

(1957) 06 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : Writ Petition No. 113 of 1957

Jagan Nath Babu and Others	Vs	APPELLANT
State of Jammu and Kashmir and Others		RESPONDENT

Date of Decision : 21-06-1957

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 32(2A)
Constitution of Jammu and Kashmir, 1956 — Section 103, 14, 25, 4(1)

Citation : AIR 1958 J&K 1(1)

Hon'ble Judges : Kilam, J

Bench : Single Bench

Advocate : Janki Nath Bhat, for the Appellant; Jaswant Singh, General, for the Respondent

Judgement

Kilam, J.—This is a writ petition submitted under Article 32(2-A) of the Constitution of India and further purports to be u/s 103 of the

Constitution of Jammu and Kashmir, for the grant of a writ of Mandamus or any other appropriate writ along with a declaration that the

appointments of respondents 3-14 as SPT Superintendents-cum-senior grade Accountants under Order No. 149/A of 1957, dated 16-2-1957

are ultra vires and ineffective and for a further declaration that the petitioners are in preference to respondents 3 to 14, eligible for the posts on

which these respondents have been appointed.

As the matter involved very important points of law, I heard the parties quite at length and further permitted the parties to submit written arguments

which they did. In addition to the written arguments the Accountant General submitted an affidavit. All this forms part of the record.

2. It appears that the Cabinet passed Order No. 2014-C, dated 8-11-56 with the

avowed object of securing of "rationalization of work and increase in the staff of the Audit and Accounts Department." In this order provision was made for direct recruitment of persons including the officials of the Audit Department to the scales of Rs. 150-15-300 and Rs. 100-7 E.B. 8-175, in the Audit and Accounts so as to remove the communal disparity" in the Department.

In pursuance of this order, the Accountant General passed Order No. 149/A, dated 16-2-57 with a view, as he says, to implement the reorganization scheme sanctioned by the said Cabinet Order No. 2014-C of 1956. The implementation of the said Cabinet Order was made by the Accountant general by promoting respondents 3 to 14 as S.P.T. Superintendents in the Accountant General's office. The allegation by the petitioners against these respondents is that they do not possess the minimum qualifications needed for being appointed to the posts of Superintendents, and as against them the petitioners possess the necessary qualifications.

The petitioners, have, therefore, challenged both the Cabinet Order No. 2014-C and also the order passed by the Accountant General by which

the Cabinet Order has been implemented as being ultra vires of the provisions of the Constitution and the rules having the force of law. The

petitioners have further submitted in their writ petition that all of them unlike respondents 3 to 14 are seniors in the list, possess the requisite

qualifications, and are otherwise also highly qualified, and have passed the necessary departmental examinations, and that some of them were

acting as Superintendents when they were reverted as a result of the order referred to above and that their superior merit and claims have been

brushed aside on communal considerations which in their submission is a violation of the fundamental rights as guaranteed by the Indian

Constitution and also by the Constitution of Jammu and Kashmir.

This fact has not been denied by the respondents that all the petitioners belong to one community and that they are senior in the list and had passed

the requisite tests laid down by the rules governing promotions to the posts of Superintendents and senior examiners and that as against all this, the

respondents 3 to 14 belong to other communities and do not possess the-qualifications needed. On these facts the petitioners have now sought the

relief which has been given in detail in the beginning of this order.

3. The petitioners learned Counsel has in course of his arguments submitted that the above mentioned Cabinet Order is hit by Article 14 of the.

Constitution. Article 14 of the Constitution, briefly speaking, lays down that nobody shall be denied equality before law or equal protection of law,

and thus puts all citizens in the State on a footing of equality without distinction of colour, creed or caste. The evolution of a common citizenship is

the sheet anchor of our constitution.

The constituent Assembly of our State was fully alive to this constitutional requirement and has therefore incorporated various provisions in our

Constitution, for securing this purpose. The State has been directed to take upon itself the-removal of fissiparous tendencies amongst people and

also fostering of a spirit of brotherhood amongst people.

In Section 25 of the Jammu and Kashmir Constitution it has been laid down that the State shall combat ignorance, superstition, fanaticism,

communalism, racialism, etc., and shall seek to foster brotherhood and equality amongst all communities under the aegis of a secular State.

Needless to add that a spirit of brotherhood can be fostered by treating all citizens equally not only before law but in all walks of life. It is common

experience that if even brOrs. are treated unequally, a disruption in the family will be inevitable.

