

(2019) 06 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2047, 2308, 2917 Of 2018, IA 01 Of 2019, CM No. 3612 Of 2019

Javid Ahmad Mir & Ors

APPELLANT

Vs

State Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 03-06-2019

Acts Referred:

Citation : (2019) 06 J&K CK 0002

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : Mohsin Qadri, Jahangir Iqbal Ganai, Suhail Rashid Bhat, Shah Aamir, Mir Suhail, Z.A, A. Hanan

Judgement

Ali Mohammad Magrey, J

1. Since, selection to the posts of Junior Anesthesia Assistant as advertised by the J&K Services Selection Board vide advertisement notice No.07 of 2015 dated 2nd of December, 2015 is the subject matter of all these writ petitions, therefore, same are heard together and decided by a common order.

2. The precise factual background giving rise to the instant litigation, as emerges from a study of the files under consideration, is that in the year 2015, the Director, Health Services sent a requisition for direct recruitment of vacancies to the Service Selection Board for the post of Junior Anesthesia Assistant, wherein the mode of qualification and recruitment was provided as "10+2 with Science and Diploma in Anesthesia Technology from SMF or any other recognized Institute." The requisitions were made for District Baramulla, Pulwama, Budgam and Kupwara. On the basis of these requisitions, the Service Selection Board, vide advertisement notice No. 07 of 2015 dated 2nd of December, 2015, advertised the posts of Jr. Anesthesia Assistant. Thereafter, by communication No. Est-5/NG-288/III/1620-22 dated 18th of December, 2015, the Directorate of Health Services informed the Secretary to Government, Health & Medical Education Department that due to oversight the requisite qualification for the

post of Anesthesia Assistant has been shown in requisition form as "10+2 with Science and Diploma in Anesthesia Technology from SMF or any other recognized Institute." This communication also mentioned that SRO 20 of 1992 does not provide for recruitment rules for the post of Anesthesia Assistant. The communication further stated that in terms of Government order No. 252-HME of 2012 dated 26th of March, 2012, the method and recruitment to the post of Anesthesia Assistant is 10+2 with Diploma in Anesthesia/ Operation Theatre Technology, however, Degree holders in Anesthesia/ Operation Theatre Technology will be preferred. Accordingly, the Director, Health Services sought necessary clarification and regretted the omission. The Government, on receipt of the said communication, forwarded the same to the Secretary, Service Selection Board under No. HD/NG/232/2015 dated 3rd of February, 2016. Thereafter, the Services Selection Board allowed the candidates to participate in the selection process for the post of "Junior Anesthesia Assistant" on the basis of the qualifications prescribed under Government Order No. 252-HME of 2012 dated 26th of March, 2012. Subsequently, on 30th of December, 2017, a provisional selection list was notified by the Service Selection Board wherein selection was made on the basis of qualifications prescribed under Government Order dated 26th of March, 2012. Aggrieved thereby, the petitioners filed a representation before the Government which was forwarded to the Service Selection Board under No. HD/NG/43/2018 dated 19th of February, 2018. In response to the representation so received, the Service Selection Board addressed a communication to the Government under No. SSB/SeI/Secy/2018/4850 dated 26th of April, 2018 seeking clarification from the Government as to whether the qualification prescribed vide Government Order dated 26th of March, 2012 is applicable for the post of "Junior Anesthesia Assistant". The Government, in turn, forwarded the said communication to the Director General, Health Services under communication No. HD/NG/43/2018 dated 4th of June, 2018 who informed the Government that there are no recruitment rules for the post of "Junior Anesthesia Assistant" as per existing recruitment rules of SRO 20 of 1992. The Director General further informed the Government that the qualifications prescribed for the post of "Anesthesia Assistant", as provided by Government Order No. 252-HME of 2012 dated 26th of March, 2012, be taken as the qualification for the advertised post. On receipt of these communications, the Government issued a communication under No. HD/NG/43/2018 dated 29th of June, 2018 addressed to the Secretary, Service Selection Board in which the Government instructed the Board that the Board must first appoint applicants who hold Diploma in "Anesthesia Assistant Technology" and in the event candidates with the said qualification are not available, then in such eventuality, the candidates having Diploma in "Operation Theatre Technology" may be considered for appointment. Aggrieved by communication dated 29th of June, 2018, the respondent Nos. 5 to 17 in SWP No.2047/2018 filed a writ petition, being SWP No. 1451/2018, wherein the operation of the communication dated 29th of June, 2018 was stayed in terms of order dated 4th of July, 2018. During the pendency of SWP No. 1451/2018, the

Government addressed another communication to the Secretary, Service Selection Board under No. HD/Legal/NG/MR-79/2018 dated 3rd of August, 2018, in terms whereof the Government cancelled/withdrew its earlier communication dated 29th of June, 2018 and instructed the Service Selection Board to make selections against the post of Junior Anesthesia Assistant in accordance with the method of recruitment as laid down in Government Order No. 252-HME of 2012 dated 26th of March, 2018. After the issuance of the said communication, the Court, vide, order dated 27th of August, 2018, disposed of SWP No. 1451/2018 as settled. It is this communication dated 3rd of August, 2018 that has been called in question by the petitioners in SWP Nos.2047/2018 and 2917/2018 seeking quashment of the same with further relief of mandamus commanding the respondents Board to accord consideration to the case of the petitioners for their selection against the post of Junior Anesthesia Assistant on the basis of qualification prescribed by the advertisement notice dated 2nd of December, 2015. In SWP No.2308/2018, the petitioners seek a 'Writ of Mandamus' commanding the respondent Board to give effect to the notice bearing No. SSB/Sel/Secy/2017/13864-67 dated 30th of December, 2017 by recommending and selecting the petitioners against the post of Anesthesia Assistant.

