

(2011) 12 J&K CK 0007

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2905 of 2010 and CMP No. 4092 of 2010

J and K Tribal United Forum and Others

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 22-12-2011

Acts Referred:

Jammu and Kashmir Civil Services Decentralization and Recruitment Act, 2010 —
Section 13, 6

Citation : (2011) 4 JKJ 509

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hasnain Massodi, Judge

1. The writ petition on consideration is admitted to hearing and at request of learned counsel for the parties, is taken up for final disposal.

2. The State Government sometime in 2010, took a policy decision to organize posts borne on the establishment of different departments or on the

service of the Government into District, Divisional and State Cadres and to restrict appointment to District and Divisional Cadres to eligible

candidates permanently residing in the concerned district or division respectively. It was, however, decided to carve out an exception in favour of

candidates belonging to Scheduled Caste Category as regards posts under District Cadre and Divisional Cadre. In other words, a candidate

belonging to Scheduled Caste Category would be eligible to apply for any post in the District or Divisional Cadre irrespective of his/her permanent

place of residence. The policy decision led to enactment of the Jammu and

Kashmir Civil Services Decentralization and Recruitment Act, 2010

(hereinafter referred to as ""the Act of 2010""). Sections 6 and 13 are relevant to the controversy raised in the petition on hand and need to be

noticed;

6. ""Appointment to District Cadre posts

A person shall be eligible to the appointment to a District Cadre post only if he,-

(i) is a permanent resident of the State;

(ii) is a resident of the concerned district; and

(iii) possesses the prescribed qualification, eligibility and experience for the post as specified under the rules/orders regulating recruitment to such

posts.

13. ""Residence

(1) A person shall be deemed to be resident of a particular District or Division if he/she has resided in such District or Division, as the case may be,

for a period of not less than 15 years before the date of applying for a particular post and is actually residing in the said area.

(2) Notwithstanding anything contained in sub-section (1), a person shall not be disentitled from claiming the residence in a particular District or the

Division only on the ground that his/her father/mother or the person on whom he/she is dependent is living in a place outside the said District or the

Division, as the case may be, on account of his/her employment, business, profession, vocational reasons or temporary dislocations from his/her

original place of residence due to security reasons.

(3) Notwithstanding anything contained in sub-section(1), the candidates applying under Scheduled Caste Category for any post in the Divisional

or District Cadre shall, irrespective of their place of residence in the State, be eligible for selection against the posts reserved for the said Category

at such selection.

3. The State Government in exercise of powers u/s 15, prescribed Rules styled as ""Jammu and Kashmir Civil Services Decentralization and

Recruitment Rules, 2010"" (hereinafter referred to as ""the Rules of 2010"") and notified vide SRO 375 dated 21st October, 2010. Rule 13 reiterates

the legislative intent incorporated in Sections 6 and 13. It reads;

13. Procedure for inviting applications by the Board and eligibility for applying to different cadres:-

(1) The Board shall advertise all State cadre vacancies referred to it by the requisitioning authority and invite applications for selection to the said

posts from the permanent residents of the State and possessing the prescribed qualification, eligibility and experience for such posts.

(2) The divisional offices of the Board shall advertise the Divisional cadre vacancies of the concerned division referred to it by the requisitioning

authority and invite applications for selection to the said posts from such permanent residents of the State who are residents of that division and

possess the prescribed qualification, eligibility and experience for such posts.

(3) The district offices of the Board shall advertise the District cadre vacancies of the concerned district referred to it by the requisitioning authority

and invite applications for selection to the said posts from such permanent residents of the State who are residents of that District and possess the

prescribed qualification, eligibility and experience for such posts.

(4) For purposes of this rule, the permanent resident certificate shall be the conclusive proof of residence of a candidate in a particular District or

the Division.

(5) Notwithstanding anything contrary contained in sub rule (2) and (3), for vacancies reserved for the Scheduled Caste Category in any Divisional

or District cadre, candidate belonging to that Category shall be eligible to apply for the said reserved vacancies irrespective of their residence in the

concerned District or Division.

