaqoob Mir, J.

Bench : Single Bench

Advocate : Mr. B.S. Bali, Advocate, for the Respondents No. 4; Mr. Ravinder Gupta, AAG, for the Respondents No. 1 to 3; Mr. O.P. Thakur, Advocate, for the Petitioner

Final Decision : Disposed off

Judgement

Mr. Mohammad Yaqoob Mir, J. - The petitioner has sought direction in the name of respondents to command them to consider his case for

promotion to the post of Junior Librarian from the date his junior Shri Jai krishan (respondent No.4) was promoted along with all consequential

benefits.

2. The admitted position is that the petitioner had been directly appointed as Library Assistant on 04.07.1986 whereas respondent No.4 Shri Jai

Krishan was initially appointed as Library Bearer in the year 1982 then had been promoted as Library Assistant in the year 1988.

3. While considering Shri Jai Krishan for next promotional post i.e. Junior Librarian, his position of appointment as Library Assistant has been

taken as 27.07.1982 when in fact he has been promoted to the post of Library Assistant in the year 1988. The seniority position for the next

promotional post of Junior Librarian was to be taken as the petitioner and

respondent No.4 had in the feeding cadre i.e. Library Assistant.

4. Petitioner noticing that his junior has been promoted had filed representation which had been accepted vide order dated 21.08.2000 as a result

whereof it appears that the promotion of respondent No.4 was cancelled and follow up order issued is dated 31.12.2000.

5. The respondent No.4 Shri Jai Krishan challenged the said cancellation order No. 6401-05 dated 13.12.2000 by medium of SWP No.

49/2001 titled Jai Krishan Sharma v. State and ors. wherein petitioner herein Fayaz Ahmed had not been arrayed as party. The said petition

stands disposed of vide judgment dated 16.08.2001 wherein it has been observed that Departmental Promotion Committee (DPC) had

considered the service particulars of both Shri Jai Krishan and Fayaz Ahmed. The DPC was within its jurisdiction to select the suitable person on

the basis of seniority-cum-merit and merit-cum-seniority and it is on the basis of proper consideration Shri Jai Krishan had been recommended by

the DPC. As such junior has superseded the senior. The DPC's recommendation has been rightly followed by respondent No. 2 promoting Shri

Jai Krishan. In the final analysis the order of cancellation has been quashed.

6. Petitioner herein Fayaz Ahmed admittedly was not arrayed as a party in the said disposed of writ petition. Whether that judgment dated

16.08.2001 will bind him has to be answered in negative. Such judgment when had effected the rights of the petitioner having been passed at his

back has to be ignored vis-a-vis his rights.

7. The position of the petitioner herein Mr. Fayaz Ahmed being a necessary party is quite clear because his seniority position has been ignored and

in the judgment his name is also referred to by saying that he being senior has been superseded. Therefore he could not be condemned unheard. In

this view, I am fortified by the judgment rendered by Hon'ble Apex Court in the case of Public Service Commission, Uttaranchal v. Mamta

Bisht and ors 2010 (4) Supreme 504. Para 7 is relevant to be quoted:

7. In case the respondent No.1 wanted her selection against the reserved category vacancy, the last selected candidate in that category was a

necessary party and without impleading her, the writ petition could not have been entertained by the High Court in view of the law laid down by

nearly a Constitution Bench of this Court in Udit Narian Singh Malpaharia v.

Additional Member, Board of Revenue, Bihar & Anr., AIR

1963 SC 786, wherein the Court has explained the distinction between necessary party and further held that if a person who is likely to suffer from

the order of the Court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles

of natural justice. More so, proviso to Order I, Rule IX of Code of Civil Procedure, 1908 (hereinafter called CPC) provide that non-joinder of

necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but

the principles enshrined therein are applicable. (Vide Gulabchand Chhotala Parikh v. State of Gujarat; AIR 1965 SC 1153. Babubhai

Muljibhai Patel v. Nandial, Khodidas Barat & Ors., AIR 1974 SC 2105; and Sarguja Transport Servie v. State Transport Appellate

Tribunal, Gwalior & Ors. AIR 1987 SC 88)"".

8. By the instant petition, petitioner has claimed that he should be extended the same treatment as has been extended to Shri Jai Krishan. In the

reply filed by the respondents, it has been specifically pleaded in Para 3 that Shri Jai Krishan had been promoted from the post of Library

Assistant to Junior Librarian on the basis of incorrect service particulars. It is nowhere stated that he had been promoted on the basis of superior

merit nor it is made clear as to whether merit-cum-seniority or seniority-cum-merit rule was followed. In case seniority-cum-merit rule would have

been followed then definitely petitioner had an edge. Para 3 of the objections clearly indicates that it is on the basis of incorrect service particulars,

respondent Jai Krishan had been promoted and is continuing as against Junior Librarian on the strength of the judgment of this Court which means

on the strength of the judgment dated 16.08.2001.

Para 3 of the reply is advantageous to be quoted:

3. That the contents of para 3 are denied. The Respondent No.4 Sh. Jai Krishan Sharma was promoted from the post of Lib. Assistant to Jr. Lib

vide Order No. DSEJ/Gen 16862-64 dated 2-11-95 on the basis of incorrect service particulars. The order of promotion was cancelled by the

Director School Education Jammu vide order No. DSEJ/Gen/10092 dated 21.08.2000, as soon as the clerical error was detected. Mr. Jai

Krishan Sharma is presently continued as Jr. Lib. on the strength of order of

Hon'ble High Court.

9. The judgment dated 16.08.2001 has not been challenged by the respondents authorities which they should have in view of their clear stand that

on the strength of incorrect service particulars, respondent No.4 was promoted. The said judgment has assumed finality as against the official

respondents but so far as the petitioner is concerned who is the real sufferer, judgment has to be ignored as against his rights because having been

ignored from being arrayed as party in the disposed of writ petition when he was a necessary party.

10. In the afore stated background, the petitioner by the instant petition has prayed for a direction so as to grant him the promotion as against the

post of Junior Librarian from the date it has been granted to Respondent No.4. Inaction on the part of the respondents authorities in not taking

care by challenging the judgment which had a direct effect on the rights of the petitioner and has a direct impact against the clear stand as was

taken by the official respondents.

11. The petitioner herein cannot be made to suffer on the basis of inaction on the part of the respondents in not challenging the judgment dated

16.08.2001. Equally the petitioner too cannot be left without the remedy when he has been condemned unheard and his rights have been seriously

prejudiced.

12. Respondent No.4 has retired from the service and to avoid travesty of justice, the respondent authorities shall accord favourable consideration

to the case of the petitioner for promotion to the post of Junior Librarian from the date respondent No.4 had been promoted notionally and

monetarily from the date of institution of the writ petition and to grant him all consequential service benefits.

13. The exercise shall be undertaken and completed within six weeks from the date copy of this order is served upon the respondents.

14. In the peculiar facts of the case, no order as to costs.

15. Petition disposed of, as above.