3. Reply stands filed on behalf of the respondents.

4. In their reply, the respondent Nos. 1,3 and 4 have stated that the Jammu and Kashmir Services Selection Board (SSB) vide Advertisement Notice No. 07 of 2015 dated 2nd of December, 2015 advertised a number of posts, including the posts of Junior Anesthesia Assistant in various districts, including District Baramulla as well as District Kupwara. The method of recruitment of Anesthesia Assistant in Government Medical Colleges, Srinagar/Jammu was notified by the Government vide Government Order no. 252-HME of 2012 dated 26th of March, 2012. The Services Selection Board (SSB) in terms of communication No. SSB/Sel/Secy/2018/4850 dated 26 th of April, 2018 had requested the Health and Medical Education Department to intimate as to whether qualification prescribed in the Government Order No. 252-HME of 2012 dated 26th of March, 2012 for the post of Junior Anesthesia Assistant is applicable to the posts referred to SSB vide No. HD/NG/232/2015 dated 23rd of September, 2015, as the selection is at final stage. The said communication was responded vide letter No. HD/NG/43/2018 dated 29th of June, 2018, whereunder, while observing that the said post has not been included in the J&K Non-Gazetted (Sub-ordinate) Service Recruitment Rules, 1992, promulgated under SRO 20 of 1992, however, the method of recruitment to the post has been separately notified by virtue of an executive order issued vide Govt. Order No. 252-HME of 2012 dated 26th of March, 2012 as "10+2 with Diploma in Anesthesia/Operation Theater Technology, degree holders to be preferred". Accordingly, it was requested to consider the candidates who have applied with eligibility criteria as 10+2 with Diploma in Anesthesia and, in case of the candidature of those candidates who have 10+2 with Diploma in Operation Theater Technology, in that eventuality, it was directed to consider the applicants with Diploma in Anesthesia Assistant Technology first

and in case candidates were not available in the said discipline, then the candidates having Diploma in Operation Theatre Technology be considered. This communication was challenged by the aggrieved candidates, being respondent Nos. 5 to 17 in SWP No.2047/2018, through the medium of writ petition bearing SWP No. 1451/2018. The said writ petition, on consideration, was pleased to stay the operation of the communication dated 29th of June, 2018. It is stated that, thereafter, the matter was examined and considered by the department, which consideration culminated in issuance of letter vide No. HD/Legal/NG/MR-70/2018 dated 3rd of August, 2018 addressed to the Secretary, J&K Services Selection Board, Srinagar, where under it was requested to follow the procedure for selection of the post of Junior Anesthesia Assistant referred vide communication dated 23rd of September, 2015, in accordance with the qualification and method of recruitment as laid down in Government Order No. 252-HME of 2012 dated 26th of March, 2012 and, as a consequence thereof, the communication dated 29th of June, 2018 was cancelled/withdrawn. It is contended that that the communication impugned, as is apparent from its perusal, does not suffer from any malice and illegality in any manner whatsoever in view of the fact that since the said post, i.e. Anesthesia Assistant has not been included in the J&K Non-Gazetted (Subordinate) Service Recruitment Rules, 1992 and, as such, a need was felt to provide method of recruitment to the said post, which was notified by an executive order issued vide Government Order No. 252-HME of 2012 dated 26th of March, 2012, wherein the qualification, i.e. 10+2 with Science and Diploma in Anesthesia Technology from State Medical Faculty or any other recognized institute has not been tampered at all.

5. The Service Selection Board/ respondent No.2 has, after giving the factual background of the case, pleaded that the action taken by the Board is in accordance with the law. It has been further submitted that the mandate of the Board is to make selections in accordance with the law and having regard to the qualification prescribed in the indents/recruitment rules of the indenting department. It is also contended that the Board, being merely a recruiting agency, cannot add or subtract any qualification and that a prescription of qualification for a post is the prerogative of the indenting department/State and the Board has no role in laying down of a qualification for a post. In that backdrop, the Board has urged that the contention of the petitioners that the impugned inactions/actions of the SSB are violative of their legal, statutory and fundamental rights is factually misconceived and misdirected and, therefore, the writ petitions deserve to be dismissed.