(6) The advertisement notices shall be given wide publicity through Government Gazette, Employment and Counseling Centres, print and electronic

media.

4. A bare look at the above reproduced provisions reveals that while a candidate otherwise eligible from Scheduled Caste Category can apply

against any post in District or Divisional Cadre irrespective of his place of permanent residence, a candidate in Open Merit Category or in other

Reserved categories like Scheduled Tribes and Social Caste can apply for a Divisional Cadre or District Cadre Post only if he/she permanently

resides in the concerned division or district as the case may be.

5. The constitutional validity of Section 13 Sub-Section (3) of the Act, and Rule 13 Sub-Rule (5) of the Rules, is questioned by the petitioners in

the present writ petition.

6. On the strength of the grounds set out in the writ petition, the following reliefs are sought;

(a) An appropriate writ, order or direction in the nature of writ of certiorari quashing sub section(3) of Section 13 of the J&K Civil Services

Decentralization and Recruitment Act, 2010 (Act No. XVI of 2010) together with the concomitant rule viz. Sub-Rule (5) of Rule 13 of the J&K

Civil Services Decentralization and Recruitment Rules, 2010 promulgated vide notification No. 375 of 2010 issued by the respondents being

totally illegal, arbitrary and violative of Articles 14 and 16 of the Constitution of India.

Or in the alternative

An appropriate writ, order or direction in the nature of writ of mandamus commanding the responding to provide similar opportunity and privilege

to the members of various communities and castes of Schedule Tribe Category as has been provided to members of Scheduled Caste Category in

terms of sub section (3) of Section 13 of the J&K Civil Services Decentralization and Recruitment Act, 2010 (Act No. XVI of 2010) and Sub

Rule (5) of Rule 13 of the Rules framed under the aforesaid legislation.

(b) An appropriate writ order or direction in the nature of writ of certiorari quashing advertisement notice No. 07 of 2010 dated 12.11.2010

issued by the J&K Service Selection Board to the extent it tends to make selection to 5845 posts in accordance with the impugned provisions of

the J&K Civil Services Decentralization and Recruitment Act, 2010 (Act No. XVI of 2010) and J&K Civil Services Decentralization and

Recruitment Rules, 2010.

(c) An appropriate writ, order or direction in the nature of writ of mandamus commanding the respondents to direct all the selection agencies and

departments to desist and refrain from making selection/appointments to any of the vacancies in accordance with the impugned provisions of the

J&K Civil Services Decentralization and Recruitment Act, 2010 and rules framed thereunder.

(d) Any other relief, which this Hon'ble Court in the facts and circumstances of

the case deems fit and proper.

7. Who are the petitioners and what are their grievances and on what grounds is the relief sought opposed is next to be seen.

8. The petitioner No. 1 is a Forum conceived and constituted by Shri Roshan Din Choudhary and Zabeer Ahmed as Founders for ""safeguarding

the constitutional rights of ""Scheduled Tribes"", and ""for organizing help to poor, orphans, infirm and aged, disabled, widows, mentally retarded

persons"". Respondents 3 to 6 are members of Scheduled Tribe Community.

9. The petitioners are aggrieved that concession extended to the members of Scheduled Caste Category in the shape of relaxation of the condition

as regards permanent residence of District or Division for applying to District Cadre/Divisional Cadre posts has not been extended to the members

of Scheduled Tribe Category.

10. It is insisted that because of relaxation for restrictions as regards permanent residence in the concerned district or division in favour of

Scheduled Caste Category, the official respondents have indulged in naked discrimination. The provisions of the Act of 2010, and the Rules of

2010, according to the petitioners, are in-conflict with Articles 14 and 16 of Constitution of India. The provisions of the Act, and the Rules, made

thereunder, according to the petitioners amount to unreasonable classifications not permitted under the Constitution and are, thus, liable to be set

aside.

11. The petitioners' grievance is that while respondents have picked up Scheduled Caste Category for preferential treatment, same treatment has

not been given to the Scheduled Tribe Category, notwithstanding the fact that both the Scheduled Caste and Scheduled Tribe Categories are

identified as Reserved Categories by the Constitution of India and stand on equal footing.