The equal protection of laws"" clause has formed the subject-matter of many a judicial discussion in many American decisions. Reference may be

made to Nixon v. Herndon (1927) 273 US 536(A), which pertained to a case in which negroes in the Texas State were debarred from

participating in a primary election of a political party. It was held to be racial discrimination, and contrary to the ""equality before law"" clause. The

learned Judge who delivered the judgment referring to this clause observed that ""it applies to all, was passed as we know with special intention to

protect the blacks from discrimination against them. It not only gave citizenship and privileges of citizenship to persons of colour, but it denied to

any-State the power to withhold from them the equal protection of the law. What is this but declaring that the law in the State shall be the same for

the Black as for the White.

In Yick Wo v. Hopkins (1886) 118 US 356 (B), an Ordinance was passed which

made it impossible for Chinese laundrymen to ply their trade, while Ors. not Chinese were free to pursue their trade. Mr. Justice Mathews of the U.S. Supreme Court observed that

No reason whatsoever except the will of the Supervisors is assigned, why they should not be permitted to carry on in their accustomed manner

their harmless and useful occupation on which they depend for a livelihood. And while the consent of the Supervisors is withheld from them and

two hundred other petitioners all of whom happened to be Chinese subjects and eighty Ors. who are not Chinese subjects are permitted to carry

on the same business under similar conditions.

The fact of this discrimination is admitted. No reason for this is shown and the conclusion cannot be resisted that no reason for this exists except

hostility to the race and nationality to which the petitioners belong and which in the eye of law is not justified.

4. Having discussed the principle underlying Section 14, let us now examine the Cabinet Order No. 2014-C. In this order we find that the

reorganization of the Audit and Accounts Department has been sanctioned to remove the communal disparity existing there. Now the removal of

communal disparity would mean that if a community is supposed to be over-represented, then at the time of making appointments, the members

belonging to that community shall have to be ignored in favour of members of Anr. community, though the former be fully qualified and of senior

rank.

It goes without saying that if there is any such law which is discriminatory in character or if a law which is otherwise innocuous is subjected to an

interpretation involving discrimination between one citizen and Anr. , the law or the interpretation thereof being discriminatory will be ultra vires of

the Constitution as being hit by Article 14. It has to be borne in mind that both the Constitution of India and our own Constitution have consistently

refused to give recognition to communities for administrative or political purposes.

The constitution makers, as already stated, have very rightly recognized and laid stress only on one common citizenship irrespective of caste,

community, or creed. This principle of common citizenship has been amongst other Articles clearly recognized in Article 16 of the Constitution of

India, which lays down that there shall be equality of opportunity for all citizens in matters relating to; employment or appointment to any office

under the State, and that no citizen shall on ground only of religion, race, caste, sex, descent, place of birth residence etc., be ineligible or

discriminated against in respect of any employment or office.

Without any effort, one shall, bearing in mind Articles 14 and 16 of the Constitution of India come to the conclusion that the. Cabinet Order No.

2014-C is repugnant to the provisions of the Constitution of India and as such liable to be declared void and ineffective.

5. The above discussion must make it abundantly clear that both the Indian Constitution and the Kashmir Constitution have disfavoured and even

banned communalism in any shape and form. But that there are backward sections amongst the population cannot be denied. How does the

Constitution deal with this Problem? Clause 3 of Article 16 as already stated has banned racial and communal discrimination. But for backward

sections of the people provision has been made in Clause (4) of Article 16 of the Constitution of India which lays down that

Nothing in this Article (Article 16) shall prevent the State from making any provision for the reservation of appointments or posts in favour of any

backward class or citizens which in the opinion of the State is not adequately represented in the services under the State.

This clause gives power to a State to see that backward classes do not remain backward for all time, and is further intended to enable the State to

make such provision as it may deem necessary for the benefit of such backward classes. The constitution has recognized the principle of equality

before the law but while doing so, it has not failed to come to the relief of backward classes in the State. Backward classes can be found in every

community For instance in the Hindu community there are advanced classes and in the same Hindu community there are scheduled tribes and

castes whose backwardness is proverbial.

Similarly there are backward classes amongst the Muslim community as also classes that may be deemed as advanced. The constitution makers

have therefore in their wisdom sought to give relief to really backward classes who are indeed needy of such relief in the name of their

backwardness only and not because of their belonging to this community or that.

If the Cabinet Order had expressed anxiety for the really backward classes, and even made reservation for them in the matter of appointments, no fault could be found in it.

But the Cabinet Order does not do so; on the contrary it says that it is meant to remove communal disparity, i.e., to give relief to the members of a

community irrespective of the fact as to whether they belong to a backward class or not. This order and the subsequent action taken by the

Accountant General has therefore clearly violated Article 16 which, as already stated, lays down that no citizen shall on the ground of his religion,

caste race etc., be ineligible for or discriminated in respect of any employment or office under the State.