6. The respondent Nos. 5 to 17 have, in their objections, submitted that the post of Junior Anesthesia Assistant was to be filled up in accordance with the qualification prescribed by the Government vide Order dated 26th of March, 2012. The Director of Health Services Kashmir/Jammu, in their communications dated 26th of June, 2018 and 13th of June, 2018, have clearly stated that the earlier order dated 29th of June, 2018 has already been cancelled/ withdrawn. It is pleaded that the matter having been settled in SWP No. 1451/2018, it is not

open for the Court to decide the present writ petition and that any fresh decision delivered will have an adverse effect on an earlier decision of this Court passed in SWP No. 1451/2018. It is further submitted that prescribing qualifications and/or which qualifications are to be followed, is not in the discretion of the authorities and such matters are regulated by rules, regulations and, in their absence, by executive orders. The respondent Nos. 5 to 17 have proceeded to state that according to the official respondents, there are no rules of recruitment governing the post in question and, as such, the respondents informed the Service Selection Board that the eligibility of the candidates to compete for the post needs to be considered in the light of the Government Order dated 26th of March, 2012. The Service Selection Board, as stated, accepted this position and proceeded with the selection process in which the respondents were found to be more meritorious than the petitioners.

7. Heard the learned counsel for the parties, perused the record and considered the matter.

8. The question that arises for consideration herein this case is whether the recruitment to service can be made only in accordance with the rules and the error, if any, crept in the advertisement notice cannot override the rules and create a right in favour of a candidate to claim consideration for selection to the exclusion of other eligible candidates.

9. At the outset, what requires to be stated is that an advertisement notice, inviting applications for filling up vacancies, cannot override the provisions of the statutory rules and that an error in eligibility requirements mentioned in the advertisement, being inconsistent with the rules, would not create any right in favour of candidates seeking consideration for selection to the exclusion of other eligible candidates. In the case on hand, the post of Jr. Anesthesia Assistant did not find a place in the J&K Non-Gazetted (Sub-Ordinate) Service Recruitment Rules, 1992 promulgated under SRO 20 of 1992 and, therefore, the Government, by virtue of an executive order bearing No.252-HME of 2012 dated 26th of March, 2012 separately notified the qualification for the said post as "10+2 with Diploma in Anesthesia/ Operation Theatre Technology, Degree holders to be preferred." It is well settled that prescribing qualifications and/ or which qualifications are to be followed is regulated by rules and regulations governing the field, however, in absence of such recruitment rules, the Government is well within its powers to notify the qualification by virtue of executive orders.

10. In pursuance of the interim directions of this Court passed in SWP No.1451/2018, filed by the respondent Nos. 5 to 17, the intending Department (Health Department) issued communication No. HD/Lega/NG/MR-79/2018 dated 3rd of August, 2018, wherein the Service Selection Board was directed to follow the procedure for selection against the post in question in accordance with the qualification and method of recruitment as laid down in Government Order No. 252-HME of 2012 dated 26 th of March, 2012 and, consequently, the communication dated 29th of June, 2018 was, accordingly, cancelled/ withdrawn.

11. The Hon'ble Supreme Court, in case titled 'Malik Mazhar Sultan v. U.P. Public Service Commission', reported as (2006) 9 Supreme Court Cases 507, while dealing with a somewhat similar issue, at paragraph No.21, has laid down as under:

"21. The present controversy has arisen as the advertisement issued by PSC stated that the candidates who were within the age on 1-7-2001 and 1-7-2002 shall be treated within age for the examination. Undoubtedly, the excluded candidates were of eligible age as per the advertisement but the recruitment to the service can only be made in accordance with the Rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only if permissible under the Rules and not on the basis of the advertisement. If the interpretation of the Rules by PSC when it issued the advertisement was erroneous, no right can accrue on basis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules."

12. The same view was, again, taken by the Apex Court of the country in case titled 'Ashish Kumar v. State of UP', reported as '(2018) 3 Supreme Court Cases 55', wherein while following the law laid down in the case of Malik Mazhar Sultan (supra), it was declared that when there is variance in the advertisement and in the statutory rules, it is the statutory rules which take precedence.

13. Applying the ratio of law laid down above to the facts and circumstances of the case on hand, the intending Department, i.e. the Health Department, after noticing the error crept in the qualification prescribed for the post in question in the advertisement notice, directed the Service Selection Board to make selection to the post in question in accordance with the qualification and method of recruitment as laid down in Government Order No. 252-HME of 2012 dated 26th of March, 2012. Any part of the advertisement which is contrary to the statutory rules has to give way to the statutory prescription. Thus, looking at the mandate of the Government order dated 26th of March, 2012 vis-à-vis qualification prescribed therein against the posts in question, the respondent Nos. 5 to 17 fulfil the said qualification and, therefore, after being provisionally selected for the posts, denying further consideration for regular selection/ appointment to them is arbitrary and illegal.

14. For all that has been said and done above, the petitions bearing SWP Nos. 2047/2018 and 2917/2018, seeking quashment of communication dated 3rd of August, 2018, being devoid of any merit, shall stand dismissed alongwith all connected IA(s). Interim directions if any, passed and subsisting as on date, shall stand vacated.

15. No order as to costs.

16. In view of the order passed hereinabove, the writ petition bearing SWP No.2308/2018 shall stand disposed of with a direction to the respondent Board to proceed ahead with the selection process in accordance with communication

dated 3rd of August, 2018 and complete the same with utmost dispatch, without any further delay.

17. Registry to place a copy of this order on each file.