12. It is pleaded that respondents cannot choose one of the equally placed categories for benefit and ignore other category and any exercise to do

so would infringe the Constitutional guarantees embodied in Articles 14 and 16 of the Constitution of India.

13. The writ petition is opposed by the respondents on the grounds that as the petitioners' Forum is not a registered body, it or other petitioners

cannot maintain the writ petition. It is denied that any legal, fundamental or

statutory rights of petitioners have been violated, entitling them to invoke the writ jurisdiction. The respondents insist that the Act of 2010, is intended to provide equitable opportunities of employment in the Civil Services of the State.

14. The case set up is that the Scheduled Tribe population is almost equally distributed in all the districts of the State, whereas same is not true about the Scheduled Caste population. The posts under the Government, reserved for Scheduled Caste Category in District and Divisional Cadre, in terms of the Jammu and Kashmir Reservation Act, 2004 and the Rules made thereunder, according to respondents, remain unfilled and on de-reservation are filled up from General Category candidates, creating imbalance in the representation of different categories/classes in the Government service.

15. It is pointed out that by carving out an exception in case of Scheduled Caste Category as regards requirement of place of residence, the rights and interests of Scheduled Tribe Category or for that matter, any other Category are not adversely reflected at all and there is no justifiable reason for the petitioners to question the relaxation given in terms of Section 13(3) of the Act, and the Rule 13(5) of the Rules, to the Scheduled Caste Category.

16. It is pleaded that the Act of 2010, and the Rules of 2010, do not downsize the quota in Government employment set apart under the Jammu and Kashmir Reservation Act, 2004 for Scheduled Tribe Category. The respondents deny that the Act of 2010, and the Rules of 2010, are violative of Articles 14 and 16 of the Constitution of India or in-conflict with any other Constitutional provision.

17. I have gone through the pleadings and have heard learned counsel for the parties.

18. There is no scope for any disagreement with learned counsel for respondents that the question of ""locus standi"" or ""standing"" whenever raised in opposition to a writ petition should be dealt with in the first instance. The interpretation of ""locus standi"" as we all know, has been liberalized and its scope expanded. There has been a shift from strict interpretation, we come across in early 70's reflected in cases like, The Nagar Rice and Flour Mills and Others Vs. N. Teekappa Gowda and Bros. and Others, and Jasbhai

Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and

Others, , to liberal interpretation widening the scope of entitlement of a person to invoke writ jurisdiction of the High Court. In the present case,

even though petitioner Forum constituted by a duly registered deed, has not been registered as society under Societies Registration Act. The other

petitioners have a cause to maintain the petition. The petitioner Forum is not the sole petitioner in the matter. It is joined by other members of the

community, not office bearers of the Forum, who belong to the Scheduled Tribe Community. The controversy involved touches each and every

member of the Scheduled Tribe Community including the petitioners before the Court. In the circumstances, the petitioners cannot be labeled as

strangers to the cause or meddlesome interlopers, having no standing to maintain the petition. The objection raised as regards petitioners ""locus

standi"" to maintain the petition, is without merit and liable to be rejected.

19. It is important to point out at the outset that the petitioners do not throw challenge to the decision of the State Government to organize posts

borne on the establishments of the different departments or on the service of the Government, into District, Divisional or State Cadres and restrict

appointment to the District and Divisional cadres to the eligible candidates permanently residing in the concerned Districts and Divisions. The

petitioners are comfortable with the policy decision of the State Government in this regard. The petitioners, accordingly, do not call in question

Rule 6 of the Jammu and Kashmir Civil Services Decentralization and Recruitment Act, 2010. Section 6 of the Act, it may be recalled, reflects the

core of the policy decision taken by the State Government and all other provisions revolve around the core object. The stand taken by the

petitioners in this behalf, is reflected in Para 6 of the writ petition wherein the petitioners support the constitutionality of policy decision of the State

government and section 6 of the Act, wherein said policy decision finds expression, by pleading;