Really a capable person belonging to a so-called over-represented community can stand ignored simply because he belongs to a particular

community and his claims shall stand brushed aside in face of this Cabinet Order. This is discrimination pure and simple and goes clearly both

against the letter and spirit of the constitution. Reference may in this connection be made to B. Venkataramana Vs. The State of Madras and

Another, , in which it has been held:

Clause 4 of Articles 16 of the Constitution of India expressly permits the State to make provision for the reservation of appointments of posts in

favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services of the State. Reservation of

posts in favour of any backward class of citizen cannot, therefore, be regarded as unconstitutional. The communal G.O. itself makes an express

reservation of seats for Harijans and Backward Hindus.

The other categories, namely, Muslims, Christians, Non-Brahmin Hindus and Brahmins must be taken to have been treated as other than Harijan

and backward Hindus. Our attention has been drawn to a schedule of Backward classes set out in Sch. III to part I of the Madras Provincial and

Subordinate Service Rules. It was therefore argued that Backward Hindus would mean Hindus of any of the communities mentioned in that

Schedule. It is in the circumstances impossible to say that classes of people other than Harijans and Backward Hindus ... can be called Backward

Classes.

As regards the posts reserved for Harijans and Backward Hindus, it may be said

that the petitioner who does not belong to those two classes is regarded as ineligible for those reserved posts not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such posts in favour of a backward class or citizens, but the ineligibility of the petitioner for any of the posts reserved communities other than Harijans and Backward Hindus cannot but be regarded as founded on the ground only of his being a Brahmin.

For instance the petitioner may be far better qualified- than a Muslim or a Christian or a Non-Brahmin candidate and if all the posts reserved for those communities were open to him, he would be eligible for appointment as is conceded by the learned Advocate General of Madras but

nevertheless he cannot expect to get any of those posts reserved for those different categories only because he happens to be a Brahmin. His

ineligibility for any of the posts reserved, for the other communities, although he may have better qualifications, than those possessed by members

falling within these categories, is brought about only because he is a Brahmin and does not belong to any of these categories.

This ineligibility created by the communal G.O. does not appear to us to be sanctioned by Clause (4) of Article 16 and it is an infringement of the

fundamental rights guaranteed to the petitioner as an individual citizen under Article 16(1) and (2). The communal G.O. in our opinion is repugnant

to the provisions of Article 16 and is as such void and illegal. This, in our opinion, is sufficient to dispose of this application and we do not consider

it necessary to consider the effect of Article 14 or 15 of the Constitution on the case of the respondents.

6. I most respectfully followed the principle enunciated in the above authoritative pronouncement.

7. Under these circumstances, I find that the Cabinet order referred to above is repugnant to the provisions of Articles 14 and 16 of the

Constitution of India and is as such void ineffective and illegal, and any action taken in pursuance or in furtherance thereof by the Accountant

General or any other officer is equally void, ineffective and illegal. This would have been sufficient to dispose of this petition, but there were some

other connected points, both factual and legal, which I might deal with now.

8. Now let us go to the factual side of the case. The petitioners have submitted

that they have passed the requisite tests laid by the Government in various orders and Notifications qualifying them for promotion to the posts of Superintendents. They further allege that as against this none of the respondents 3-14 has passed the requisite tests or examination. It is further submitted by the petitioners that the persons to be promoted to the grade of Superintendents-cum-senior grade Accountants should have passed the two tests, i.e., parts I and II of the prescribed examination.

In support of this submission, my attention has been drawn to Cabinet Order No. 81 of 1951 dated 19-1-1951 published in the Jammu and

Kashmir Government Gazette, dated 1-2-1951. Rule 7(b) of this Order lays down that passing of the Part I of Audit and Accounts Examination

qualifies for promotion to the grade of examiners and

Accountants and Parts II qualifies for promotion to the grades of Superintendents.

The provision regarding the qualifications, i.e., passing of the tests namely Parts I and II which is a condition precedent for promotion to the posts

of Superintendents has undergone no amendments and stands in its pristine form. The Advocate General was not right, when he had said that this

rule has undergone some amendment.