6 That although all the provisions of the said Act do not offend any constitutional guarantees and schemes.

20. The grievance, however, is restricted to Section 13 (3) of the Act, read with Rule 13 (4) of the Rules, framed under the Act. What offends the

petitioners is that the State Government as in terms of Section 13 (3) of the Act,

read with Rule 13 (5) of the Rules, made thereunder, left room for the candidates belonging to Scheduled Caste Category to apply for District Cadre and divisional cadre posts irrespective of their permanent place of residence and such benefit has not been extended to the members of the Scheduled Tribe Category. The petitioners, in view of the averments made in the petition, would have no grievance, if right to apply for the District cadre posts and Divisional cadre posts is made subject to permanent residence in the concerned District or Division, in case of both Scheduled Tribe Category as well as Scheduled Caste Category like General Category and other Categories. However, if the State Government is keen to make the right to apply for district cadre posts and divisional cadre posts, free from restriction as regards permanent residence in the concerned district or division, in case of Scheduled Caste Category, the petitioners insist that such a concession should be also extended to Scheduled Tribe Category.

21. The petitioners' stand is, however, clear from the prayer clause of the petition. The petitioners, as set out in para 6 (Supra), claim the reliefs in alternative. The petitioners seek quashment of section 13 (3) of the Act, and Rule 13 (5) of the Rules, made under the Act, on the ground that these Rules are violative of Articles 14 and 16 of the Constitution of India and in alternative the petitioners seek a direction to the respondents to extend same benefit as has been given to scheduled caste category.

22. Article 15 of the Constitution of India prohibits any discrimination against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. However, Clause (4) of Article 15 carves out an exception in favour of Scheduled Castes, Scheduled Tribes and Socially and educationally Backward Classes of the citizens. It, in effect, permits the State to make special provision for the upliftment/advancement of such classes, notwithstanding the prohibition incorporated in Article 15 clause (1) or Article 29 clause (2). It needs to be pointed out that Article 29 guarantees Cultural and Educational rights of the minorities and confers a right on a section of citizens, having a distinct language, script or culture of its own to conserve the same. Article 29 Clause 2 prohibits denial of admission into any educational institution maintained by the State or which receives aid out of the State funds, on the grounds of religion, race, caste,

language or any of them. Article 16 Clauses 1 and 2, Constitution of India guarantee equality of opportunity for all citizens in the matters relating to employment or appointment to any office under the State and prohibits discrimination in respect of, any employment or office under the State only on the ground of religion, race, caste, sex, descent, place of birth, residence or any of them. Article 16 Clause (4) like Article 15 Clause (4), empowers the State to make any provision for the reservation of appointments or posts in favour of any Backward Class or citizens which in the opinion of State is not adequately represented in the service under the State. Article 16 Clause 4 (A) and 4 (B) extends the power to make provision for reservation in the matters of promotion as well and enables the State to carry forward the posts set apart for such categories to the next selection, subject of course, to the consideration of the efficiency of the administration, Article 46 identifies promotion with special care of the educational and economic interest of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes and their protection from social injustice and all forms of exploitation, as one of the Directive Principles of the State policy. Article 335 of the Constitution of India saddles the State with a constitutional duty to take into consideration the claims of members of the Scheduled Castes and Scheduled Tribes in the matter of appointment. The President under Article 341 of the Constitution of India is given power to specify the castes, races, or tribes or parts thereof to be deemed to be Scheduled Castes for the purposes of the constitution, in relation to a State or Union Territory as a case may be. Likewise, the President under Article 342 of the Constitution of India is clothed with a similar power to specify the tribes or tribal communities or part thereof or groups within the tribes to be deemed to be Scheduled Tribes for the purposes of the constitution, in relation to the State or Union Territory as the case may be. The list of the Scheduled Castes and the list of Scheduled Tribes are contained in the Constitution (Scheduled Castes) Order 1950, Constitution (Scheduled Tribes) Order, 1950, as amended by Scheduled Castes and Scheduled Tribes Order (Amendment) Act 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990.