9. Having found out as to what are the qualifications needed for being promoted to the posts of Superintendents, let us now see what are the rules

regarding the requisite qualifications for appointment to a post or promotion to a post, and whether such rules are merely meant for departmental

guidance or have the binding force of law. Reference may in this behalf be made to rule 18 of the KCSR. (Kashmir Civil Service Rules) which lays

down:

No person shall be eligible for appointment to any service, class, category or grade or any post borne on the cadre thereof unless he--

(a) possesses such qualifications and has passed such special tests as may be prescribed in that behalf by the Government, or

(b) possesses such other qualifications as may be considered by the Government to be equivalent to the said special qualifications of special tests.

10. No elaborate discussion is needed to establish that according to this rule it is absolutely necessary that a person to be appointed to a post have

passed special tests prescribed by the Government or possess such other qualifications as may be considered equivalent to the said special

qualifications or special test. In the present case this rule does not seem to be applicable because the respondents 3 to 14 were already in the

service of the Department and their case is merely of promotions.

Assuming that these promotions are of the nature of new appointments, even then possessing of such qualifications and passing of special tests is of

absolute necessity. It is an admitted fact that the respondents 3 to 14 do not possess the prescribed qualifications nor have they passed the

prescribed tests. Nor can Clause (4) of the above rule be made applicable to the present case, for the simple reason that nowhere in the Cabinet

Order or the Accountant General's order has it been stated that these respondents possessed other qualifications as were considered by the

Government to be equivalent to the tests mentioned in (a).

The rule would clearly mean that it is only the Government and not a Head of a Department which can make an adjudgment in accordance with-

this rule. But apart from this, the present case Is a case of promotions. Now so far as promotions are concerned, they are governed by Rule 25 or

the K.C.S.R. Rule 25 lays down:

(1) All promotions shall be made by appointing authority.

(2) Promotions to a service, or class or to a-selection category or grade in such service or class shall be made on grounds of merit and ability and

shall be subject to the passing, of any tests that Government may prescribe in this behalf, seniority being considered only where the merit and ability

are approximately equal.

(3) All other promotions shall be made in accordance with seniority and subject to any tests or special qualifications prescribed by the Government

unless:

(a) the promotion of a member has been withheld as a penalty; or

(b) a member is given special promotion for conspicuous merit and ability, etc., etc.

11. I think that in the present case since promotion is not to a class, service, or a selection category or grade in such class or service, Clause (2)

does not seem to apply, though in effect the application of this sub-clause or Sub-clause 3 will not make any appreciable difference. These

promotions, however, would be governed by Clause (3) of Rule 25 and had to be

made in accordance with seniority and subject to any test or special qualifications prescribed by the Government.

We have seen that passing of parts I and II of the tests is a condition precedent for promotion to the grades of superintendents. The learned

Advocate General felt the force of these facts and advanced an argument that these qualifications have not been prescribed by any Statute. Prom

this he meant to establish that the appointments could be made of persons or promotions could be given to such persons who may not be

possessing the necessary qualifications. But he has clean forgotten that Rule 25 makes it absolutely essential that any tests prescribed by the

Government must have been passed before getting a promotion.

Now the above tests, i.e. passing of parts I and II are prescribed by the Government as qualifications for holding a Superintendent's post, and

these tests have been given statutory recognition by having been incorporated in Clause (3) of Rule 25 which as we shall presently see, is a

statutory provision. Therefore it is plain that promotions in the present case had to be made in accordance with seniority and subject to any test or

special qualifications prescribed by the 'Government.

This not having been done, the order passed by the Accountant General is against law and denies equal protection of law to the petitioners, and as

such for reasons detailed above cannot but be declared as void and ineffective.

12. The Accountant General has submitted an affidavit in which he has in essence accepted the position taken by the petitioners, though he has

tried to clothe his action with some legal semblance. In his affidavit he says that the respondents have passed part I of the Departmental

Examination of the Audit and Accounts Department and that they are trained hands in that respect. The passing of only part I of the departmental

examination would show that they (respondents) are not qualified for the post of a Superintendent, because the qualifications needed is passing of

Parts I and II of the examination and not only Part I test.

Nor has the Accountant General denied in his affidavit that the petitioners are senior to the respondents. The Accountant General has in his affidavit

further submitted that the appointment of the respondents was made by him, while keeping their merit and ability in view, It is of interest to note

here that the Accountant General has for the first time made the declaration and that too in his affidavit that the promotions were given by him to

the respondents, while keeping their merit and ability in view.

In his order he has stated nothing like that. He has, simply observed therein that he is implementing the Cabinet Order No. 2014-C. Besides that

the Accountant General should know that it is not his opinion that entitles or disentitles one to a promotion. Promotions have to be given according

to rules and the relevant rule is contained in Clause (3) of Rule 25 of the KCSR according to which promotions of the kind made by the

Accountant General as in the present case shall be made in accordance with seniority and subject to any tests or special qualifications prescribed in

this behalf by the Government.