23. Article 338 of the Constitution of India provides for Constitution of National

Commission for Scheduled Castes. The Commission is to submit periodical reports to the President, making the recommendation, as to the measures that should be taken by the Union or the State for the effective implementation of those safeguards and other measures for the protection, welfare and social development of the Scheduled Castes. In terms of Article 338 (10) reference to Scheduled Castes is to be construed to include reference to other Backward Classes as the President may, on receipt of the report of Commission appointed under Clause (1) Article 340, by order specify and also to the Anglo Indian Community. Article 338-A provides for Constitution of National Commission for Scheduled Tribes and Article 340 provides for National Commission for Backward Classes. The two Commissions like the National Commission for Scheduled Castes are to make recommendations as to the measures that should be taken by the Union or any State for effective implementation of those safeguards and other measures for protection, welfare and socio economic development of the Scheduled Tribes and in later case, make such recommendation as the Commission deems fit.

24. From the above brief survey of constitutional provisions, it transpires that while the Constitution guarantees equality of opportunity in matters relating to public employment for all the citizens and prohibits any discrimination on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, in such matters, it obligates the State to make provision for reservation for appointments or posts in favour of Backward Classes of citizens which, in the opinion of the State, is not adequately represented in public employment.

25. The Constitutional provisions identified above, are an "affirmative action plan" or a "constitutional device" that provides for reverse discrimination in favour of the weaker sections of society. Why should the Constitution having "equality before law and equal protection of laws" as its theme provide for reverse discrimination in favour of Scheduled Tribes, Scheduled Castes, socially and educationally Backward Classes of citizens or weaker sections of the society is not difficult to answer. Article 14 of the Constitution of India guarantees equality before law and equal protection of laws within the territory of India. The equal protection means the right to equal treatment in similar circumstances. In other words,

Article 14 of the Constitution of India guarantees equality amongst equals. Equal treatment of un-equals as much infringes the constitutional

guarantee as unequal treatment of equals. The bottom line is equality of treatment or that law must operate equally on all persons under like

circumstances. The Scheduled Castes and Scheduled Tribes, Backward Classes and Weaker Sections of society, for historical reasons, have

remained under privileged, downtrodden, disempowered, marginalized and unattended sections of the society. Treating such segments of society in

the same manner, as rest of the society that is empowered, and distinct as regards its resources, avenues and opportunities, would be in conflict

with the principle of the "equality before law and equal protection of laws". The reservation in public employment for such segments of the society,

thus, is nothing but a facet of the principle of "equality before law and equal protection of laws" embodied in Article 14 of the Constitution of India.

However, the State can pick up an identifiable segment of the society for a special treatment or "affirmative action" only, if such, class is

distinguishable from the rest of the society and there are objective and valid reasons that make it, so distinguishable and furthermore, the special

treatment proposed to be given to such segment(s) of the society has a reasonable relationship with the object sought to be achieved by the special

treatment. In other words, to make legislation or an executive order aimed at a segment of the society constitutionally valid the classification must

be reasonable, apparent and understandable i.e. there must be intelligible differential and, the legislative or executive efforts must have a reasonable

nexus with the object sought to be achieved by such effort.

26. However, does the constitutional obligation to ameliorate lot of such segments of society or to increase their representation in the Government

services further obligate the State to give equal treatment, across the board to all such segments i.e. Scheduled Caste, Scheduled Tribe, Backward

Classes, Weaker Sections or does the State have power to go an extra mile for one or more such segments, having regard to the level of their

representation in the government service and other such factors, is the question that calls for an answer in the present petition.

27. In case, learned counsel for the petitioners is to be believed the Constitution of India having identified Scheduled Tribes and Scheduled Caste