From his affidavit it becomes abundantly clear that the respondents are neither senior nor have they passed the special tests and as such on this

ground alone the order promoting them over the heads of their seniors and better and fully qualified persons cannot stand.

13. In a feeble voice the Advocate General tried to argue that the promotions given to the respondents were of a special character and were given

for conspicuous merit and ability. But while doing so, he has forgotten that these promotions were made -- as becomes evident from the Cabinet

Order No. 2014-C -- not on the ground of conspicuous merit and ability, but for the purpose of removing ""communal disparity"".

Besides that even his affidavit which was given by him sometime after the arguments were concluded, the Accountant General says only that their

merit and ability were kept in view. He does not say that these promotions were given because of ""conspicuous merit and ability"", and therefore

Sub-Clause (b) of Clause 3 of Rule 25 can have no applicability. In his order sanctioning the promotions or in his affidavit, the Accountant General

has nowhere stated that he was compelled to promote the respondents over the heads of their fully qualified seniors because of their conspicuous

merit and ability.

All that the Accountant General says in his affidavit is that he had kept their merit and ability in view. Keeping merit and ability of a person in view

does not mean possessing extraordinary merit and ability by that person. It appears that the Accountant General was not very much satisfied with

his own performance as becomes evident from his affidavit in which he stated that though initially the respondents were declared as S.P.T.

Superintendents, yet later on by a subsequent order this order was modified and the respondents were declared as having been promoted

temporarily with this condition that they must pass their requisite test within two years.

All this would negative the faint attempts made at arguing that the respondents possessed' ""extraordinary merit and ability"". The long and short of all

this discussion is that the respondents do not possess even the minimum qualifications needed for promotions In Mohd. Aslam Bach v. V.L. Vishin

(S) AIR 1957 J&K 8 (D), a Full Bench of this Court has laid down that

it follows therefore that merit and ability being matters relating to subjective satisfaction, the Court cannot act as an appellate authority, and

substitute its opinion for that of the appointing authority, unless the appointing authority has selected a candidate who does not possess the

minimum qualifications prescribed for the appointment.

The facts in this Full Bench judgment involved a question about the interpretation of Rule 25, Clause 2 in which the merit and ability of a candidate

is the main guiding factor for giving promotions seniority to be taken into consideration if the merit and ability are approximately equal. But the

present case, as seen above, falls within the purview of clause 3 of Rule 25 according to which seniority of a candidate coupled with the fact of his

having passed the necessary tests is the main guiding principle.

In the Full Bench judgment we find that even in a case under Rule 25 Clause 2, irrespective of the opinion of the appointing authority regarding the

merit and ability of candidate, minimum qualifications must be there, or else the Court will assume Jurisdiction. Needless to add that this principle

applies with redoubled force in the present case. The respondents 3 to 14 not possessing minimum Qualifications, their promotions can by no

means be supported.

14. The last point that I have got to tackle is as to whether the Kashmir Civil Service Rules have the force of law and are enforceable in a Court of

law. In Ghulam Rasul v. State of Jammu and Kashmir (S) AIR 1956 J&K 17 (E), which is a Full Bench Judgment of this Court it has been held:

The amendment to Section 4(1)(b) of Sri Pratap J and K Consolidation Act places

the Kashmir Civil Service Rules (1939) on the same footing as existing law enforceable by the State Courts. Hence the Kashmir; Civil Service Rules (1939) are laws for the purposes of Article 14 as applied to the State of Jammu and Kashmir.

I respectfully follow this authoritative pronouncement and hold that the KCSR have the force of law and are enforceable in a Court of law.

15. I, therefore, while making the following declarations:

(a) that the provision in the Cabinet Order No. 2014-C dated 8-11-1956 regarding ""removal of communal disparity"" and the subsequent order

No. 149/a dated 16-2-1957 passed by the Accountant General for its implementation are hit by Articles 14 and 16 of the Indian Constitution.

(b) that respondents 3 to 14 do not possess the qualifications prescribed by rules having the force of law and as such the order appointing them to

the posts of Superintendents-cum-senior grade Accountants is void and ineffective, and

(c) that the petitioners have passed the required tests and possess the necessary qualifications and are as such eligible to be appointed to the posts

on which respondents 3 to 14 have been appointed, accept this petition and order that a writ of Mandamus be issued to respondents 1 and 2 with

the direction that the petitioners be appointed to the posts to which respondents 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 have been appointed.