as the categories that in terms of above stated Constitutional provisions are to be given reservation in public employment, both the categories are to be given similar treatment. The petitioners' case, as a matter of fact, has its edifice on this legal proposition. An overview of the constitutional provisions relating to reservation in appointments of posts for said categories would indicate that no such obligation is cast on the State. Otherwise also, the proposition put forward would be in-conflict with the very rationality of reservation. It may be stated at the cost of repetition that affirmative action plan"" for the weaker sections of the society who do not enjoy a level play field is based on the principle that such sections of society suffer from inequalities, for a host of reasons and deserve a special treatment to achieve the ultimate target of lifting them to the level of rest of the society. It cannot be presumed nor is there any guarantee that such segments of society are at the same level as regards their resources, empowerment or representation in the public employment. To illustrate level of representation in public employment of one of such segments, say Scheduled Tribe Category, having regard to its population, may be poorer as compared to other segment say Scheduled Caste Category. The two segments or categories may together constitute the Backward Class of the society but still constitute two different categories or classes amongst themselves calling for different remedial measures. This is the reason that different percentage in the posts to be filled up from these categories is prescribed under the reservation law.

28. In the present case, the State after making a survey of the population of Scheduled Castes in different districts of the State found that there is no Scheduled Caste population in four of the districts namely, Anantnag, Pulwama, Baramulla and Kupwara and that there is 0.10% or less Scheduled Caste population in four districts namely, Srinagar, Budgam, Leh and Kargil. Therefore, in all the districts of Kashmir Division, the Scheduled Caste population is less than 0.5% on an average as against 8% of the District and Divisional Cadre posts reserved for the category. Resultantly, the posts in District and Divisional Cadre reserved for the Scheduled Caste Category go un-responded and unfilled, making it necessary for the recruitment agencies to revert the posts to the General Category. The end result is that the level of representation of the

Scheduled Caste Category in the public employment does not show any significant upward swing. The Scheduled Caste population being primarily concentrated in Jammu, Kathua and Udhampur districts, a good number of candidates from these districts compete for 8% posts set apart for the category and most of them are not selected because of imbalance between the posts available and the number of aspirants. The result is that the unemployed Scheduled Caste candidates remain unemployed leading to a sense of frustration and disappointment. The Scheduled Caste population, thus, continues to be caught in disempowerment and "chill penury". Same is not true about Scheduled Tribe population. The Scheduled Tribe population is spread across the State, has its presence in every district and in Leh and Kargil districts, it represents 82% and 88% of the population. In none of the districts of the State, its population is less than 2.3%. The Scheduled Tribe candidates, thus, are available in every district of the State and none of the posts advertised and earmarked for the Scheduled Tribe Category is left unfilled to be reverted to General Category. The Scheduled Caste Category and Scheduled Tribe Category, thus, constitute and may be classified into two different classes. The bases for such classification are dispersal of their population in different districts of the State and inability of Scheduled Caste Category candidates to fill up the posts earmarked for the category in District Cadres and Divisional Cadres because of their almost zero presence in eleven of the twenty two districts of the State.

29. It is, thus, part of the constitutional obligation of the State to take extra measures for the Scheduled Caste Category as regards its representation in District Cadre and Divisional Cadre posts. Section 13 Clause 3 of the Act and Rule 13 sub rule 5 of the Rules, are nothing but an effort on part of the legislature and the Rule making Authority to discharge its constitutional obligations towards the Scheduled Caste Category.

The aforesaid provisions, therefore, are not in-conflict with Articles 14 and 16 of the Constitution of India but carry out the constitutional mandate embodied in the preamble of the Constitution of India that makes the State duty bound to secure to all its citizens justice in all its manifestation -- social, economic and political and equality of status and of opportunity and also in Articles 15 Clause 1, 16(4), 46 and 335 of the Constitution of

India.

30. It is pertinent to point out that even if, the petitioners' plea is accepted and Section 13 Clause 3 of the Act, and Rule 13 sub rule 5 of the Rules,

held unconstitutional. The petitioners are not to be get any benefit inasmuch as the District and Divisional Cadre posts earmarked for Scheduled

Caste Category, left unfilled due to no response from the category because of its near zero population in some districts/Kashmir division are to be

de-reserved without any change in the Scheduled Tribe Category share.

31. For the reasons discussed, there is no merit in the petition. The Section 13 Clause 3 of the Act and Rule 13 sub rule 5 of the Rules does not

offend and is not in-conflict with Articles 14 and 16 of the Constitution of India.

32. The writ petition is, accordingly, dismissed along with all CMP(s) and interim directions vacated.